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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2014-CA-01378

THE CITY OF TUPELO, MISSISSIPPI **APPELLANT**

TERRY Y. MCMILLIN, M. D., ET UX. **APPELLEES**

APPELLANT'S RESPONSE TO MOTION FOR REHEARING

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INTRODUCTION

Under Rule 40 of the Mississippi Rules of Appellate Procedure, the purpose of a Motion for Rehearing is limited. A Motion for Rehearing "is not intended to afford an opportunity for a mere repetition of the argument already considered by the court," but "should be used to call attention to *specific errors* of law or fact which the opinion is thought to contain." M.R.A.P. 40(a) (emphasis added); *see also Brandau v. State*, 662 So. 2d 1051, 1052 (Miss. 1995)(quoting rule). Thus, this Court should not entertain a Motion for Rehearing unless the motion points out clear and obvious errors of law or fact, such as the court's overlooking binding precedent. In this case, the Motion for Rehearing does not point out any such error and, instead, is a rehashing of the McMillins' arguments made to the trial court and to this Court on appeal.

I. This Court Did Not Usurp And, Instead, Agreed With The Trial Court's Finding That Vail Committed A Mistake In Substituting Deas As Licensed Contractor.

The McMillins complain that this Court improperly substituted its opinion for that of the trial court's by stating that "Vail's inclusion of Deas's name was a genuine mistake that does not rise to the level of arbitrary and capricious behavior." (¶20). The McMillins argue that because the trial court found that Vail was negligent, then she could not have committed a "genuine mistake."[1] According to the McMillins,

> A fact finding of negligent and wrongful conduct[2] by any definition of those words precludes the finding of "honest mistake." * * * [Vail's 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." Motion for Rehearing, p. 5.

[1] The McMillins repeatedly assert this Court's opinion improperly stated that Vail made an "honest mistake." Though "genuine mistake," "honest mistake," and "mistake" all mean the same thing, in responding, Tupelo uses the phrase used by this Court, which was "genuine mistake." (¶20).

[2] The McMillins repeatedly used the phrase "negligent and wrongful," not only in their Motion for Rehearing but also in their proposed and adopted findings of fact. There is no such legal standard, and there is no recognized tort for "wrongful conduct." Instead, conduct giving rise to a tort may be negligent, grossly negligent or intentional.

First, there is no such thing as a dishonest mistake. If something is dishonest, then there is, necessarily, knowledge and understanding of the action by the dishonest person. A mistake, on the other hand, is

> some unintentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence. A mistake exists when a person, under some erroneous conviction of law or fact, does, or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted.

Black's Law Dictionary (5th ed.). This definition precisely described the undisputed evidence at trial that construction continued - and was not required to be stopped by any city ordinance or state statute - upon Vail's mistaken belief that Lawrence Deas immediately took over as licensed contractor.

Second, no rehearing is warranted over this Court's statement that Vail's decision in April 2006 was a mistake when the trial court, adopting the McMillins' proposed finding of facts, likewise found it was a mistake. "As the circuit court pointed out, Vail's inclusion of Deas's name on the replacement blue card was a mistake." (¶20).

Third, the McMillins' argument necessarily assumes that a mistake can be arbitrary and capricious. Even if a mistake can be arbitrary and capricious, the evidence was undisputed - and the trial court found - that Vail did not realize her mistake until after the McMillins had purchased and were residing in the Residence. Contrary to the McMillins' portrayal in their Motion for Rehearing, the trial court did not find that Vail's decision in April 2006, which allowed construction to continue and allegedly resulted in defective work, was arbitrary and capricious.

II. <u>This Court Did Not Err In Recognizing That There Was No Substantial and Credible Evidence To Support The Trial Court's Ruling That Vail Acted Arbitrarily and Capriciously.</u>

The McMillins assert that this Court made a "grave error [by] rejecting the conclusion of

law drawn by Judge Pounds, that the actions of the Defendant were arbitrary and capricious," upon which the trial court held, as a matter of law, Tupelo lost immunity under §11-46-9(1)(h). Motion for Rehearing, p. 7.

First, conclusions of law, including as to a governmental entity's immunity, are reviewed de novo, and this Court does not have any duty to give the trial court's determination on this issue of law any deference. *See, City of Laurel v. Williams*, 21 So.3d 1170, 1174 (¶15)(citations omitted).

