

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' MOTION FOR REHEARING**

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument was already ordered by this Court and had before this Court. No further oral argument is requested.

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INTRODUCTION

This Court's decision of April 14, 2016 is incorrect, according to this Court's own prior decisions, as the majority failed to follow its own rules. The dissent properly frames most of the issues, but not the simplest, most important one. In finding as it did the majority of this Court unlawfully substituted its own view of the facts, rejecting the specific facts found by the Circuit Judge sitting as a trier of fact. The Circuit Judge rejected the "honest mistake" claim and found that the Defendant City of Tupelo had acted negligently and wrongfully. That fact finding precludes the "honest mistake" position taken by the majority. That "honest mistake" finding by the majority is the only support for rejecting the Circuit Court's conclusion of arbitrary and capricious action by the City of Tupelo and the majority's rejection of the Circuit Court's application of equitable estoppel.

By making its own findings of fact, contrary to the findings of the trier of fact, this Court has made a substantial and unprecedented departure from centuries of prior practice, without justification and without logical support.

Pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure, Plaintiffs/Appellees move this Court for an Order Granting Rehearing, vacating the opinion of April 14, 2016, reinstating the Trial Court decision and remanding on the issue of attorney fees in the MTCA case against the City of Tupelo.

I. ISSUES PRESENTED FOR REHEARING

- (1) Whether this Court erred when it rejected the trial court's fact finding of negligent and wrongful action and that the City of Tupelo failed to follow its own rules, supporting the conclusion of arbitrary and capricious action, and instead recharacterized the same actions as merely an "honest mistake."
- (2) Whether this Court erred when it rejected the trial court's fact finding of negligent and wrongful action, and instead finding that the Defendant lacked the required mental element of "known or should have known" to support equitable estoppel, and instead recharacterized the same actions as merely an "honest mistake."
- (3) Whether this Court erred when it refused to even consider whether or not Plaintiff should be entitled to attorney fees in the MTCA case against the City of Tupelo.

II. ARGUMENT FOR REHEARING

This Court should reconsider the finding that the Defendant's actions were merely an "honest mistake." That factual finding is the basis for the Court's decision that the actions of the Defendant were not arbitrary and capricious and are also the basis for this Court finding that one of the elements of equitable estoppel had not been met.

A. STANDARD OF REVIEW

This Court ignored its own standard of review in rendering the April 14, 2016 decision. A very recent statement of the standard of review of the decision of a Circuit Judge sitting in a bench trial can be found in *Prayer v. Greenwood LeFlore Hospital*, 183 So.3d 877 (Miss. 2016).

The trial court's "findings must be supported by substantial, credible, and reasonable evidence." Its findings are accorded deferential treatment, such that "[f]indings of fact by a trial judge after a bench trial are subject only to a limited scope of review if the trial judge applied the appropriate legal standard." If the record contains substantial supporting evidence, **"this Court will not reverse a trial court's findings, even if this Court disagrees with those findings."** In determining whether the trial court's findings are supported by substantial, credible, and reasonable evidence, this Court "must examine the entire record and **must accept that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which**

may be drawn therefrom and which favor the lower court's findings of fact." Moreover, conflicting testimony is to be resolved by the trier of fact, the judge in a bench trial. The trial judge in a bench trial must also determine questions of weight and credibility of testimony, including that of experts.

Prayer v. Greenwood Leflore Hospital, 183 So.3d 877, 883 (Miss. 2016)(emphasis added).

