IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2014-CA-01378

THE CITY OF TUPELO, MISSISSIPPI — APPELLANT/ CROSS APPELLEE

V.

TERRY Y. MCMILLIN, M.D., ET UX. — APPELLEES/ CROSS APPELLANTS

APPELLEES' AND CROSS APPELLANTS' BRIEF

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THE CITY OF TUPELO, MISSISSIPPI	**APPELLANT/ CROSS APPELLEE**
TERRY Y. MCMILLIN, M.D., ET UX.	**APPELLEES/ CROSS APPELLANTS**

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 representatives 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.

1. Terry Y. McMillin, Plaintiff/Appellee
2. Leslie Susan McMillin Plaintiff/Appellee
3. City of Tupelo, Mississippi, Defendant/Appellant
4. Bradley T. Golmon, counsel for Plaintiff/Appellees
5. Stacey Woodruff Golmon, counsel for Plaintiff/Appellees
6. Holcomb, Dunbar, Watts, Best, Masters & Golmon, P.A., counsel for Plaintiff/Appellees
7. John S. Hill, counsel for Defendant/Appellant
8. Martha Bost Stegall, counsel for Defendant/Appellant
9. Mitchell, McNutt & Sams, P.A., counsel for Defendant/Appellant
10. Travelers Insurance Company, insurer for Defendant/Appellant

/s/ Bradley T. Golmon
Attorney of Record for Appellees,
Terry Y. McMillin, M.D., et ux.

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STATEMENT OF ISSUES ON CROSS APPEAL BY PLAINTIFF

Issue 1. Plaintiffs are entitled to attorney fees in the current case due to the gross negligence of Defendant found in the punitive damages statute.

Issue 2. Plaintiffs are entitled to attorney fees in the current case due to Defendant's denial of liability in Plaintiffs request for admissions.

Issue 3. Plaintiffs are entitled to attorney fees in the current case as these fees are the natural consequence of the actions and omissions of Defendant and they should be assessed with them under *Veasley* and *Essinger* case law.

Issue 4. Plaintiffs are entitled to post judgment interest at a rate to be set by the court below.

STATEMENT OF ISSUES ON APPEAL FROM DEFENDANT

Issue 1. Plaintiffs presented sufficient evidence for the lower court's verdict awarding them $9,319.23 for repair work.

Issue 2. Defendant did not enjoy immunity from liability under Miss. Code Ann. §11-46-9(1)(h).

Issue 3. There was sufficient and ample evidence that the City's Permit Manager, Marilyn Vail violated Miss. Code Ann. §73-59-17.

Issue 4. City Permit Manager Marilyn Vail actions and omissions after the Plaintiffs purchased their new home did breach a duty the Defendant owed Plaintiffs and Defendant was not immune from such a duty and the injury to Plaintiffs proximately caused them to incur attorney's fees in litigation with Lawrence Deas.

Issue 5. The trial court did not err when they awarded Plaintiffs attorney fees of $105,894.39 as these were fees Plaintiffs incurred in other litigation that Plaintiff pursued after Defendant refused to acknowledge their negligence.

Issue 6. Plaintiffs claims are not barred by the applicable statute of limitations as Defendant waived the statute of limitations by their delay in asserting their defense and even if Defendant had not waived it, equitable estoppel bars the Defendant from asserting this defense.

BRIEF SUMMARY OF CASE AND TRIAL COURT'S FINDINGS

The present action is about new home construction in the City of Tupelo, Mississippi. Mississippi law requires that municipalities must ensure that new construction be done by a licensed and bonded Mississippi contractor. While construction on the home Plaintiffs purchased did have a valid contractor at the time the building permit was issued by the Defendant, the permit lapsed and was withdrawn by the licensed contractor and the Defendant admits that construction continued for approximately 6 more months with no valid permit and without a licensed contractor. Plaintiffs bought the home during the time that construction was ongoing and thought the apparent contractor Jamie Ewing was licensed because he said he was licensed, and had a sign in the yard that City officials had to have seen when they did inspections, that asserted that he was licensed and bonded, but he was, in fact, not licensed by the Mississippi State Board of Contractors. The Defendant, through their agents at the Permit Office, knew he was unlicensed and told various stories to the Plaintiffs about who the licensed contractor on the home was. The Permit File for this home reflected that Lawrence Deas was the contractor of record for this home after April 11, 2006 while members of the Permit Office also stated Jamie Ewing was the licensed contractor during time periods that he was clearly shown not to have a valid Mississippi contractor's license.

Plaintiffs spent months trying to figure out who was responsible for the building defects and code violations they only learned about days after they closed on the home. Defendant, through its Permit Manager Marilyn Vail ("Vail"), admitted she never told the Plaintiffs about her negligent placement of Deas' name on their home. She also admitted that their home was without a licensed contractor from April 11, 2006 until October 27, 2006 when Ewing finally got his license. Vail admitted she never stopped construction on this home when Guyton pulled his

license. Vail admitted she misplaced the very documents she claims were the reasons she put Deas' name on Plaintiffs home and she also admitted she had no authorization from Deas to place his name on their home.

The evidence at trial established that there were defects and code violations on this new home construction on August 24, 2006 when Plaintiffs purchased the home. The central exhibit in this trial was the Permit File and it details pages of "punch lists" stating that this home had items that must be completed before it met basic Tupelo code requirements.

Judge Jim Pounds heard evidence in a two (2) day bench trial on March 24 and March 25, 2014. Judge Pounds entered a ruling on August 28, 2014 and found that Defendant had negligently and wrongfully allowed construction on Plaintiffs home to continue from April 11, 2006 until October 27, 2006 without a valid permit and a licensed contractor as required by Mississippi Code §73-59-17 (Rev. 2008). Judge Pounds found the Defendant, by and through its agents in the Permit Office, had a duty to ensure a validly permitted and licensed contractor constructed this home and they breached that duty. Judge Pounds found although the Defendant might have sovereign immunity under the Tort Claims Act under Section 11-46-9(1)(h), the City was liable under the Act due to the arbitrary and capricious acts of their agents in the Permit Office.

Judge Pounds set the date of April 11, 2006, the date Guyton withdrew his valid license, as the day from which he would consider damages. As such, the Plaintiffs were not allowed damages for repairs to the roof as the Court found that the roof was on the home prior to April 11, 2006. The Plaintiffs were only awarded $9,319.23 for repairs to the home made by Lynn Bryan Construction to fix items detailed by the Defendant's own inspectors and Plaintiffs home inspection report. The Court found that the driveway was already in place after April 11, 2006,

therefore he did not award Plaintiffs any damages regarding the misplacement of the driveway on neighboring land. The court also awarded Plaintiffs damages for legal fees they paid to two different law firms in pursuing claims against Ewing and Deas. Judge Pounds ruled these were damages incurred by Plaintiffs and they would not have been pursued but for the arbitrary and capricious actions of the Defendant that misled the Plaintiffs. The court stated that the damages were appropriate based on Plaintiffs reasonable reliance upon the contents of the Permit File and communication with the Defendant. Judge Pounds did not award Plaintiffs any monies regarding the purchase or maintenance of the Tupelo home as he stated those would have been costs they incurred no matter where they had bought a house. The court also stated the Plaintiffs currently have the home on the market and as such, will recoup monies from that sale to replenish what they spent on this home. The court did not award any attorney fees in the present case as he stated he did not find authority in statute or case law that would support such a finding.

FACTS OF THE CASE

McMillin and his wife Susan ("Plaintiffs") purchased a new home within the city limits of Tupelo, Mississippi on August 24, 2006 located at 4848 Market Street. (Ex. P-8). The home was still under construction when the Plaintiffs purchased it. (Tr. 370). The original building permit for this home was issued to a licensed contractor named Joey Guyton ("Guyton") on July 5, 2005 and construction began on the home in late August of 2005. (Ex. J-1, #0034-0042). That Permit had a one year time frame. (Ex. J-1, #0035). The Defendant admitted, through its agent, Permit Manager Marilyn Vail ("Vail"), that it allowed this property to continue to be built without a licensed contractor from April 6, 2006, when Guyton withdrew his license, until Ewing obtained his license on October 27, 2006. (Ex. J-1 #001246, Tr. 176, 295). Defendant did not issue a new permit on this construction in April of 2006 but instead Vail substituted the name of "Lawrence

Deas" ("Deas") on this project, though she did so without any authorization from Deas and Deas, in fact, had no connection to this property at all, and was not even personally licensed. (Ex. J-1 #0095-0096, 0108, Ex. P-12). Deas was the manager for an LLC that held a license.

Guyton steps out

Vail testified that Guyton came into the Permit Office on April 11, 2006 and withdrew his contractor's license from certain properties. (Tr. 267, Ex. J-1, #T0088). The home that Plaintiffs would later buy was one of those properties. (Ex. D-13, Ex. J-1 #0087-0088). Vail requested and Guyton gave her a typed letter stating the addresses for the properties he was withdrawing his license from. (Tr. 278-278). All of the addresses he listed, except for 4848 Market Street and 1026 Fawn Street, were located in a subdivision called Harvester's Square and had a Harvester's Square street address. (Ex. P-11, D-13). Vail also says she got a letter from Deas and Ewing on April 5, 2006, stating that Deas was "taking over" as the contractor for all Harvestor Square properties. (Ex. P-12). 4848 Market Street, Plaintiffs home, was not mentioned in this letter nor is 4848 Market Street located in Harvestor's Square subdivision. (Ex. P-12, P-11).

Vail begins making mistakes

Vail did not place the Ewing/Deas letter in any of the Harvestor's Square files mentioned in the letter nor did she place it in the file for Plaintiffs property. (Ex. J-1, Tr. 306-307). This letter was not produced by the Defendant when Plaintiffs subpoenaed their Permit File in January of 2008. (Ex. J-1). Vail, at trial, had no explanation for what happened to the letter. (Tr. 306-307). Plaintiffs found about the letter on March 18, 2010 when Deas produced the letter in discovery to the Plaintiffs during litigation between Deas and the Plaintiffs. (Tr. 415-417).

Even though Defendant is charged under Mississippi Code §73-59-17 (Rev. 2008) with requiring that all new construction within the City have a licensed contractor performing work,

Vail did not, when she got Guyton's withdrawal, issue a new permit for Plaintiffs home. (Ex. D-18). Vail merely substituted Deas name on the property. (Ex. J-1, #T0060, D-18). She had no authority to do so and admitted at trial she did not have Deas sign a new permit card or application in regards to this new construction. (Ex. J-1 #T0095-96, Tr. 272-273). Vail also did not modify any of the other existing permits to reflect a new contractor was taking over. (Ex. J-1, Tr. 306-307).