Second, as this Court noted, it was because the trial court determined Vail was arbitrary and capricious in "'allowing Ewing to continue to perform work on the [residence] when they knew he was not licensed and without a valid [p]ermit'" since "Guyton had withdrawn the only valid license," and "Deas had never agreed to take responsibility for the residence's construction," (¶19) that the trial court concluded Tupelo lost immunity under §11-46-9(1)(h). To the contrary, the evidence was undisputed - and established during the McMillins' case-in-chief - that Vail did not knowingly allow construction to continue under an unlicensed contractor but, instead, mistakenly believed that Deas' letter of April 5, 2007 was his written agreement to take over as licensed contractor.

The McMillins also argue that this court erred in not affirming the trial court's conclusion of law that Vail's actions were *per se* arbitrary and capricious for violating both §73-59-17 and its own rules. [3] To the contrary, the evidence was undisputed that Tupelo had never before

[3]For example, in rehashing the same arguments made in their appeal briefs, the McMillins argue that Tupelo was required to stop construction in July 2006 (one month prior to closing when construction was substantially complete) because the permit stated it expired in one year after issuance in July 2005. Instead, as David Wammack, senior building inspector, testified during the McMillins' case-in-chief, construction was not stopped after any permit's expiration date where construction was ongoing, and permits stated they expired in one year so as to enable the city to address situations where a construction had stopped for an extended period of time. (Tr. 155-160, 163, 175-180). Regardless, whether or not the permit issued for the Residence had expired provides no basis for rehearing since the McMillins never

encountered this situation and there was no policy or procedure in place requiring that construction be stopped. And contrary to the dissent's statement that Vail's affidavit showed she violated city policy, the affidavit clearly stated that only *if* there were no licensed contractor in place to take over, *then* construction must be stopped and a new permit issued. David Wammack, senior building inspector, testified under direct examination by the McMillins' attorney that, in this case, it was not necessary to stop construction because a licensed contractor was in place (or so Vail mistakenly believed). Tr. 157-158, 176-177. Accordingly, this Court was correct in stating, "the City does not have a policy or procedure for the situation of having a licensed contractor release his permits and withdraw his license." (¶20).

Finally, the McMillins also seem to argue that simply because the trial court used the phrase "arbitrary and capricious" in its ruling, then immunity was necessarily lost and this Court cannot properly hold otherwise. Even when assuming that a determination of whether conduct rose to the level of being arbitrary and capricious is a finding of fact and not a conclusion of law, this argument ignores that, contrary to the McMillins' contention that the trial court's findings of fact are "not subject to review by this Court," Motion for Rehearing, p. 11, not only are a trial court's findings reviewable to determine if supported by substantial and credible evidence but where, as here, the trial court adopts verbatim a party's proposed findings of fact, they are entitled to less deference. *See*, *Univ. of Miss. Med. Ctr. v. Peacock*, 972 So.2d 619, 629 (¶¶25-26) (Miss.Ct.App. 2012).

This Court did not err in determining whether the trial court's adoption of the McMillins' proposed findings of fact supporting its determination that Vail acted in an arbitrary and capricious manner were supported by substantial and credible evidence and finding that they

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proved what, if any, construction occurred thereafter, because they never contended that expiration proximately caused either the allegedly defective construction or the lawsuit against Deas.

were not so supported for, indeed, that is the duty of this Court.

III. This Court Did Not Err In Ruling That §73-59-17 Did Not Provide Basis For Breach Of Duty Under The Facts Of This Case.

Section 73-59-17 prohibits a building official from issuing a building permit to an unlicensed builder. This Court stated that, "we cannot discern a statutory basis to support *any* duty to the McMillins that Vail and the City did not satisfy." (¶17, emphasis original). The Court further noted that it had not found or been provided with any legal authority supporting the McMillins' argument to the contrary.

The McMillins still have not provided the Court with any such legal authority yet, nevertheless, ask this Court to grant a rehearing in order to re-write Miss. Code Ann. §73-59-17 so as to find Tupelo violated this statute and, therefore, acted in an arbitrary and capricious manner which removed the shield of immunity under §11-46-9(1)(h). The McMillins argue that unless this Court broadens this statute to include situations such as occurred in this case, then "it's the wild, wild West and anyone can then build anything he or she likes, licensing be damned." Motion for Rehearing, p. 7.

The McMillins do not state how they want this Court to re-write the statute but, regardless, this Court cannot so invade the power of the legislature. Instead, this Court's duty in interpreting a statute is to neither broaden nor restrict an unambiguous statement. *Mississippians Educating for Smart Justice, Inc. v. MDOC*, 98 So.3d 459, 461 (¶6) (Miss. 2012); *see also, Fairley v. George County,* 871 So.3d 713, 718 (¶13) (Miss. 2004)(duty of court is to interpret statute as written, mindful that legislature has ultimate authority to modify if legislature deems necessary); *Jefferson v. State,* 95 So.3d 709, 715 (¶24)(Miss.Ct.Ann. 2012)(court is not to decide what statute should provide but what it does provide).