The trial court below found the following facts based on the testimony and the reasonable inferences to be drawn from the testimony: (1) Marilyn Vail failed to place the April 5, 2006 memo in the file for the Plaintiffs' property or the file for any property to which it related, Tr. 288-89, 269; (2) Vail wrongfully and negligently substituted Lawrence Deas' name in the permit file for the Plaintiffs' property, FF&CL 1; (3) Vail failed to issue a new permit when Joey Guyton withdrew his license, J-1, Permit File; (4) Vail failed to modify the existing permit to reflect a change of licensed contractor, J-1; (5) Vail failed to get Deas' consent to substituting his name on the permit for the Plaintiffs' property, J-1, Tr. 279-80; (6) Vail wrongfully and negligently substituted Deas' name on the blue card, FF&CL 2; (7) the City allowed Jamie Ewing to work while unlicensed, Tr. 261, 280-84, 326, D-18, Vail Affidavit; (8) Lynda Ford refused to explain Deas' involvement to McMillin, Tr. 359-60; (9) Vail refused to answer the Plaintiff's valid questions, Tr. 366-67, 369; (10) Vail did not, in 2006, tell Plaintiff that listing Deas was a mistake, Tr. 366-67, 371-72; (11) Plaintiff attempted to see his Permit File but was not allowed to do so, Tr. 409-10; (12) Plaintiffs were reasonable in their uncertainty regarding who their contractor of record was, FF&CL 5; (13) the January 10, 2007 memo Vail placed in the permit file for the Plaintiffs' property placed responsibility on Deas, Tr. 369-70; (14) Vail failed to indicate that the permit had expired, J-1, FF&CL 6; (15) Plaintiffs were reasonable in thinking that Deas was the contractor of record on their property, FF&CL 6; (16) Plaintiffs added Deas to

the lawsuit because of the January 10, 2007 memo and the fact that no one at the Permit Office would explain Deas' name in the permit file, Tr. 369-71; (17) Vail intended that the file reflect that there had always been a proper contractor of record, despite the fact that this was not true, FF&CL 7; (18) Vail cannot explain why the letter of April 5, 2006 was missing from the files to which it relates, Tr. 288-89; (19) the April 5, 2006 letter was not given to the Plaintiffs until March of 2010, Tr. 371-74; (20) Dave Wammack testified that construction should stop when a licensed contractor pulls his license from a project, Tr. 153-55; (21) Marilyn Vail started, in April of 2006, asking Jamie Ewing if he had taken and passed his contractor's examination, Tr. 261-62; (22) Deas told the City by letter of October 30, 2006 that Marilyn Vail could confirm that his inclusion in this Permit File was a clerical error; P-1, #T0095-9; (23) That October 30, 2006 letter is in the Permit File; P-1, #T0095-6; (24) Deas claims that in October of 2006 he contacted the Permit Office and was assured that the inclusion of his name in this Permit File was a clerical error; D-24, paragraph 8.

Substantial credible evidence supports each of these facts, findings and inferences above and thus the Supreme Court is not free to disregard them and blithely find that they amount to nothing more than an "honest mistake." Judge Pounds' findings are entitled to deference.

The majority did not find that these facts were not proven or unsupported by substantial, credible evidence, and yet, the majority rejected these fact findings. These are the facts of the case and the majority cannot disregard them.

B. A FINDING OF NEGLIGENT AND WRONGFUL ACTION PRECLUDES THE "HONEST MISTAKE" DEFENSE.

- 1. "Honest Mistake" is the only grounds to oppose the Trial Court's finding of arbitrary and capricious action.**

The seven Justice majority opinion of the Supreme Court found that the facts and findings shown above reflect only an "honest mistake." On that basis this Court reversed the Circuit Judge's decision of law that the City's actions were arbitrary and capricious. In doing so the Supreme Court ignored the factual finding by the Circuit Judge that the City's actions were *wrongful and negligent*. The Circuit Court found that the City acted wrongfully and negligently in substituting Deas' name as contractor of record in the permit file and on the blue card and further acted wrongfully and negligently in misrepresenting the facts of Deas' involvement to the Plaintiffs.