The Permit Office pretends all is well

From April 6, 2006 through the end of the year, Defendant continued to send out city inspectors to 4848 Market Street and the inspectors kept finding issues with Plaintiffs home. (Ex. J-1). Some of the items that did not pass inspection were code violations of the City of Tupelo's Building Code. (Tr. 149). On August 18, 2006, just days before the Plaintiffs purchased the home, the City gave this home a failed inspection. (Ex. J-1, #0060). Plaintiffs purchased 4848 Market Street on August 24, 2006 and at the closing, when asked if he was a licensed contractor, Ewing lied and said that he was. (Tr. 77, 383). Between August 25-27, 2006, while moving into their new home, Plaintiffs found a copy of the City's Blue Card which showed failures on final inspections on their home in their kitchen drawer. (Ex. J-1, #0060, Tr. 388-389). The Blue Card also listed "Lawrence Deas" as the contractor for their home. (Ex. J-1, #0060) Plaintiffs called their realtor, Sue Gardner ("Gardner") on Sunday, August 27, 2006 about these issues. (Tr. 389-390, 398-400).

The cover up begins

Gardner called Vail about the failed inspection and Deas' name as contractor and Vail told her to call Lynda Ford ("Ford") a city inspector. (Tr. 81-82). Dr. McMillin talked to Ford about finding the report and asked her about Deas being listed as the contractor on his home. Ford told

him he needed to leave Deas alone or Deas would sue him. (Tr. 399-400). Neither Ford nor Vail would offer any other explanation about Deas and Plaintiffs home. (Tr. 399-400, 409).

On October 21, 2006, Plaintiffs sent a letter to Deas, Ewing, Guyton, copying the City and others, about problems with their home and demanded they be given their money back on the home. (Ex. J-1, #T0085-86). Plaintiffs received a letter from Guyton on October 26, 2006 who told them for the first time that he pulled his contractor's license on their home back on April 11, 2006. (Ex. J-1, #T0087-88). Guyton said he notified Vail of his decision and the memo is in the permit office files. (Ex. J-1, #T0087-88). Dr. McMillin and Deas had an unpleasant phone conversation days later and Deas said he was not associated with the Plaintiffs home and threatened to sue Dr. McMillin. (Tr. 405). Deas also sent Plaintiffs a letter dated October 30, 2006, in which he claimed he had nothing to do with their home. (Ex. J-1 #T0095-97). Deas also wrote that he had talked to Vail and that the City **was aware** of the error and it was his understanding the City had already told the Plaintiffs about this, but they could contact Vail or any other department employee and they would explain a mistake had occurred. (Ex. J-1, #T0095-97). However, when Dr. McMillin went to the Permit Office days later to question Vail about Deas' name being listed on his home records, she refused to answer his questions and instead told him to go look at his Permit File. (Tr. 407, 409). Dr. McMillin immediately went to that office and was told by other permit office employees he could not see his Permit File. (Tr. 409-410). Gardner, Plaintiffs' realtor, called Vail in early October of 2006 and asked her about Ewing's licensing status. (Tr. 85-86). Vail's stories kept changing. First, she said Jamie Ewing was licensed. (Tr. 85-86). Vail even told Gardner the Mississippi Board of Contractors was behind on getting their website up to date. (Tr. 85-86). Later, Vail told Dr. McMillin that Ewing had a 6

month grace period to get a license. (Tr. 85). Vail never once mentioned Deas and any mistake she made regarding him and the Plaintiffs home. (Tr. 416).

Litigation commences

Plaintiffs filed suit on December 7, 2006, against Ewing and others. (Ex. P-27). Plaintiffs did not list Deas as a Defendant at this time because while Deas denied that he was associated with their home, the City refused to answer any questions about Deas in regards to their house. (Ex. D-15, Tr. 400-410). Plaintiffs sent a claim notice to the City dated August 23, 2007 as they, at this time, based on the facts they had been told or given, were not sure who actually was the contractor on their home was and if the City had made any errors regarding their contractor. (Ex. D-15). Based on the information they had, Plaintiffs had a basis to believe either Ewing or Deas was the contractor. At this point all the Plaintiffs knew was that Guyton had pulled his license, Ewing was performing work on the home, the City's Blue Card reflected Deas as contractor but Deas claimed he was not the contractor and the City knew it but the City refused to discuss Deas with Plaintiffs at all. (Ex. J-1). Plaintiffs had nothing in their possession to definitively prove what had happened with their home after Guyton pulled his license in April of 2006. (Ex. J-1).

To gain information about what had happened, Plaintiffs issued subpoenas to the City in December of 2007 and received a copy of the Permit File for their property and copies of all the other Permit Files associated with Guyton's withdrawal letter and any properties with Deas listed as their contractor. (Tr. 411). The April 5, 2006 Deas/Ewing Letter which detailed the specific properties Deas would be taking over for Ewing was **not** in any of the Permit Files subpoenaed by Plaintiffs. (Tr. 412). It was not in the Permit File for their home, and it was not in the Permit Files for the Harvester's Square properties. (Tr. 411-412).

The January 10, 2007 memo

In their file, Plaintiffs saw a memorandum written by Vail called "Transfer of Contractor Responsibility" dated January 10, 2007 saying when Guyton and Ewing dissolved their partnership and Guyton held the license, Deas agreed to "take responsibility" for Ewing's projects until Ewing got his license. (Ex. J-1, #T0108, Tr. 412). Vail also said in that memorandum that Ewing got his license in September of 2006 and that was when she transferred all permits to Ewing's name. (Ex. J-1, #T0108). Plaintiffs knew at this point that Ewing was not licensed in September of 2006 from conversations they had with the Mississippi Board of Contractors telling them Ewing was not licensed until October 27, 2006. (Tr. 174-176).

Based on Vail's memorandum, coupled with the fact that neither Vail nor anyone else from the Permit Office would tell them what happened back in 2006, Plaintiffs amended their Complaint on December 11, 2008 and added Deas to their pending lawsuit in Lee County Circuit Court Cause No. 2006-1772-41. (Tr. 411-414). The Permit File for Plaintiffs home in December of 2007 showed the following items: (1) Guyton applied for and received a permit for this home under his license in July of 2005; (2) Guyton withdrew his license on April 11, 2006; and (3) Permit Lapsed on July 5, 2006; (4) Vail's January 2007 Memo stating she substituted Deas onto the Guyton/Ewing properties and Deas was responsible for the properties until Ewing got his license. (Ex. J-1, #T0034-0110). The City's file appeared as if they had done everything they were supposed to do under the applicable statutes. (Ex. J-1). The Defendant's own permit files, in December of 2007, did **not** contain the piece of paper that Vail later says was the reason she "substituted" Deas back in April of 2006. The Deas/Ewing letter of April 5, 2006 that stated he was assuming responsibility for Harvestor's Squares properties (**not** 4848 Market Street) was missing. (Ex. J-1, Tr. 306-307). At trial, Vail had no explanation for why that letter was missing

from all of the files and says she does not know why the letter never made it to the files. (Tr. 306-307). Plaintiffs did not find out of this letter's existence until Deas, not the Defendant, produced it on March 18, 2010 in separate litigation. (Tr. 416-417).

Litigation between Plaintiffs and Deas continued with Deas filing a Motion to Dismiss in Lee County Circuit Cause No. 2006-1772-41 in June of 2010. Deas had also previously added a defamation counterclaim against the Plaintiffs in that same cause of action. (Tr. 417). Deas based his motion on a document he produced, a March 2010 affidavit of Vail. Deas' Motion to Dismiss was granted on November 21, 2011. (Tr. 417, Ex. D-26). A Summary Judgment Motion was filed by the Plaintiffs on the defamation claim and their Motion was granted on November 7, 2012. (Ex. D-26). Deas filed another lawsuit against the Plaintiffs on August 15, 2012 for malicious prosecution in Lee County Circuit Cause No. CV-12-192. (Ex. D-27). Plaintiffs filed a Summary Judgment Motion in the malicious prosecution case on December 12, 2012 and after receiving said Motion, Deas signed a Stipulation of Dismissal on January 17, 2013, finally bringing the litigation with Deas to an end. (Ex. D-28).

The City's "*volte-face*"

However, it was only through litigation with Deas that the Plaintiffs finally saw documents that the Defendant never produced. (Tr. 416-417). One piece of evidence was the March 18, 2010 affidavit of Vail where she, for the first time, detailed what she did in 2006 regarding the contractor for 4848 Market Street. (Tr. 416, Ex. D-18). She explained how she took the various pieces of paper she received and made a "honest mistake"when she allowed 4848 Market Street to be without a licensed contractor for 6 months. (Ex. D-18). Deas also produced, on March 18, 2010, the Deas/Ewing letter which they said they gave to Vail back in April of 2006 that stated Deas would be taking over only Harvestor's Squares properties. (Tr. 416-417). Plaintiffs home

was **not** in Harvestor's Square subdivision. This letter was not in any of the files for Harvester's Squares, the homes Deas apparently became the contractor for, nor was it in the file for 4848 Market Street, Plaintiff's home. (Tr. 306-307). It was March of 2010 before Plaintiffs finally had documents that shed some light on what may have happened with their home in 2006. (Tr. 416-417). However, Plaintiffs still had unanswered questions and the veracity of both the Vail affidavit and the Deas/Ewing letter needed to examined. (Tr. 416).

The City of Tupelo, acting through the Permit Office and it's officer, Vail, had a duty to do the following things: (1) ensure that a licensed contractor was working on the property for the entirety of the construction; (2) once Guyton withdrew the only valid license on the property, to stop construction; (3) prevent construction from resuming until such time as a licensed contractor (that the City verified had an individual contractor's license in Mississippi) agreed to be responsible for the construction; (4) properly process the Guyton withdrawal; and (5) refrain from placing misleading and untruthful papers in their permit files. Mississippi Code §73-59-17.

The Defendant did not perform their statutory duties in regards to Plaintiffs home. Defendant, by their acts, omissions, silence and the placement of misleading and incorrect papers in their files, acted in an arbitrary and capricious manner and as such were found by the lower court to be liable for damages to Plaintiffs. (Judge Pounds August 28, 2014 Findings, R. 927-944).

