

**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**

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**APPELLEES' AND CROSS  
APPELLANTS' REPLY BRIEF**

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## PLAINTIFFS' 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 the attorney 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, without specifically addressing the grounds that Plaintiff claimed authorized fees in this case. The court below stated as follows:

The attorney fees in this particular as that we're here trying today are clearly barred under the Tort Claim Act and the Court is not going to allow that to be introduced. You can certainly proffer that, Counsel, if you so desire. As well and any punitive damages will not be allowed.

I did allow it on the other cases because I think that was a foreseeable consequence of the -- as I previously state, the error at a minimum by the City of Tupelo permit department which resulted in this and that was the reason I let those attorney fees come in. But the attorney fees on this actual case are prohibited by law pursuant to 11-46-15(2).

Tr. 383. Plaintiffs agree that punitive damages, and pre-judgment interest, are explicitly barred by the Act. This merely shows that the Legislature knows how to bar certain possible aspects of damages. Attorney fees are not so barred by the Act and 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.

Plaintiffs specifically argued these three grounds in the trial below.

Your Honor, it's clearly two different kinds and varieties of attorney's fees, and I'll concede that at the beginning. And the burden on me in terms of the attorney's fees ensued against the City of Tupelo is different than the burden against Deas. Because the Deas' fees can be characterized simply as just regular old damages. To a certain extent I agree with what John Hill just said. Generally speaking, what the Mississippi Tort Claims Act says is that you're not entitled to

attorney's fees. But it says exactly what he was fair enough to also say, it says that you're not entitled to attorney's fees unless otherwise allowed.

Now, the first basis on which I'm seeking attorney's fees is indeed what Mr. Hill just identified. There's a gross negligence standard contained within the punitive damage statute. Now, to be sure you cannot get punitive damages against a municipality, and I'm not saying that you can, but what I am saying is that the Supreme Court has begun a process of removing the link that may exist between punitive damages and attorney's fees. In fact, the Supreme Court has said this in 2011. This Court has previously held that attorney's fees may be awarded instead of punitive damages. A trial judge may validly find that although the conduct of a defendant in a given case is such that the award of punitive damages would be appropriate the actual award of monetary damages arose 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's fees should be awarded. This is the line of cases that arises out of *Universal Life Company v. Veasley*. Those cases all have to do with insurance, Your Honor, and I concede that in this argument.

That principle, I don't find it in Tort Claims Act cases. But when it comes to insurance what the courts have said is that when you have a clerk somewhere who picks up the wrong stamp or makes some mistake in terms of looking at a life insurance application, that's what *Veasley* was about, then the life insurance company can be made to pay attorney's fees even if the trial court were to find that punitive damages were not appropriate.

The third basis is simply my Requests for Admissions, Your Honor. I'm entitled to attorney's fees for having to prove that the City is liable. It has seemed to me from the beginning that the City was liable because what they did was they didn't follow their own rules. And what the *Lowe* case tells us is that's, *per se*, arbitrary and capricious, which is the triggering condition inside the Tort Claims Act.

I started with the comment that this category of fees is different than the category of fees against Deas. I felt, Your Honor -- and maybe I'm being overly cautious and conservative, I felt that because the Deas fees didn't directly relate to the fees in this case I had to get them in as proof. Because normally with an attorney's fees claim you file that application after judgment is had one way or another. I've never tried to pursue fees in an instant case inside the proof of that case.

Tr. 380-82. Plaintiffs clearly articulated these three grounds, gross negligence, Veasley and Rule 37 at trial, and the court below disagreed.

**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.**

It is true, as the City claims, that there was no finding of gross negligence by the court below. That is indeed part of the error Plaintiffs claim. The court below should have addressed the issue of gross negligence and that should be one of the issues on remand.

The court did find that the City of Tupelo had acted in a manner that was arbitrary and capricious and rejected the City's claim that all that happened was a mere mistake. Did the mistake and the act of deception that followed to cover that mistake amount to "gross negligence?" This should be determined by the court on remand.

On the record as it currently exists, Plaintiffs 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.

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 (6<sup>th</sup> 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 Env'tl. 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.*

There does not appear to be any case law addressing the relationship between “arbitrary and capricious” and “gross negligence” within the context of the MTCA. However, the Court has addressed the relationship of “arbitrary” and “gross negligence” within the insurance context. In *Fonte v. Audubon Insurance Company* the issue was whether the insurer could be liable for punitive damages for failing to properly adjust a claim.

The Fontes' adjuster, John Jay, made an arbitrary determination that he was “going to adjust this claim based on the top half of the home being damaged by wind,” and he thinks it would be correct to say “that this estimate did not take into account possible damage to the lower portions of the home that would have been caused by the loss of the roof or breaking of the windows on the upper portion of the home from the ingress of rainwater or wind-driven water.” Jay's determination was made with limited expertise, without meteorological data, without a consulting expert, and based on the instruction not to pay one hundred percent of the Fontes' policy limits. Whether an arguable or legitimate basis for denying the Fontes' claim existed for Audubon's decision not to pay the policy limits must be examined by a jury to determine if there existed a gross and reckless disregard for the Fontes' rights.

The trial court erred in finding that Audubon exhibited no conduct which would allow the fact finder to determine that Audubon had committed acts of gross negligence amounting to an independent tort. Thus, summary judgment was improperly granted on this issue. Finding that this issue has merit, we must remand this case to the trial court for determination by a jury.

*Fonte v. Audubon Ins. Co.*, 8 So. 3d 161, 167 (Miss. 2009), *as modified on denial of reh'g* (May 14, 2009). *Fonte* stands for the proposition that conduct which is arbitrary can amount to gross

negligence and whether or not it does is a question of fact. The standard that Plaintiffs met in the trial below was “arbitrary and capricious” and while this phrase may not be the absolute equivalent of “gross negligence” they are clearly close neighbors and, according to *Fonte*, arbitrary is a subset of “gross negligence.”