A fact finding of negligent and wrongful conduct by any definition of those words precludes the finding of "honest mistake." The facts established by the Circuit Court below show that Marilyn Vail may have initially made an "honest mistake" but she failed to answer proper questions when asked, inserted false and misleading paperwork into the file, failed to include paperwork that would have shown her mistake, unlawfully substituted Deas for Guyton, and did everything that she could to make sure that the file itself reflected that a valid contractor had always been associated with this construction, first Guyton, then Deas, then Ewing. She only told the truth when she found herself between a rock and a hard place, between Lawrence Deas and the accusation made against him by McMillin against Deas, based on her Permit File.

These misleading actions had the effect that Vail wanted, they prevented the Plaintiffs from finding and understanding her error. These actions go beyond an "honest mistake." They are at least negligent and wrongful, amounting to a cover up and at the very least, a dishonest mistake.

That finding, that the actions of the Defendant were negligent and wrongful, is a factual decision. In *Clark v. Clark*, this Court stated that "whether the actions of [Defendant] at the intersection could be considered negligent was a question for the jury to decide." 863 So.2d 1027, 1032 (Miss. 2004). In *Andrews v. Jitney Jungle Sores of America*, the Court stated it another way: "The issues of proximate cause, negligence and contributory negligence are for the jury to decide under proper instruction from the court." 537 So.2d 447, 450 (Miss. 1989). See also, *Moore v. Winn-Dixie Stores*, 173 So.2d 603, 507 (Miss. 1965).

Whether acts are negligent or wrongful is a question of fact and questions of fact in an MTCA case are decided by the Circuit Court Judge and not a seven Justice majority of this Court. The majority clearly and obviously disagrees with Judge Pounds and chooses to believe Marilyn Vail. That is not the fact decision that Judge Pounds made at all. None of the seven Justice majority saw her testify and none of the seven Justice majority has weighed her credibility. That credibility determination cannot be made on the basis of a cold record. Judge Pounds had her live testimony before him and found her live testimony wanting. Even a cursory review of the record and the facts found by Judge Pounds indicates that he had substantial and credible evidence supporting his findings, most of which amounts to admissions by Marilyn Vail herself or other employees of the Permit Office of the City of Tupelo. These fact findings are entitled to "deferential treatment, such that findings of fact by a trial judge after a bench trial are subject only to a limited scope of review if the trial judge applied the appropriate legal standard." *Prayer v. Greenwood Leflore Hospital*, 183 So.3d 877, 883 (Miss. 2016). The majority made no determination that Judge Pounds made any error in finding these facts.

The next grave error the majority makes is when it attempts to parley the unsupportable finding of a mere "honest mistake" into rejecting the conclusion of law drawn by Judge Pounds, that the actions of the Defendant were arbitrary and capricious. What is truly stunning is that the majority does so while quoting the very language that should lead them to the opposite finding. *Lowe v. Lowndes County Building Inspection Department* holds that when an agency fails to follow its own rules, its conduct is *per se* arbitrary and capricious. 760 So.2d 711, 714 (Miss. 2000).

The dissent properly frames and addresses the issue, as did Judge Pounds below. There is more to the duty of the Defendant than is found in Section 73-59-17. It is true that this Section of the Code deals only with the refusal to issue a license, however there are additional rules and duties than these and those were explained by Dave Wammack, in his testimony, and Marilyn Vail, in her affidavit. These duties include stopping construction on an expired permit, stopping construction when a licensed contractor withdraws his license, and only allowing construction to proceed once a licensed contractor is once again responsible. (D-18, Tr. 153-54, 159-60). Only when these local rules are in place does Section 73-59-17 make any practical sense.

The majority finds that the only duty is to "refuse to issue" a permit. Under this strained interpretation the public has no protection if the initiating license contractor dies, moves away, quits his business or does anything else that ends his service. At that point it's the wild, wild West and anyone can then build anything he or she likes, licensing be damned. The City of Tupelo, the Defendant, does not even believe that. Judge Pounds did not find that. The majority opinion now concludes that the **only duty** a municipality has with regard to construction permits applies at the beginning of the process, at the point of the application, and no where else. If

nothing else, this Court should grant rehearing to correct this grievous oversimplification of the law. This is especially true because the City of Tupelo, does, in fact, have processes and procedures to address this situation, explained by Wammack, despite Vail's apparent confusion, strangely shared by the majority.