ARGUMENT

A. STANDARD OF REVIEW

The City's brief correctly states this Court's standard of review for claims based on the Mississippi Tort Claims Act ("M.T.C.A."). Under the Act, a trial judge sits as the finder of fact. Mississippi Code §11-46-13(1) (Rev. 2008). The trial judge will be accorded the same deference

with regard to his findings as a chancellor and the court's findings will not be reversed on appeal so long as they are supported by substantial, credible and reasonable evidence. *City of Jackson Sandifer*, 107 So.3d 978, 983 (Miss. 2013); *City of Jackson v. Law*, 65 So.2d 821, 827 (Miss. 2011). The court has also stated that the trial judge's findings will not be disturbed unless they are "manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Sandifer*, 107 So.3d at 983. Plaintiffs believe Judge Pounds findings were supported by substantial, credible and reasonable evidence and the correct legal standards for the M.T.C.A. were applied.

While the aforementioned standard is correct for examining the lower court's Findings of Fact, it is also true that the proper standard for review of the application of the law by this Court is a *de novo* review. *Tallahatchie General Hospital v. Howe,* 2013-1A-01095-SCT (Miss. 2013). The McMillins aver that the lower court correctly applied the facts of this case to the M.T.C.A. though they believe the court below was mistaken as to the law applicable to attorney fees and should have awarded post judgment interest.

B. NO LESSENED DEFERENCE SHOULD BE GIVEN TO LOWER COURT'S FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The City claims there should be lessened deference given to Judge Pounds' Findings of Fact and Conclusions of Law as they claim large portions of his opinion were taken "verbatim" from the Plaintiffs proposed Findings. The lower court did not adopt the Plaintiffs Findings of Fact and Conclusions of Law verbatim. In fact, the Plaintiffs submitted a 25 page "Findings of Fact and Conclusions of Law as to the Liability of the City of Tupelo"; a 21 page "Findings of Fact and Conclusions of Law as to the City of Tupelo Regarding Damages"; and a 3 page "Undisputed Facts and Time Line" to the lower court. (R. 902-926, 881-901, 877-881). Defendant submitted similarly titled documents and their findings were also of a similar number.

(R. 867-876, 841-866, 837-840). A review of these documents shows that while the lower court did use portions of the Plaintiffs proposed language found in their Findings of Fact as to Liability, the court did not use much, if any, of the facts found in their Findings of Fact as to Damages or their Time Line Findings. (R. 927-944).

As to the lower courts use of portions of the Plaintiffs Findings as to Liability, it was **not** copied verbatim. In fact, the lower court at times disagreed with the Plaintiffs facts and specifically did not find that the Defendant should be liable in regards to their roof deficiencies nor for the cost they incurred when their driveway was poured on neighboring property. Specifically, the lower court disagreed with McMillin's testimony when he testified that the driveway was not yet poured on April 11, 2006. A thorough review of the lower court's Findings and the Plaintiffs two (2) proposed Findings show that the lower court picked and the chose the facts he felt had been proven by evidence and then discarded other proposed facts. (R. 927-944). On each and every page of the lower court's Findings, he either added words, changed the order of words, added his own sentences or completely left out sentences proposed by the Plaintiffs in their Findings. Particularly, there are 12 complete sentences that are not found in any of the Plaintiffs submitted Findings nor are they found in their entirety in the City's Findings. There are 47 instances of the lower court adding his own words to proposed sentences by the Plaintiffs and 13 times the lower court deleted words or phrases out of the proposed sentences offered by the Plaintiffs. (R. 927-944).

Obviously the lower court found a great portion of the facts as stated by the Plaintiffs in their Findings as to Liability had been proven in testimony he heard. However, he disagreed and wrote his own findings as to other facts submitted by the Plaintiffs. The lower court's Findings were 18 pages long while the Plaintiffs Findings as to Liability was 25 pages long and their

Findings as to Damages was 21 pages long. (R. 927-944, 902-926, 881-901). In fact, the last 3 pages of the lower court's Findings, but for 10 similar (not identical) sentences from the Plaintiffs Findings, were written entirely by the lower court. (R. 927-944).

Heightened scrutiny of a lower court's Findings is only authorized when the lower court adopts one parties language verbatim or they (the Findings) are essentially the same as one of the party's proposals. *Joel v. Joel*, 43 So.3d 424, 429 (Miss. 2010). That is certainly not the case here. Judge Pounds agreed and used some portions of the Plaintiffs proposed Findings as to Liability, however, he disagreed with the Plaintiffs about certain facts and when he did so, he wrote his own sentences or used those proposed by the Defendant. As to the Plaintiffs Findings of Fact as to Damages, the lower court cited some law from those Findings but used very little verbiage from the Plaintiffs Findings as he did not agree they were entitled to a large part of the damages they sought. (R. 881-901, 927-944).

The Defendant has not shown any reason for this court to use a heightened scrutiny standard of review as to the facts adopted by the lower court. It is clear the lower court received ample Findings of Fact from both sides in this matter and after sitting and listening attentively to two (2) days of witness testimony, and reviewing numerous evidentiary exhibits, the court issued his Findings based on the substantial, credible and reasonable evidence presented to him. His Findings were his conclusions about what he had heard and while the Defendant obviously does not like his conclusions or that he agreed with Plaintiffs about many of those facts, it does not warrant any more stringent scrutiny of his Findings by this Court.

C. PLAINTIFF'S CROSS APPEAL

The Tort Claims Act is not an absolute bar to attorney fees, however it does state that to receive fees, a Plaintiff must establish that said fees are "specifically authorized by law."

Mississippi Code §11-46-15(2). The trial court below denied Plaintiffs request for fees in the instant case.

> Clearly, the rule announced repeatedly by this Court in *Presley, Mohundro, Gressett*, and even more recent decisions, is that the State, and its political subdivisions, are liable unless the legislature declares otherwise. *Pruett, Presley* and their progeny declare that governments enjoy no immunity except that is specifically established by the Legislature.

City of Jackson v. Williamson, 740 So.2d 818, 820 (Miss. 1999). The Legislature did not say that attorney fees could not be had against a municipality, as they did with pre-judgment interest and with punitive damages. The Legislature only said that to secure an award of attorneys fees they had to be otherwise "specifically authorized by law." Plaintiffs do not rely on anything in the Tort Claims Act in support of their claim for attorneys fees in the instant action, rather they rely on the independent standards "specifically authorized by law" in the area of gross negligence, Mississippi Rule of Civil Procedure 37, and the standards of *Veasley* and related cases.

Issue 1. Plaintiff is entitled to attorney fees in the current case due to the gross negligence of Defendant found in the punitive damages statute.

The "gross negligence" standard is contained within the punitive damages statute, discussed by the Supreme Court as follows:

> Mississippi follows the American rule regarding attorney fees: unless a statute or contract provides for imposition of attorney fees, they are not recoverable. *Grisham v. Hinton*, 490 So.2d 1201, 1205 (Miss.1986). When there is no contractual provision or statutory authority providing for attorney fees, they may not be awarded as damages unless punitive damages are also proper. *Central Bank of Mississippi v. Butler*, 517 So.2d 507, 512 (Miss.1987).

Century 21 Deep South Properties, Ltd. v. Corson, 612 So.2d 359, 375 (Miss. 1992). It is true that punitive damages are not available against the City under the Tort Claims Act. But an actual finding of punitive damages is not a prerequisite to the assessment of attorney fees. The

Court has held as follows: "We expressly hold here that such an actual awarding of punitive damages is not a prerequisite for the awarding of attorney fees." *Aqua-Culture v. Holly*, 677 So.2d 171, 185 (Miss. 1996). In that case a chancellor allowed attorney fees, but not punitive damages. The defendant appealed claiming that in the absence of punitive damages, attorney fees were improper. The Court reiterated that while attorney fees are ordinarily not recoverable without statute or contract, they may be awarded if punitive damages are proper. The Supreme Court found that the conduct of the defendant could have supported punitive damages and alone that was enough for attorney fees. The Court affirmed the trial court's finding that the plaintiff should not have to bear the burden of the fees of litigation forced upon it by the defendant's conduct, and that the trial court has flexibility to decide that even if punitive damages are inappropriate, attorney fees may be allowed if "the conduct of the defendant is so extreme and outrageous that he, rather than the plaintiff, should bear the expense of litigation." *Aqua-Culture*, 677 So. 2d at 184-185.

The United States District Court for the Southern District of Mississippi has stated it in this fashion: "Thus, defendants are not accurate when they assert that, before attorneys' fees may be awarded, plaintiffs "must prove that defendants are liable for punitive damages." Rather the burden on the [plaintiffs] was only to prove that an award of punitive damages would be proper." *Jowers v. BOC Group, Inc.*, 608 F.Supp.2d 724, 779 (S.D.Miss. 2009)

As recently at 2011 the Court of Appeals has reiterated the position:

> This Court has previously held that attorney fees may be awarded instead of punitive damages. A trial judge may validly find that, although the conduct of the defendant in a given case is such that the award of punitive damages would be appropriate, the actual awards of additional monetary damages above the compensatory damages would serve no purpose or otherwise be inappropriate. Nevertheless, the trial judge may also validly find that the plaintiff should not have to suffer the expense of litigation forced upon it by the defendant's conduct, and therefore determine that attorney fees should be awarded.

Pursue Energy v. Abernathy, 77 So.3d 1094, 1101 (Miss. 2011).

Plaintiff proved that the actions of the City of Tupelo Permit Office were arbitrary and capricious and that Vail intentionally misled Plaintiffs, in derogation of her official duties. But for the ban on punitive damages under the M.T.C.A., they would be appropriate for this misconduct, therefore attorney fees may still be awarded as this conduct was at least gross negligence.

Issue 2. Plaintiff is entitled to attorney fees in the current case due to Defendant's denial of liability in Plaintiffs request for admissions.

An alternate basis for the imposition of fees is the denial of proper requests for admission. This should have been a case about damages, but the City refused to admit that they violated their own rules and that liability attached because of that violation. (Ex. P-2). All of this in the face of the proposition that an agency that violates its own rules is *per se* acting in an arbitrary and capricious fashion. *Lowe v. Lowndes County*, 760 So.2d 711, 714 (Miss. 2000). Under the Rules of Civil Procedure, the Plaintiffs are entitled to their fees for proving that which the City has denied. M.R.C.P., Rule 37. The City refused to admit that they had allowed Plaintiffs home to be without a licensed contractor from April 11, 2006 until October 24, 2006. (Ex. P-2). They would not admit that Vail was negligent in placing Deas name on the Plaintiffs home. (Ex. P-2). At trial, Vail quickly admitted her "mistake." (Tr. 295). However, early on, during the exchange of discovery requests, the City's counsel denied Vail was negligent and even denied she did anything wrong as they did have the name of a licensed contractor's on the building permit and it was just unfortunate that he was not associated with the home. (Ex. P-2). Had the Defendant admitted their employee's negligent behavior, then Plaintiffs case would not have dragged on, causing them to incur attorney fees to matters so readily admitted under oath at trial. For these reasons,

Plaintiffs should be allowed to recover the fees in pursing this case to trial and this requires a hearing in the Court below on the sum of fees related to proving liability.