The City of Tupelo relies heavily upon *In re Guardianship of Duckett* in asserting that the conduct of Vail was just an honest mistake. 991 So.2d 1165 (Miss. 2008). In that case a bank failed to make a certain notation on an electronic file and that mistake allowed persons to withdraw guardianship funds without a court order. *Duckett*, 991 So.2d at 1176-77. There was no proof of any mistake other than that. Based upon that this Court on appeal reversed the imposition of punitive damages. *Id.* at 1179.

*Duckett* won't help the City of Tupelo because the City of Tupelo did much, much more than just make in erroneous notation on a file. The City had opportunity after opportunity to correct Vail's error. Not only did they fail to do so, Vail compounded her error by inserting the inexplicable January 10, 2007 memo into the Plaintiffs' file. The accumulation of these actions makes the claim that this was an “honest mistake” preposterous.

**Issue 2. Plaintiffs are 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).

The City of Tupelo complains that Plaintiffs failed to bring a post-trial motion for violation of Rule 37. What the City wants the Court to miss is the extended explanation of the basis for fees quoted above. Tr. 380-82. The court below, having heard the three grounds, including Rule 37, ruled against Plaintiffs. Nonetheless the City requires that the Plaintiffs bring a post-trial motion, or the claim is waived. According to the City, but for the lack of reasserting what the trial court had already categorically denied, the claim fails. This is nonsense. This Court does not want the members of the Bar to waste each other's time or the time of our trial court. "Although it is incumbent upon taxpayers to be knowledgeable about the assessments on their properties, the law does not require one to do a vain and useless thing. *McLain v. Meletio et al.*, 166 Miss. 1, 147 So. 878 (1933); *Kron v. Van Cleave*, 339 So. 2d 559, 561 (Miss. 1976). The law should never require that any litigant, even the City of Tupelo, do a vain and useless thing.

The City appears to be raising this objection for the first time on appeal. No one for the City objected at trial on this basis. "It is well-settled law that Mississippi appellate courts will not review matters on appeal that were not raised at the trial court level." *McKee v. Bowers Window & Door Co.*, 64 So.3d 926, 940 (¶ 42) (Miss.2011) (citations omitted). *Bartley-Rice v. State Farm Mut. Auto. Ins. Co.*, No. 2013-CA-00966-COA, 2014 WL 7120893, at \*2 (Miss. Ct. App. Dec. 16, 2014), *reh'g denied* (June 9, 2015). The City rested on the trial court's denial of this aspect of damages but now complains that the Plaintiffs did not act in a specific fashion, without raising that objection amid trial.

The admission responses are in the record as P-2. This Court should remand for a hearing into this basis for assessment of fees. The City is correct that under this theory Plaintiffs

would have to prove what portion of the fees related to proving which denied admission requests. Plaintiffs do not want to deny the City to right to argue over that, the Plaintiffs just want that opportunity for themselves, as well.

**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.**

There is a third basis for the imposition of fees in this case that was described to the trial court below. 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 City relies upon two construction cases in which Plaintiffs tried to get *Veasley* damages without success. In *Garner v. Hickman*, the Court held that “while *Veasley* damages would be appropriate in many construction contract cases where neither the contract nor any statutory authority provide for attorney fees, they are not warranted under the facts of the case *sub judice*.” 733 So2d 191, 198 (Miss. 1999). In that case the proof was that the Plaintiff may have made the work of the contractor impossible. *Garner*, 733 So.2d at 195-96. Under those particular circumstances, *Veasley* damages were inappropriate.

In *Sports Page, Inc. v. Punzo* the Court of Appeals stated much the same thing. “*Garner* asserts, without any elaboration, that ‘Veasley damages’ could be recoverable in many construction cases, although the court found that no such damages were recoverable in the *Garner* case.” 900 So.2d 1193, 1204 (Miss.Ct.App. 2004).

Plaintiffs do not claim attorney fees as *Veasley* damages because they are merely foreseeable, though these fees were indeed foreseeable, but also because the Plaintiffs should not have the cost of this litigation forced upon them and it is no more than just that they be compensated for this loss. This is the standard in *Veasley* and the issue for this Court is does the duly elected and appointed municipal officers of the City of Tupelo owe their constituents at least the level of care that an insurance company owes its customers? Are these scenarios comparable? Plaintiffs believe that this Court should find that local governments owe their voters more than an insurance company owes its customers.

Judge Pounds below specifically identified his judicial philosophy, on that this writer greatly agrees with and appreciates, as follows:

THE COURT: I 'd like to go back on the record. I failed to mention like I normally do in most cases, I'm not one to make new law, Counsel, and if I'm wrong I 'm sure Judge Maxwell and the Court of Appeals will tell me again that I am wrong. But at this time I'm going to follow the folks in Jackson who I believe and hope are a lot smarter than I am. Until they give me a new set of rules to go by I'm going to travel on the ones they've already established; therefore, the objection will be sustained.

Tr. 384. Plaintiffs had already conceded that they could find no direct authority for *Veasley* damages in a MTCA case and the issue for this Court, and proper only for this Court, is “are such damages possible?” What, indeed, is the point of continuing to

schedule hearings before a judge who has very frankly and openly and with good reason and explanation, told a litigant that he's not going to make new law?

**Issue 4. Plaintiffs are 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. The City appears to agree that the judgment should bear interest as required by the statute.

**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 27<sup>th</sup> day of July, 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  
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P.O Box 7120  
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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 27th day of July, 2015.

/s/ Bradley T. Golmon  
BRADLEY T. GOLMON