The Defendant, in failing to follow its own rules, acted in a way that was not just arbitrary and capricious, but *per se* arbitrary and capricious. The majority's holding to the contrary ignores the facts found by Judge Pounds and the law found in *Lowe v. Lowndes County*.

2. "Honest Mistake" is the only grounds to oppose the Trial Court's finding that equitable estoppel applies

The majority finds that equitable estoppel does not apply. Inexplicably, the Court noted: "There is no proof in the record, much less proof by a preponderance of the evidence, that the City or Vail "knew or had reason to know" that its actions or inactions would result in the McMillins' claims or suits being barred by the statute of limitations." Opinion at 14-15. This statement by the majority is based on the premise that all Vail did was make an "honest mistake." While the majority is entitled to its opinion about the facts and may disagree with Judge Pounds about the facts, the majority is not entitled to its own facts. The facts show, and Judge Pounds found, that Vail was *negligent and wrongful* in misrepresenting the facts concerning the relationship that Deas had with this Permit File. That misrepresentation was calculated to cover up the fact that Vail had allowed construction to proceed without the presence of a licensed contractor. It was also calculated to create a situation in which the Permit File appeared to have a licensed contractor responsible for the construction throughout the process. These were indeed parts of Marilyn Vail's job duties that she took public funds to perform. She failed to do her job,

and then attempted to obfuscate that fact, successfully from 2007 until 2010, when the bell finally tolled for her. When McMillin sued Deas, relying on Vail's Permit File, Deas demanded Vail's *mea culpa* and extricated himself from McMillin's claims.

The City clearly knew that litigation was afoot. It responded to a subpoena request in January of 2008. Tr. 286-88. This was the first time that McMillin was able to see his Permit File and that paperwork reflected that Deas was his contractor of record. Vail had failed to include the paperwork that would have shown him the facts reflecting the process of the handoff between Guyton and Deas, and how it was limited to Harveters Square and excluded the McMillin property. It beggars the imagination that the City argued, and the majority of this Court agreed, that the City and Vail had no reason to know that the papers in the file might persuade McMillin to refrain from suing the City when they were produced in another lawsuit and a Notice of Claim letter had been sent. The file at that time did not reflect an "honest mistake," it reflected that Deas was the contractor of record.

It is indeed hard to prove what someone knew at some time in the past. We have no time machine and no mind reading devices. The majority appears comfortably satisfied concerning Vail's knowledge simply because she denies knowing of her mistake, until March of 2010. Her denial is apparently enough, though the majority never saw her testify and Judge Pounds rejected her denial. Strangely, the majority faults the Plaintiff for not discovering Vail's mistake until March of 2010, but accepts her statement that she did not know of her own mistake until March of 2010. This position taken by the majority is plainly contradictory.

Fortunately a party is required neither to construct a time machine nor a mind reading device, the standard is a "known or should have known" standard. Knowledge can be inferred.

"Judge Yerger found that the above facts and circumstances, coupled with reasonable inference, serve as direct evidence and/or circumstantial evidence of Eaton's knowledge (through Eaton's corporate officers and Wisconsin counsel) of Peters' improper contacts with Judge DeLaughter." *Eaton Corporation v. Frisby*, 133 So.3d 735, 755 (Miss. 2013). This Supreme Court affirmed that trial court, based at least in part on knowledge demonstrated with circumstantial evidence. *Frisby*, 133 So.3d at 760.