Issue 3. Plaintiff is entitled to attorney fees in the current case as these fees are the natural consequence of the actions and omissions of Defendant and they should be assessed with them under *Veasley* and *Essinger* case law.

There is a third basis for the imposition of fees in this case. This rests on the *Veasley* case and the cases that have followed it. The Court in *Veasley* held the following:

> Applying the familiar tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment. Some anxiety and emotional distress would ordinarily follow, especially in the area of life insurance where the loss of a loved one is exacerbated by the attendant financial effects of that loss. *Additional inconvenience and expense, attorneys fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries.*

Universal Life Ins. Co. v. Veasley, 610 So.2d 290, 295 (Miss. 1992)(emphasis added). The Court of Appeals recently echoed that language:

> Fulton's request for attorney's fees and expenses was based on the following language from *Veasley:* " Additional inconvenience and expense, attorney['s] fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries." *Id.*

Fulton v. Mississippi Farm Bureau Cas. Ins. Co., 105 So.3d 331, 333-334 (Miss.App. 2011). *Fulton* was subsequently reversed by the Supreme Court, but only because attorney fees in that case were sought post judgment with a Motion to Alter or Amend. *Fulton v. Mississippi Farm Bureau Cas. Ins. Co.,* 105 So.3d 285, 287 & 290 (Miss. 2012).

In *Essinger v. Liberty Mutual Fire Insurance Co.,* 534 F.3d 450, 451 (5th Cir. 2008), the United States Fifth Circuit Court of Appeals discussed *Veasley* and concluded:

> In practice, two separate categories of damages are recognized. Punitive damages are available for egregious conduct. The lesser level of damages may be appropriate where the insurer lacks an arguable basis *for delaying or denying* a claim, but the conduct was not sufficiently egregious to justify the imposition of punitive damages. *See Universal Life Ins. Co. v. Veasley,* 610 So.2d 290, 295 (Miss.1992). These damages are an intermediate form of relief between simply receiving incidental costs of suit (but not attorneys' fees), and getting punitive damages. *Id.* at 295 (" Additional inconvenience and expense, attorney['s] fees and the like should be expected in an effort to have the oversight corrected. It is no more than just that the injured party be compensated for these injuries.").
> The Mississippi Supreme Court described the kind of conduct that gives rise to the lower level of damages: Applying the familiar tort[-]law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment. *Id. Thus, Mississippi law recognizes that negligent conduct of the insurance company can justify recovery of, for example, attorneys' fees; punitive damages require bad faith by the insurance company.* (Emphasis added).

Essinger v. Liberty Mutual Fire Insurance Co., 534 F.3d 450, 451 (5th Cir. 2008).

While these cases deal with attorney fees in the context of a dispute between an insurance company and an insured, and not within the context of the government and one of its citizens, the relationship is analogous. In both cases the power of the individual is often dwarfed by the larger entity, the large entity controls all of the information and sets the terms, by contract, or by legislation, of the relationship. The individual is at a great disadvantage because of the disparity in size, and efforts by an individual in this type of context may lead to the greater good of the public as a whole and, government owes a greater obligation to its citizens to be fair and diligent in its relationships with them. If we are to be a "government of the people, by the people, for the people" then government, including the Permit Office of the City of Tupelo, must be at least as accountable to its citizens as an insurance company. *Gettysburg Address*, President Abraham Lincoln, November 19, 1863.

Plaintiffs are entitled to recover attorney fees for each of these three reasons and this matter should be remanded to the trial court for a determination of the proper sum of those fees.

Issue 4. Plaintiff is entitled to post judgment interest at a rate to be set by the court below.

The Final Judgment from the court below awarded the Plaintiffs $115,238.62 against the Defendant. The Final Judgment does not provide for post-judgment interest. Under the terms of Mississippi Code Section 74-17-7 this judgment "shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge but in no event prior to the filing of the complaint." While the M.T.C.A. does prevent pre-judgment interest, it does not prevent post judgment interest and post judgment interest in this case should be set on remand to the court below. This is also in accord with the decisions of this Court in *Mississippi Department of Health v. Hall,* 936 So.2d 917, 929 (Miss. 2006) and *City of Jackson v. Williamson*, 740 So.2d 818, 821-22 (Miss. 1999).

D. RESPONSE TO DEFENDANT'S BRIEF

Issue 1. Plaintiff presented sufficient and ample evidence for the lower court's verdict awarding them $9,319.23 for repair work done on their new home.

Defendant, now on appeal, for the first time, seeks to attack the invoices admitted into evidence from repairman Lynn Bryan. The invoices from Bryan were a part of Plaintiffs composite exhibit and labeled as "Plaintiffs' Expenses." (Ex. P-29). While the Defendant voiced an objection to the composite exhibit as it related to the Plaintiffs damages regarding a down payment on the home, mortgage payments, bills for upkeep on the home (electricity, gas, water, lawn care, etc.) and six months of future payments on these items as the home was on the market

for sale as being speculative and/or recoverable once Plaintiffs sold their home, Defendant did **not** object to entry of the Lynn Bryan invoices. (Tr. 448-449). In fact Defendant's counsel stated at trial that he would stipulate that Plaintiffs did in fact pay these invoices. (Tr. 448-449). While Defendant's counsel questioned McMillin about these expenses and what they were for, Defendant never objected that these expenses were cosmetic nor that they were not done to repair defects with the home detailed by their own inspectors. (Tr. 457-458, 469). As Defendant did not properly object to these expenses during trial, it has waived any right to object to them on appeal. Failure to raise a contemporaneous objection to evidence constitutes a waiver of the issue on appeal. *Patton v. State*, 742 So.2d 150, 153 (Miss. 1999). Therefore, this issue is procedurally barred. *Holt v. Mississippi State Bd. of Dental Examiners*, 131 So.3d 1271, 1278 (Miss.App. 2014)

However, there was sufficient evidence presented to the lower court for the aforementioned expenses by Bryan. The lower court found that the Defendant was liable for damages that occurred after April 11, 2006 (when Guyton pulled his license) and he found the items repaired existed after that date. The court awarded $9,319.23 in damages and stated that the damages were "admitted into evidence" and "substantiated by the testimony of Dr. McMillin and Curtis "Butch" Cobb," whose testimony the court found to be credible. (Judge Pounds August 28, 2014 Findings, R. 927-944).

At trial, McMillin testified that when he first saw the home in July of 2006, there were many issues that had not been completed on the home. (Tr. 370-371). He detailed all of the items left undone and among them were fixtures being added, plumbing work, interior painting, staining

and sealing of floors, smearing of the outside of the home not done, and various caulking to be completed. (Tr. 370-371). McMillin also stated that the closing date on his home had been moved once as Ewing had not completed basic items in the house that were necessary for he and his family to move into the home. (Tr. 377).

McMillin also testified at trial that Lynn Bryan ("Bryan") made repairs to his home. (Tr. 469). The invoices admitted into evidence show a total of $9,319.23. (Ex. P-29, #001407- 1410, 001839-1841). McMilllin also testified that the punch lists generated by city inspectors and placed in his Permit File also detailed these same issues that needed to be repaired. (Tr. 478). McMillin testified that those were the items that Bryan gave him an estimate for in November of 2012 and then repaired in 2013. (Tr. 478).

Also testifying at trial was Curtis "Butch" Cobb ("Cobb") who the McMillins hired to perform an inspection the new home after the Plaintiffs discovered the home had not passed City of Tupelo inspection requirements. (Ex. P-3, P-4, Tr. 13). Cobb's report, which he did on October 9, 2006, just weeks after the Plaintiffs purchased the home, was admitted as evidence and it details items that were improperly done or were not up to Code. (Ex. P-3, P-4, Tr. 232-233). These items, along with Cobb's Summary Report were added to the City's Permit File and were also items Lynda Ford ("Ford"), one of the city's inspectors, listed as items that needed to be repaired. (Ex. J-1, #T0071-0079). Among the issues in Cobb's report he referenced plumbing and fixtures and other "finishing" items that are referenced in Bryan's invoice. (Ex. P-3, P-4, P-29, #001407-001410, 001839-001841).

Also admitted into evidence was the City's Permit File which contained numerous "punch

lists" detailing items that city inspectors found to be faulty and contrary to the Tupelo building code after April 11, 2006. (Ex. J-1, #T0057-0061, 0063-0065, 0080). Because Ewing did not remedy these violations, Ford stated she did not ever grant Plaintiffs' home a passing grade in regard to City of Tupelo codes. (Tr. 207).

Defendant's own inspectors detailed by month the various issues that were defective on the home and ultimately did not give the home a passing inspection. (Ex. J-1, #T0042-0048, 0051, 0054-0056, 0068). Inspections done after April 11, 2006 (when Guyton license was pulled) show that this home could not and did not ever pass inspection regarding building issues, electrical issues, mechanical issues and plumbing issues. (Ex. J-1, #T0054-0056, 0060). Listed in the City's own report were numerous issues with the home that required "finishing" as well as plumbing work. (Ex. J-1, #T0054-0056, 0060). These are the same repairs Dr. McMillin testified were addressed by Lynn Bryan Construction in his repairs. (Tr. 478).

The repairs performed by Lynn Bryan Construction in the amount of $9,319.23 were supported by sufficient and ample evidence in the form of witness testimony and properly admitted invoices of work completed.

Issue 2. Defendant was not immune from liability under Mississippi Code §11-46-9(1)(h).

The Defendant, because it is a governmental entity, enjoys qualified sovereign immunity by Section 11-46-9(1)(h) of the Mississippi Code. It reads in part:

> (1) A governmental entity and its employees acting within the scope of their employment or duties shall not be liable for any claim:
>
> (h) Arising out of the issuance, denial, suspension, or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its

> employees is authorized by law to determine whether or not such authorization should be issued, denied, suspended, or revoked ***unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature.***

Mississippi Code §11-46-9(1)(h) (emphasis added). However, the actions by the Defendant, in allowing an unlicensed contractor to continue to perform work on Plaintiffs home when they knew that he was not licensed and without a valid permit and failing to revoke that permit, even after it expired, or to issue a new permit when the original one had a licensed contractor withdraw, rises to the level of arbitrary and capricious.