Marilyn Vail knew, or she should have known, that she was covering up her mistake when she refused to answer Plaintiff's questions, when she placed a plainly false memo, that served to hide her error, into the Permit File, when she failed to include the April 5, 2006 memo, when she ignored the expiration of the permit and when she knowingly allowed Ewing to continue working. She even admits that she was asking Ewing if he had taken the qualifying examination! Tr. 261-62. It is undisputed that Deas had told her it was a mistake! P-1, T#0095-96. These uncontested facts clearly indicate that she knew Ewing was unlicensed from April until October of 2006, and that Deas was not involved as contractor of record for that time frame, and if Vail knew that Ewing was unlicensed while he was building and Deas was not involved, she could not have believed the Deas had stepped in, and the January 10, 2007 memo was an out and out lie, serving only to make the Permit File appear that she had done her job all along, though she knew or should have known by January 10, 2007, that she had not. This, along with the cover up itself and the failure to include the April 5, 2006 memo, is the circumstantial evidence relied upon by Judge Pounds when he found that the *scienter* element of equitable estoppel had been met. Vail should have known. Unless the Court is prepared to find that Judge Pounds lacked reasonable and credible support, primarily the admissions of Vail and Wammack,

for his factual conclusions, then his factual findings are entitled to deference and conclusive effect and lead inexorably to his conclusion, via *Lowe*, of arbitrary and capricious conduct.

C. FAILING TO FOLLOW RULES IS *PER SE* ARBITRARY AND CAPRICIOUS

The dissent properly states that there is more to this case than Section 73-59-17 and that centers around the testimony of Dave Wammack, a fifteen year veteran of the Permit Office. The dissent also properly points to Vail's own affidavit. It is plainly erroneous for the majority to allow the City to escape liability by finding that only 73-59-17 applies and that the City did not violate it. It's an easy thing to say that someone is correct when you set the bar so low. Setting the bar that low is irresponsible, and the City of Tupelo does not even believe it should be set that low. Wammack, in his testimony, does not, and even Vail herself, in her affidavit, does not. (D-18, Tr. 153-54, 159-60). *Lowe v. Lowndes County Building Inspection Department* holds that when an agency fails to follow its own rules, its conduct is *per se* arbitrary and capricious. 760 So.2d 711, 714 (Miss. 2000). The City failed to follow its own rules, testified to by its own fifteen year Chief Inspector and even without the finding of negligent and wrongful action, that would be *per se* arbitrary and capricious. Judge Pound's factual finding, not subject to review by this Court, takes it a step further. He found that they failed to follow their own rules in a negligent and wrongful fashion.

D. PLAINTIFF MAY BE ENTITLED TO ATTORNEY FEES IN THE MTCA CASE.

The MTCA does not prohibit attorney fees, it just cannot stand as the basis for fees. It does allow for other independent bases for fees. Plaintiff has articulated three such independent bases. The majority has out of hand dismissed this part of Plaintiff's appeal without discussion at all. Fees are clearly not impossible in an MTCA case, and if these independent grounds are

insufficient, the majority should let us know why. Are fees under Rule 37 available? Are fees under the gross negligence standard available? Are fees under *Essinger v. Liberty Mutual Fire Ins. Co.*, 534 F.3d 450 (5th Cir. 2008) available? The majority gives no guidance.

III. CONCLUSION

The majority cannot undo the factual finding that Vail's actions were not an "honest mistake." It may have started as a mistake, but the cover up and lies turned it, at a minimum, into a "dishonest mistake." Judge Pounds found the conduct negligent and wrongful. The majority cannot ignore that. Ignoring that finding serves as the basis for the majority finding that the actions of the City were not arbitrary and capricious and the finding that equitable estoppel does not apply. Those decisions by the majority cannot be preserved and must be reversed. When the factual findings of Judge Pound are reinstated, the Supreme Court should address the Plaintiffs' attorney fee claims.

Respectfully submitted, this the 28th day of April,

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
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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 28th day of April, 2015.

/s/ Bradley T. Golmon
BRADLEY T. GOLMON