The lower court, in his Findings, found Section 11-46-9(1)(h) was violated in the following ways: (1) Vail wrongfully and negligently substituted Deas name as the contractor in Plaintiffs permit file; (2) Vail wrongfully and negligently substituted Deas name on the Plaintiff's blue card; (3) construction was allowed to continue past April 11, 2006 with no licensed contractor overseeing work on the home; (4) Ewing was allowed to continue to work on the home even though he was not a licensed contractor; (5) Vail wrongfully informed Plaintiffs realtor that Ewing was licensed when in fact he was not; (6) Work on Plaintiffs home should have stopped on July 5, 2006 when the Tupelo permit expired and (7) In light of the totality of their actions, the Defendant acted in an arbitrary and capricious manner in their oversight in regards to the construction of Plaintiffs home. (Judge Pounds August 28, 2013 Findings, R. 927-944).

Black's Law Dictionary defines "arbitrary and capricious" as the "[c]haracterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts and law or without determining principle." Black's Law Dictionary 105 (6th ed. 1990). The Mississippi Supreme Court has

discussed these terms in decisions made by an administrative agency or a commission on appeal. *State Tax Comm'n v. Earnest,* 627 So.2d 313, 319-20 (Miss. 1993); *Mississippi Dep't of Envtl. Quality v. Weems,* 653 So.2d 266, 281 (Miss. 1995). In *Miss. State Dep't of Health v. Southwest Miss. Regional Med. Ctr.,* 580 So.2d 1238, 1239 (Miss. 1991), the Court stated that an act is "arbitrary" when it is done without adequately determining principle, not done according to reason or judgment, but depending upon the will alone, absolute in power, tyrannical, despotic, non-rational, implying either a lack of understanding of or a disregard for the fundamental nature or things. *Id. at 1240.* An act is "capricious" when it is done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles. *Id.*

An agency acts *per se* arbitrarily and capriciously when it fails to abide by its own rules as well as when the agency failed to conform to prior procedures without an adequate explanation for the change. *Mississippi Dep't of Envtl. Quality v. Weems,* 653 So.2d at 281. In this case, Vail admitted at trial that Ewing was not licensed until October 27, 2006. (Tr. 295). She has also admitted that Guyton withdrew the only valid license on 4848 Market Street on April 11, 2006. (Tr. 295). Vail had no authority, on April 11, 2006, to place Lawrence Deas' name as the contractor for 4848 Market Street. (Ex. J-1, #T0095-97). Vail did not issue a new permit under Deas name. (Ex. J-1). There is no piece of paper in the Permit File showing that Deas agreed to take responsibility for 4848 Market Street and instead the piece of paper Deas did sign about other homes was misplaced and could not be found. (J-1, #T0095-97, Tr. 306-307).

The Defendant, by and through its agent Vail, admits she should have stopped construction on 4848 Market Street when Guyton pulled his license. (Ex. D-18). If Vail thought Deas was taking contractor responsibility for this home, she should have had Deas fill out a permit and sign his authorization. She then should have checked to see if Deas, individually, was licensed. (Deas was not licensed individually, he was the manager for an LLC that was licensed. The LLC license was not listed as the contractor on paperwork for 4848 Market Street. The Defendant listed "Lawrence Deas" and Deas did not have an individual license (J-1, #T0067, P-12). The permit for 4848 Market Street expired on July 5, 2006, however Vail did not issue a new permit. (J-1, #0034-35). Then, when Vail and the office were notified by Deas that they had erred in placing his name on 4848 Market Street, Vail and other employees at the Permit Office refused to tell Plaintiffs. (J-1, #T0095-97, Tr. 407, 409). Vail refused to answer any questions about Deas and instead only spouted out the mantra that "Ewing is licensed" even though he was not licensed at that time and city documentation showed Deas as the contractor on the home. (Tr. 407, 409, J-1, #T0067). Vail then even went further, she placed a memo in the Permit File for 4848 Market Street in January of 2007 that says Deas was taking over as contractor on Guyton's former properties. (Ex. J-1, #T0108). Defendant was also put on notice by letters from Dr. McMillin, Deas, calls from the realtor Gardner, and a visit by McMillin to their office about Deas name and its association with this file in August of 2006. (Ex. J-1, #T0085-86, 0095-97, Tr. 85-86, 407, 409). Vail did not provide any answers to the Plaintiffs and even when asked by McMillin directly, Vail refused to answer his questions and told him to look at his Permit File but

when he asked to see his file, another City employee refused to let him see him see it. (Tr. 407, 409-410).

The paperwork in the Plaintiff's Permit File certainly showed that trouble was brewing, but Vail still continued to ignore the problem and did not use plain common sense to address the situation and relieve the confusion. (Ex. J-1). The Tupelo Permit Office had rules and regulations in place regarding new residential construction. There was applicable Code that detailed what is expected of their office. There were procedures for expired permits and for the change of contractors at the Permit Office level. However, the Defendant did not follow those rules. (Ex. D-18). Workers in the Permit Office chose to make up procedure and ignore licensing requirements for their builders which is *per se* arbitrary and capricious.

Issue 3. There was sufficient and ample evidence that the City's Permit Manager, Marilyn Vail violated Miss. Code Ann. §73-59-17.

The City of Tupelo has a statutory duty to ensure that all builders of residential property within the City limits be licensed. Under Mississippi Code §73-59-17 "the building official, or other authority charged with the duty of issuing building or similar permits, of any municipality or county, shall refuse to issue a permit for any undertaking which would classify the applicant as a residential builder or remodeler under this act unless the applicant has furnished evidence that he is either licensed as required by this act or exempt from the requirements of this act." Mississippi Code §73-59-17 (Rev. 2008). Vail and Wammack, city employees, admitted that construction should have stopped when Guyton withdrew his license on April 11, 2006 and should not have been allowed to continue until and unless a licensed contractor took on this property. (Ex. D-18,

Tr. 130). This would have been the first step in assuring that §73-59-17 was not violated. Further Mississippi Code §11-46-9(1)(h) governs the revocation of permits as well and the permit for 4848 Market Street expired on July 6, 2006. For these two reasons, the license withdrawal by Guyton and the expiration of the valid permit, construction should have stopped. Had Vail stopped or revoked the permit when Guyton came in on April 11, 2006 or stopped or revoked the permit on July 5, 2006, when the permit expired, a new permit would have been prepared and she would have an opportunity to do her statutory duty of checking and making sure either Deas or Ewing were property licensed contractors with the state of Mississippi. Had Vail done that for Ewing, she would have quickly found him unlicensed. Had Vail done that for Deas, she would have been told by him he was not taking responsibility for that home and she would have also discovered Deas was not individually licensed but held a license for an LLC. Vail did not do either and instead allowed Ewing to perform work when she knew he was unlicensed. (Tr. 295).

The Mississippi State Board of Contractors has only the duty to issue or not issue licenses and while they are authorized to discipline builders who do not comply with the Code, it is the duty of the City to report violations to the Board. Defendant never notified the Board that Ewing had been building without a license. (Tr. 178). While the Defendant does have a way to take a builder before the local municipal court if a builder does not correct building violations, the Defendant did not pursue Deas or Ewing when the code violations occurred at 4848 Market Street. Mississippi Code §73-59-13 (Rev. 2008) (Tr. 140).

Section 73-59-17 of the Code clearly places certain state requirements on its residential builders and ultimately gives homeowners someone to hold responsible if problems with new

construction surface. Vail did not perform her duties and admits she was "flying by the seat of her pants." (Tr. 317).

Deas, in his October 31, 2006 letter to the Plaintiffs, a copy of which was in the Permit File, wrote that he had spoken with the Permit Office and the use of his name on the 4848 Market Street property was a mistake and he told the Plaintiffs to contact Vail or any other employee in the Permit Office and they would tell the Plaintiffs about this error. (Ex. J-1, #T0095-97, Tr. 317-318). However, when McMillin asked both Ford and Vail about why Deas name was in his Permit File, neither would answer his question and neither would tell him anything about an error made by the Permit Office. (Tr. 399-400, 407, 409). That a mistake had been made was not told to the McMillins until March of 2010, some four (4) years later. (Tr. 412).

Even after McMillin told Vail on October 13, 2006 that the Mississippi Board of Contractors said Ewing was not licensed and after Vail spoke with Deas in the same month about his name not being connected to this home, she allowed construction to proceed on 4848 Market Street with Ewing acting as the contractor, even though he was not licensed and even though the Permit had expired and even though Deas was not licensed individually. (Ex. D-18). In fact, Vail even told Dr. McMillin and his realtor Gardner that Ewing was licensed in early September when he was not licensed until October 27, 2006. (Tr. 85-86). Vail's January 2007 Memo that she placed in the Plaintiffs file even states a falsehood as it says Jamie Ewing was licensed in September of 2006 when he clearly was not licensed at that time. (Ex. J-1, #T0108, Tr. 174-176). She pretends in 2010 that she did not know that listing Deas was an error, but this ignores the October 2006 letter from Deas that was in the Permit File.

Vail testified in her Affidavit that "Mr. Ewing did not inform me or, to my knowledge, anyone else in the department, that 4846 (sic) Market Square was without a licensed contractor during any period of time that construction occurred." (Ex. D-18). The Code does not require that the builder "inform" the building officials of his status. The Code requires that the building officials not issue permits without first checking to make sure a contractor is licensed. Mississippi Code §73-59-13 (Rev. 2008). This is asking the fox to guard the henhouse.

Charles Sharman, with the Mississippi State Board of Contractors, testified that a list of residential builders who are properly licensed with the State of Mississippi was then and is now available to anyone who calls and asks, or checks a website. (Tr. 176). All the Defendant had to do was call the Mississippi Board of Contractors and verify if Ewing was licensed or not. (Tr. 176). The City did not do this.

The Building Permit for 4848 Market Street was issued on July 5, 2005 and expired on its own terms on July 5, 2006. (Ex. J-1, #T0034-37). The City had a duty to stop the construction when the Permit expired. At trial, the City's Chief Building Inspector David Wammack, when asked if construction should have stopped when Guyton pulled his license in April of 2006, testified that "in my opinion as a building inspector it should stop." (Tr. 130). The City failed to do that. (Ex. J-1).

The situation that Vail created, effectively allowing an unlicensed contractor, Ewing, to "borrow" the license of a nonparticipating and also unlicensed individual, Deas, is in direct violation of Mississippi Code Section 73-59-13. While Deas was the manager of a licensed entity, that entity was not listed as contractor, Deas was listed individually. This is another

perspective from which to view the actions of the Permit Office and has the same goal, protecting the public from the actual work of unlicensed builders.

Vail admits that it was her job to confirm that Ewing was licensed and Sharman confirms how easy it is to determine. (Tr. 259, 260). Vail said she had several conversations with Ewing in which she inquired about whether or not he had passed the licensing test so for some period of time in 2006 she obviously knew Ewing was not licensed. (Tr. 271). Vail stated that the permit office was "flying by the seat of our pants." (Tr. 317). She also said they were "doing the best we could do to keep those jobs going and to keep those men employed." (Tr. 317). Her goal was to keep contractors, like Ewing, employed. (Tr. 318). These are not among the duties of the Permit Office.

The Permit Office is making an absurd argument, and it is not even supported by their own proof. Even without considering the lack of support, the argument is, at best absurd, and at worst dishonest. Ignoring their factual error for the moment, the Permit Office appears to believe that because there was always a licensed builder listed on the permit for this property, Guyton, and then Deas, they did not violate §73-59-17. If this is indeed the law of the land, then all any Permit Office must do is find the most reputable, grey haired, glad-handing, popular, seersucker suit wearing builder in the town, and put his name on each and every permit in each and every file. Forget that he has had nothing to do with the construction, has no contract with a customer, is not supervising the project, has no liability for the project, he's licensed, and, according to the Permit Office, that's all this statute requires. That cannot be the law, and if it is, then this part of the Code is meaningless. Obviously, the builder must have some relationship to the property, some

management or some responsibility. Deas in this case had none, and he said so emphatically in his letter of October 31, 2006, a copy of which is in the Permit Office file. (Ex. J-1, #T0095-97).

Beyond that, the Permit Office had Lawrence Deas listed as the licensed builder. (Ex. J-1, #T0060). That is true, but even then the statute is not satisfied. Lawrence Deas was the manager for Deas Property Group, LLC and Deas Property Group, LLC held the license, not Lawrence Deas. (Ex. P-12). This distinction in ownership and responsibility was part of the emphasis of this Court's decision in *Lutz Homes, Inc. v. Weston,* 19 So.3d 60 (Miss. 2009). The Court found that the license in the name of an individual, Barry R. Lutz, did not make his corporation, Lutz Homes, Inc. licensed. *Lutz Homes, Inc. v. Weston,* 19 So.3d at 63. In this case we have the reverse, but the proposition is the same, and the Permit Office did not, in fact, have a license holder listed at contractor of record, they had the name of the manager of a license holder listed a contractor of record.

Issue 4. City Permit Manager Marilyn Vail actions and omissions after the Plaintiffs purchased their new home did breach a duty the Defendant owed Plaintiffs and Defendant was not immune from such a duty and the injury to Plaintiffs proximately caused them to incur attorney's fees in litigation with Lawrence Deas.

As stated previously, Vail's actions and omissions before and after Plaintiffs purchased their new home did breach a duty they owed homeowners under Mississippi Code §73-59-17 to ensure a licensed contractor was building their home; Defendant is not immune because these same actions and omissions were done in an arbitrary and capricious manner; and the attorney fees they incurred in litigation with Lawrence Deas was proximately caused by these actions and omissions by Vail.

Under §11-46-9(1)(h), the entity is told to only "issue, deny, suspend or revoke" a permit where authorized by law to do so. Here, the City was given that duty in Mississippi Code §73-59-17 and had two reasons to revoke the permit, the withdrawal of Guyton and the expiration of the permit itself. The City would be immune unless they acted with an arbitrary or capricious nature. As stated above, the actions of the City in allowing a new contractor on the Plaintiffs' home without a valid permit was done in an arbitrary and capricious manner. The actions of the Permit department employees established at trial and by and through evidence presented to the court were not based on substantial evidence. In fact, all of the evidence in the form of the various letters about the revoking of a license as well as the letters about the properties that were being allowed a "substitution" contractor, all show there was no evidence to support the City's actions. All of the evidence showed there was no new permit issued on 4848 Market Street and there was no licensed contractor working on the home for over 6 months of construction. (Ex. J-1, D-18). If an agency's decision is not based on substantial evidence, it necessarily follows that decision was arbitrary and capricious. *Stevison v. Pub. Employees' Ret. Sys.*, 966 So.2d 874, 878 (Miss. Ct. App. 2007). Another agency finding of arbitrary and capricious behavior was when the agency offered an explanation for its decision that runs counter to the evidence. *Donovan v. City of Long Beach,* 104 So.3d 166, 169 (Miss. App. 2012). All of the evidence in the present case shows that a new permit should have been issued and there in no mention in the statute of an agency being allowed to substitute in another contractor in lieu of issuing another permit.

A. City Permit Manager Marilyn Vail's deliberate omission of the April 5, 2006 letter to Plaintiff's Permit File was one of the reasons Plaintiffs sued Lawrence Deas.

It is undisputed that the Deas/Ewing April 5, 2006 letter that states Deas will "temporarily oversee" construction of all residencies under construction by "Harverster's Square Developers, LLC." (Ex. P-12). Ewing signed as the manager for Harvestor's Square and Deas signed and gave the current Mississippi builders license number of his LLC. (Ex. P-12). It is also undisputed that Vail did not place this paper in Plaintiffs' permit file nor did she place it in the Harvester's Square permit files. (Tr. 306-307). Vail testified she did not know where the letter was. (Tr. 306-307). However, she said this letter was the reason she put Deas' name on Plaintiffs home as contractor of record. (Ex. D-18). As the letter was not in Plaintiffs Permit File nor would Vail tell Plaintiffs why she placed Deas name on their home, Plaintiffs continued to think Deas was involved with their home. When Plaintiffs subpoenaed their file in 2007 they had no way to know how Deas name was placed on this property. (Tr. 411). If Vail had done her job and placed this paper in the Permit File, Plaintiffs would have been able to see how Deas' license became associated with Ewing and his properties. Plaintiffs home is not located in Harvester's Square. This paper, alongside the Guyton April 11, 2006 letter detailing the specific homes he was pulling his license from, shows that but for 2 properties (Plaintiffs property and 1026 Fawn Street), Guyton was pulling his license from Harvester's Square property. (Ex. P-11, D-13).

To say that Vail's omission in placing this letter in Plaintiffs Permit File is of no consequence to them pursuing Deas is absurd. Not only would this letter's proper placement have potentially helped Vail figure out her error quicker, it would have given Plaintiffs the information they needed to see how Deas' name became associated with their home and Ewing. Thus, a reasonable conclusion is that Plaintiffs would have been able to piece Vail's actions together in

2007, when they subpoenaed their Permit File and been able to figure Vail's negligence then rather it being given to them for the first time by Deas in 2010.

B. City Permit Manager Marilyn Vail's January 2007 Memo which contradicted other papers she placed in the Plaintiff's Permit File was one of the reasons Plaintiffs sued Lawrence Deas.

Based on Defendant's own Permit File, Deas' name, along with Ewing's name, are both listed as contractors on Plaintiffs' home. (Ex. J-1, #T0047-48, 60, 67, 89, 108). Plaintiffs were told by Deas in a letter dated October 30, 2006 that he had talked to the Permit Office about an error they made and they know and would tell Plaintiffs about it if they would just ask. (Ex. J-1, #T0095-97). However, when McMillin asked Vail she would not respond to any of his inquires about Deas and according to Ford, a city inspector, McMillin needed to "watch out for Deas" because "he will sue you." (Tr. 399-400, 409). It was plainly reasonable that Plaintiffs thought Deas was connected. The City refused to even discuss it with the Plaintiffs. They certainly did not tell them what Deas says they would. No one at the City ever mentioned that they had made a mistake, until 2010. Defendants would not even let McMillin see his own Permit File. (Tr. 409-410). It was reasonable for Plaintiffs to think Ewing was in charge. Ewing was doing the work. Ewing was the one out at the new home. But Ewing was the one who had lied and put a sign in the yard declaring himself to be a licensed contractor when the Board of Contractors list reflects that at that time, he was not licensed. (Tr. 373-374). Defendant appears to fault Plaintiffs for asking about Ewing and not Deas when the testimony of McMillin at trial clearly was that he asked Vail about Deas and she refused to respond. (Tr. 407, 409). McMillin also asked inspector Ford about Deas and all she would say was to be careful with Deas. (Tr. 399-400). If the City

bothered to answer McMillin at all, they would only say "Ewing is licensed" when he clearly was not at that time. (Tr. 85-86).

The lower court heard from Marilyn Vail. The court heard her explanations and obviously did not find them believable. The court did not believe Vail's explanation that when she wrote the January 2007 Memo that it was because she thought Deas was the rightful contractor of record on Plaintiffs home up until Ewing was licensed on October 27, 2006. (Ex. D-18). Deas' letter stated he has gone to the Permit Office and "they (the city) know about their error." (Ex. J-1, #T0095-97). That letter is in the Permit File. The lower court ruled she did this because she was trying to cover up her mistake in allowing Deas' name to be placed on the Plaintiffs' home. The lower court said Vail made a negligent misrepresentation by placing the January 2007 memo in the file and should have told the Plaintiffs what had happened. (Judge Pounds August 28, 2013 Findings, R. 302). The court also said the City had been put on notice that the Plaintiffs had issues with their home and their contractor, had hired a lawyer at this time and that this memo did not relieve the confusion they had created. (Judge Pounds August 28, 2013 Findings, R. 313).

C. City Permit Manager Marilyn Vail's continued and repeated failures to tell the Plaintiffs about her mistake and about Lawrence Deas role with their new home was one of the reasons Plaintiffs sued Lawrence Deas.

Again, the trial court heard the testimony of the witnesses at trial and did not find Vail's explanations about why she did not respond to the Plaintiffs questions believable. The court believed the testimony of McMillin when he stated that he asked both Vail and inspector Ford about why Deas' name was in his file as contractor of record as soon as he saw it on the Blue Card in his home. (Tr. 399-400, 409). The court obviously did not believe Vail when she testified that

she did not specifically remember Deas' name coming up when she was talking to Dr. McMillin. (Tr. 312). The court found the City was put on notice of their error when Deas copied them with a letter he sent to Plaintiffs saying he (Deas) was not associated with their home. (Judge Pounds August 28, 2013 Findings, R. 308).

As to the immunity Defendant's rely upon under 11-46-9(1)(d), as stated previously, the Defendant's are relying on the wrong section of the Act and instead, as the lower court found, Section 11-46-9(1)(h) applies. The lower court also stated that he found the actions of the Defendant regarding the applicable statutes to be a ministerial duties as opposed to discretionary duties and the Defendant is subject to liability if their acts are malicious or arbitrary and capricious. (Tr. 431). The court found, and Plaintiff agrees, that the Defendant's acts were arbitrary and capricious.

Issue 5. The trial court did not err when they awarded Plaintiffs attorney fees of $105,894.39 as these were fees Plaintiffs incurred in other litigation that Plaintiff pursued after Defendant refused to acknowledge their negligence.

The lower court awarded Plaintiffs fees of $105,894.39 for the costs of separate litigation Plaintiffs were involved in due to the arbitrary and capricious actions of the Defendant and also stated he found that the Plaintiffs would not have asserted claims against Lawrence Deas and defend themselves against Deas claims but for Defendant's actions. (Judge Pounds August 28, 2013 Findings, R. 313).

The Defendants assert for the first time on appeal specific objections they have with the details of the attorney fees Plaintiffs paid to two different law firms regarding fees incurred in litigation separate from this action. The Defendants have waived any objection to these fees as

their only objection at trial regarding these fees were regarding relevancy and a claim that these types of fees were not recoverable under a tort claims act lawsuit. (Tr. 420-421, 423). Failure to raise a contemporaneous objection to evidence constitutes a waiver of the issue on appeal. *Patton v. State*, 742 So.2d 150, 153 (¶ 9) (Miss. 1999). Therefore, this issue is procedurally barred. *Holt v. Mississippi State Bd. of Dental Examiners*, 131 So.3d 1271, 1278 (Miss.App. 2014)

Defendants did not object to the substance of the bills and did not ask McMillin any questions about the specific fees he paid to either law firm or what those fees specifically addressed. Defendant cannot now, assert an objection to these fees as they did preserve such an objection at the trial court level.

Nevertheless, the fees awarded by the lower court were supported by substantial evidence in the form of testimony by McMillin and the entrance of the detailed invoices exhibits as evidence. The fees for Plaintiff's first attorney, T.K. Moffett, was for $8,908.31. (Ex. P-19). Plaintiff Dr. McMillin testified he incurred fees with the Moffett law firm and the Holcomb Dunbar law firm for litigation separate and apart from this litigation. (Tr. 421-423). Plaintiff testified he originally filed against Jamie Ewing, banking institutions and then later added Deas to the litigation due to the City's representations and official Permit File. (Tr. 410-414). He also testified that due to that suit, Lawrence Deas counterclaimed against him for defamation in that cause and then sued Plaintiffs for malicious prosecution. (Tr. 417-418). These legal fees were admitted as evidence over the objection of the City. They objected dually by stating first, that these fees were improper based on "relevance" and, then secondly as they stated it was Plaintiffs choice to sue and there was no tort that allowed for this recovery. (P. 423). The lower court

overruled those objections and stated that these fees were a foreseeable consequence of the error that the City had already admitted. (Tr. 423). The court also stated that it was making a distinction between the attorney fees in the case on trial versus the attorney fees as expenses in the case against Deas and Ewing. (Tr. 425). Defendant did not object about the details or the sum of the Moffett fees or object to their connection to Lawrence Deas individually as opposed to Deas, Ewing and the banking institutions.

The fees for Plaintiffs second firm, Holcomb Dunbar, were for $96,986.08. (Ex. P-20). Those were for fees Plaintiffs paid involving the addition of Lawrence Deas into the earlier filed lawsuit and then the counterclaim filed by Deas against Plaintiffs for defamation and then malicious prosecution. The City did not object to the details or the sums of the Holcomb Dunbar invoices. Therefore, the City waived objecting to them now as it did not properly preserve such objection at the trial level and such was a question of fact.

Fees incurred by the Plaintiffs in the actions against Deas and Ewing were allowed by the lower court as damages. (Tr. 431, Judge Pounds August 28, 2013 Findings, R. 313). The court stated that but for the arbitrary and capricious actions of the Permit Office, the McMillins would have never incurred the fees in these separate lawsuits. The court also found these damages were the reasonably foreseeable consequence of Defendant's multiple errors. The City clearly placed responsibility for these projects with Deas. (Ex. J-1, #T0108, Tr. 411). McMillin believed it and sued Deas. That was the assumption of David Wammack, the long time veteran of the Permit Office when he examined the file, but the City claims it was the wrong conclusion for McMillin to draw from looking at the same file. (Tr. 155). The City knew that litigation had been filed

seeking the responsible parties relating to this construction and the City pointed squarely at Deas while hiding their own multiple mistakes. (Ex. J-1, #T0085-86, 99, 101, D-15). In reliance on that assertion, the Plaintiffs sued Deas. (Tr. 411-414). It was only after Deas procured the March 12, 2010 Affidavit of Vail, also prepared by counsel for the Defendant, did the City reveal this dramatic change of position. (Ex. D-18). The Defendant went from "Deas is the contractor of record" to "it was all just a mistake" with the stroke of a pen and now wants to escape responsibility for the reasonable consequence of that dramatic change in position. (Ex. D-18). These fees, ordered to be paid by the Defendant to the Plaintiff, are not fees incurred against litigation with the Defendant, but these fees are damages, the reasonably foreseeable losses of the Plaintiffs arising out of the failure of the Permit Office to keep a proper file.

Issue 6. Plaintiffs claims are not barred by the applicable statute of limitations as Defendant waived the statute of limitations by their delay in asserting their defense and even if Defendant had not waived it, equitable estoppel bars the Defendant from asserting this defense .

Below McMillin argued that the City waived the applicability of the statute of limitations by waiting 1 year and 5 months before ever asserting M.T.C.A. as a defense in this case. The trial court found no waiver. Plaintiffs filed suit against Defendant on October 13, 2011. (R. 1). Plaintiffs received on April 2, 2013, a Motion for Summary Judgment by Defendant asking the lower court to dismiss this suit as they claim it is time barred under the M.T.C.A. (R. 3). Defendant waited **1 year and 5 months** to file their motion and assert this claim. (R. 3). The case had been actively pursued by both parties and substantial litigation had already been conducted. (R. 1-3). Discovery had been completed by both parties. (R. 1-3). Over 1,800 pieces of paper

had been exchanged between the parties as interrogatories were answered and documents were produced. Depositions of parties on both sides had occurred and transcripts had been produced and certified. (R. 1-2). A Scheduling Order had been signed by counsel for both parties in December of 2012, which set up a time frame leading to the trial of this matter. Expert designation time periods had concluded with both sides submitting to the other the names and substance of what those experts would offer as testimony. (R. 2-3). Plaintiffs had also filed a motion to compel Defendant to answer additional discovery requests that the Defendant had objected to. (R. 3). Great time and expense had certainly been had by both parties to this litigation. After a seventeen (17) month delay, with no new facts or materials upon which they rely, Defendant decided then to pursue the statute of limitations defense.

An unjustified delay in the pursuit of any affirmative defense, which if timely pursued, could serve to terminate litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law. *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180-181 (Miss. 2006). In *Horton*, both sides involved in the suit had consented to a scheduling order, had engaged in written discovery and had conducted depositions. The Court found that an **8 month unjustified delay** by the Defendants in pursuing an affirmative defense they pleaded but did not pursue, together with Defendant's **active participation** in the lawsuit, waived their statute of limitations defense. *Id.* In *Estate of Grimes ex rel,* the Court also found a unreasonable delay by the Defendant in asserting a claim of immunity under the M.T.C.A. . *Estate of Grimes ex rel. v. Warrington*, 982 So.2d 365, 370 (Miss. 2008). The Defendant in that case waited 5 years before he brought his motion to dismiss on this ground. *Id.* Like the Defendant in the present case, the

Grimes defendant also participated in discovery, conducted depositions, as well as signed a scheduling order before he filed his motion to dismiss. *Id.* The Court found this to be an unnecessary and excessive waste of the time and resources of the parties and the Court if the Defendant had been immune from tort liability since the moment the Complaint was filed. *Id.* The Court went on to say this behavior constituted waiver by defendant of its affirmative defense of the claim being time barred under M.T.C.A.

The City unjustifiably delayed in asserting the statute of limitations defense under the M.T.C.A. Before filing their motion and asserting this defense, the lawsuit had not laid dormant. This litigation was actively moving forward, pushed by both parties and both parties had even signed a Scheduling Order guiding the case to trial. There was nothing the City knew when they asserted the claim on April 2, 2013, that was not known to them when McMillin filed suit on October 13, 2011. The City had a duty to not only plead this defense in their answer (which they did) but to "bring it to the court's attention, and request a hearing." *MS Credit Center, Inc. v. Horton*, 926 So.2d at 181. They did not bring it to the court's attention in a timely manner and instead waited an unjustifiable 1 year and 5 months.

The City's long delay in pursuing this affirmative defense, coupled with their active and aggressive participation in the litigation process constituted waiver and as such the City should not have been allowed to claim the statute of limitations under the M.T.C.A. Beyond this, the principles of equitable estoppel also require that the City be precluded from asserting a statute of limitations defense. The court below did agree with this position and denied the City's summary judgment motion. Equitable estoppel can be asserted to a statute of limitations defense to avoid a

serious miscarriage of justice if there is inequitable conduct. *Trosclair v. Miss. Dep't of Transp.*, 757 So.2d 178, 181 (Miss. 2000). Governmental entities are also not immune from equitable estoppel. *Carr v. Town of Shubuta*, 733 So.2d 261, 265 (Miss. 1999). Estoppel is action or inaction that induces another's reliance thereon, either in the form of action or inaction, to his or her detriment. *Williams v. Clay County*, 861 So.2d 953, 961 (Miss. 2003). The Courts have also said that for equitable estoppel to apply, there must be a representation by a party, reliance by the other party, and a change in position by the relying party. *Carr v. Town of Shubuta*, 733 at 265. The conduct on which a party relies to his detriment can include actual conduct, actions, language or silence. *McCrary v. City of Biloxi*, 757 So.2d 978, 981 (Miss. 2000).

Plaintiffs did believe, as did Wammack, a long time Permit Office inspector, and rely on the representations of the City that Deas was responsible. When trying to determine who was responsible as their contractor and if the Defendant had any involvement in allowing someone unlicensed to work on their home, McMillin asked the City's Permit Manager. (Tr. 407, 409). She refused to answer him. (Tr. 407, 409). Ms. Vail's conduct was silence. The Court has said conduct under the doctrine of equitable estoppel includes "silence." *McCrary v. City of Biloxi*, 757 So.2d at 981. McMillin next asked to see the permit file for themselves. (Tr. 409-410). The Permit Office refused to allow him to see the file. (Tr. 409-410). When the McMillins then subpoenaed the Permit File for their home and only then learned that Vail had placed a Memo in the Plaintiffs file in January of 2007 giving her account of what happened when Guyton pulled his licence from the home on April 11, 2006. (Tr. 411). Vail said the licensed contractor was Guyton, then it was Deas, who took over Guyton's licenses until Ewing could get his license

(Ex. J-1, #T0108). If true, then the City did not allow an unlicensed contractor to work on the subject property and the City would not be liable. (Tr. 411-414). This reliance by the McMillins was a reasonable one given the facts known to them at the time.

The McMillins also changed their position as a result of what Vail said in the Memo she placed in Plaintiffs' file. (Ex. J-1, #T0108). Before seeing this Memo, the Plaintiffs were going to pursue the City as evidenced by the Notice of Claim letter they sent to the City on August 23, 2007. Plaintiffs saw the subpoenaed documents with Vail's Memo in December of 2007. Based on that Memo, the McMillins did not file suit against the City. (Tr. 411-414). According to Vail in her Memo, the City never allowed the subject property to be without a licensed contractor. (Ex. J-1, #T0108). The Plaintiffs would only come to know what Vail really did in March of 2010 when Deas, in separate litigation, produces an affidavit from Vail contradicting her earlier memo. (Ex. D-18).

The McMillins also suffered a detriment and were prejudiced by not pursing the City in 2007 based on Vail's Memo in the form of a monetary loss as they had to defend themselves against a counterclaim and another lawsuit filed by Deas against them. (Tr. 417-418, Ex. P-19, P-20). Deas filed a counterclaim against McMillin for defamation and later a separate lawsuit was filed against McMillin for malicious prosecution. (Tr. 417-418). Both of these claims were without merit and dismissed, however, they were filed by Deas because the Plaintiffs, after reading their Permit File, and seeing Vail's 2007 explanation, relied on her statements as the Manager of the Permit Office to accurately record what happened with their Permit File. (Tr. 411-414).

The lower court, during summary judgment motion hearings, heard the evidence from both sides about equitable estoppel and ruled that the Defendant was equitably estopped from asserting the statute of limitations defense due to the actions and inactions of the City of Tupelo employees in their dealings or lack of dealings with Plaintiffs. (R. 803). Judge Pounds found that the representations, actions and inactions of the City of Tupelo induced the reliance of the Plaintiffs and a change of position by the Plaintiffs, so that enforcing the Stature of Limitations would be a serious miscarriage of justice. (R. 803).

Under §11-46-11 actions must be brought within 1 year of when the claimant knows or by exercise of reasonable diligence should know of both the damage or the injury and the act or omission which proximately caused it. Miss. Code Ann. §11-46-11; *Caves v. Yarbrough*, 991 So.2d 142, 147 (Miss. 2008). The City claims that all of the events in this case establishing damage, injury and/or the omission which proximately caused it occurred in 2006. The recitation of the facts above clearly show that is not the case. The omission which was the proximate cause of what happened in 2006 was not known to the Plaintiffs until March of 2010, when Deas produced his letter about taking over properties that did not include 4848 Market Street and also produced an affidavit from Vail stating, for the first time, what she did in regards to the McMillins' home in 2006. (Ex. J-1, #T0095-97, D-18). While injury certainly occurred in 2006, in the form of faulty and inadequate work on the home that did not comply with Tupelo Code requirements or was left undone, and no licensed contractor overseeing the building of this home, the City's actions and omissions misrepresentations were not discovered by the Plaintiffs until March of 2010. (Ex. J-1, #T0095-97, D-18, P-12). This was not on account of any lack of

diligence by the McMillins, they simply believed what the City was representing in the Permit File.

McMillin testified that the facts he knew or were discovered by his reasonable diligence were the following: (1) Ewing told him he was the licensed contractor for 4848 Market Street; (2) Ewing had a sign displayed on the front yard of 4848 Market Street saying he was a licensed Mississippi contractor; (3) Vail placed Deas' name as contractor on this home in April of 2006, however he did not know this until they found a Blue Card in their kitchen drawer in August of 2006; (4) the McMillins had their realtor ask about Deas days after finding the Blue Card; (5) the Permit Office refused to answer any questions about Deas except to warn McMillin to leave him alone; (6) Guyton responded to a letter written by McMillin and told him he pulled his license from their home on April 11, 2006 and the City was given written documentation from him about his withdrawal; (7) McMillin spoke with Deas by telephone who said he was not associated with 4848 Market Street but Deas also threatened Plaintiff with a lawsuit; (8) Deas sent McMillin a letter, copied to the Defendant, stating he had talked to Vail about her mistake in placing his name on the property and all McMillin needed to do was ask Vail or any other city employee and they would explain their mistake; (9) McMillin went to the Permit Office and asked Vail about Deas and Vail refused to answer him and to tell him to go look at his Permit File; (10) McMillin asked for his Permit File and other city employees refused to let him see it. (Tr. 374-375, 379, 70, 373-374, D-18, J-1, #T0060, Tr. 81-82, 399-400, J-1, #T0087-88, Tr. 405, J-1, #T0095-97, Tr. 407, 409, 410).

Not only did the City refuse to let the Plaintiffs see their file but they also refused to tell

Plaintiffs if their contractor was, as their records state, Deas, or if it was Ewing. (Tr. 407, 409). These actions, inactions, and misrepresentations by the Defendant caused them to believe, in 2006, that the person or persons who have by either their acts or omissions caused injury to the them were Ewing and/or possibly Deas. To find out if Deas was responsible, since the City would not say and would not let him see his own file, the McMillins subpoenaed their Permit File in December of 2007. (Tr. 411). They saw in the file for 4848 Market Street that Guyton pulled his license. (Ex. J-1, #T0088). They also saw a January 2007 Memorandum signed by Vail in which she says Deas agreed to step in and allow building to go forward under his contractor's license until Ewing got his license, which she said happened in September of 2006. (Ex. J-1, #T0108). This is not true as Ewing was not licensed until October 27, 2006. (Tr. 174-176). Based on this letter from the Manager of the Permit Office and the Permit File, the City was clearly saying that 4848 Market Street had a licensed contractor for the entire building process. (Ex. J-1, #T0108). According to Vail, this home's contractor was Guyton, then Deas (who was listed on the Blue Card as the contractor for this property), then Ewing when he was licensed. (Ex. J-1, #T0108). Testimony at trial established clearly that there was no licensed contractor on 4848 Market Street from April 11, 2006 until Ewing was licensed on October 27, 2006. However, in 2007, the City maintained, through its official records, that they had performed their duties under §73-59-17 as there was a licensed contractor at all times on 4848 Market Street. Mississippi Code §73-59-17 (Rev. 2008) (Ex. J-1, #T0108). The only consistency from the City has been this position.

The McMillins used reasonable diligence to ascertain what had happened with their home and the City's own file did not show any cause of action against them as of early 2008. Though

Vail says she had the April 5, 2006 Deas and Ewing letter that would show Deas was not taking over as contractor on 4848 Market Street, Vail lost that letter and it was not in Plaintiffs Permit File. (Tr. 306-307). With this information, Plaintiffs proceeded with their lawsuit against Ewing and later added Deas as a defendant. (Tr. 411-414). Deas was dismissed from the case in November 21, 2011, however the lower court based his decision, in part, on the affidavit of Vail, which was produced by Deas, not the Defendant, in March of 2010. (Ex. P-26).

Under this Court's standard adopted under *Caves v. Yarbrough*, the Plaintiffs are a part of the rare cases where a portion of the injury and damages were known to them in 2006 and 2007 but they did not discover, even though they used reasonable diligence, the acts and omissions of the City until March of 2010. *Caves v. Yarbrough*, 991 So.2d at 155. The McMillins were unable to discover the acts and omissions of the City because of the actions, inactions, silence and misrepresentations of their employees in the Permit Office. According to *Caves,* the statute of limitations against the Defendant would not begin to run until this later discovery of the acts and omissions on March 18, 2010. As Plaintiffs sent a notice of claim to the City as required under §11-46-11 on March 17, 2011, the statute of limitations was tolled for 120 days. As the City did not offer a denial or any response to Plaintiffs claim, the statute was tolled for an additional 90 days. The McMillins filed suit against the City on October 13, 2011, which was within the 1 year statute of limitations for suit under §11-46-11.

The lower court heard the City's same assertion about the complaint being barred by the statute of limitations at a hearing for summary judgment and the court denied the City's motion and found Defendant was equitably estopped from asserting the statute of limitations defense due

to the actions and inactions of City employees in their dealings or lack of dealings with Plaintiffs. (R. 803-804). The lower court found that the elements of equitable estoppel had been met and that the representations, actions and inactions of the City induced the reliance of the Plaintiffs and a change of position by the Plaintiffs, so that enforcing the statute of limitations would be a serious miscarriage of justice. (R. 803-804). *Williams v. Clay County*, 861 So.2d 953, 961 (Miss. 2003); *Trosclair v. Miss. Dept. of Transp.*, 757 So.2d 178, 181 (Miss. 2000); *McCrary v. City of Biloxi*, 757 So.2d 978, 981 (Miss. 2000); *Carr v. Town of Shubuta*, 733 So.2d 261, 265 (Miss. 1999).

CONCLUSION

The City of Tupelo, through the employees of its Permit Office, acted in an arbitrary and capricious manner by failing to live by its own rules and in misrepresenting the facts to the Plaintiffs and they are therefore not immune under the Mississippi Tort Claims Act and that statute of limitations was waived and the City should be estopped from arguing the statute of limitations. This Court should affirm the finding of liability and damages made by the Trial Court below and remand this matter for presentation of proof on the issue of attorney fees in the instant case.

Respectfully submitted, this the 8th day of April, 2015

BY: */s/ Bradley T. Golmon*
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CERTIFICATE OF FILING AND SERVICE

I, Bradley T. Golmon of HOLCOMB, DUNBAR, WATTS, BEST, MASTERS & GOLMON, P.A., attorney of record for the Appellees, Terry Y. McMillin, M.D. et ux., certify that I have this day filed the foregoing document using the Court's ECF system, which sent notification to the following counsel of record by email as follows:

John S. Hill, Esquire
Martha Bost Stegall, Esquire
MITCHELL, MCNUTT & SAMS, P.A.
P.O Box 7120
Tupelo, MS 38802

and via U.S. First Class Mail, postage prepaid to the following:

Honorable Jim Pounds
Lee County Circuit Court Judge
P.O. Drawer 1100
Tupelo, MS 38802

This the 8th day of April, 2015.

/s/ Bradley T. Golmon
BRADLEY T. GOLMON