This Court should not grant rehearing to do something that is contrary to its duty and

improperly invades the province of the legislature.

IV. <u>This Court Did Not Err In Finding That Tupelo Was Not Equitably Estopped From Prevailing On Its Statute Of Limitations Defense.</u>

The trial court ruled that Tupelo was equitably estopped from prevailing on its statute of limitations defense because "the representations, actions and inactions of the City of Tupelo induced the reliance of the Plaintiffs and a change of position by the Plaintiffs [i.e., deciding not to timely sue Tupelo after having submitted a Notice of Claim dated August 23, 2007], so that enforcing the Statute of Limitations would be a serious miscarriage of justice." ROA.803-804. The trial court never explained what "representations, actions and inactions" induced the reliance.

As Tupelo explained in its appeal briefs, and the McMillins do not dispute, the only event that arguably could have supported the trial court's denial, based on the doctrine of equitable estoppel, of Tupelo's request to dismiss the lawsuit as barred by the statute of limitations was Vail's January 2007 memo (most of which the McMillins believed to be false), since all other actions or inactions occurred prior to submission of the McMillins' First Notice of Claim.

The McMillins contend that, because the trial court found Vail's actions were "negligent and wrongful," then this Court erred in its analysis of the elements of the doctrine of equitable estoppel by stating, "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 a statute of limitations." (¶26). However, because a ruling concerning equitable estoppel is reviewed de novo*, see, Rawls v. Spring Util. Dist. v. Novak*, 765 So.2d 1288, 1292 (¶12) (Miss. 2000), then the McMillins' argument that this Court improperly rejected the trial court's findings of fact is inapplicable and insufficient to warrant rehearing (and, in any event, the trial court's Findings of Fact did not address equitable

estoppel, which was denied by a pre-trial ruling).

Moreover, the McMillins, who had the burden of proving each element of equitable estoppel, *see, id*., including inducement, do not explain how Vail's placement of a memo in a permit file induced them not to file suit or caused Tupelo/Vail to know (or should know) that the McMillins would not pursue their lawsuit based on their first, timely Notice of Claim. Even though the permit file was public, the McMillins have never explained how, or argued that, Tupelo had any way of knowing the file would be subpoenaed by the McMillins. Inducement necessarily involves an action that is active, not passive, such as putting a memo in a file and waiting to see if another party obtains the file. Tupelo does not find any case where an action that might never be discovered by the complaining party is sufficient to support the element of inducement. And, as this Court correctly noted, there was no reason for Tupelo to know that the McMillins would choose to believe one sentence in the memo while disbelieving the remainder and choose to ignore conflicting information in the same file to the effect that Deas had no involvement. As this Court stated, "[T]here is no dispute that the McMillins knew confusion surrounded the permit, as evidenced by their first Notice of Claim, which was timely," (¶27) and there was nothing to prevent them from timely suing Tupelo.

Finally, the McMillins ignore that, even if the trial court's ruling of equitable estoppel had been affirmed, that did not mean that the limitations period began anew on receipt of Vail's affidavit in March 2010. The doctrine of equitable estoppel has never been applied by this Court to prevent a defendant from raising a defense that the lawsuit is barred; instead, it has been applied to toll the limitations period until the point at which the plaintiff realizes that it was improperly induced to act to the plaintiff's detriment.

As Tupelo explained in its appeal briefs, even if the elements of the doctrine of equitable

estoppel had been proven by the McMillins, the limitations period was, at most, tolled at that point until they received Vail's March 2010 affidavit. *See*, *Peavey Electronics Corp. v. Baan U.S.A., Inc.*, 10 So.3d 945, 953, ¶18 (Miss. 2009)(equitable estoppel tolls limitations period). The limitations period did not begin anew upon receipt of Vail's affidavit concerning the events of 2006. Even if the McMillins had met their burden by a preponderance of the evidence as to each element of the doctrine of equitable estoppel, because they failed to file their lawsuit within the time remaining on the limitations period after they discovered Vail's January 2007 memo, then their lawsuit was, nevertheless, barred.

V. This Court Did Not Err In Rejecting The Cross-Appeal As Unnecessary.

On cross-appeal, the McMillins appealed the trial court's denial of their claim for attorney's fees incurred in litigation with Tupelo. The McMillins complain that this Court "out of hand dismissed [the claim for attorney's fees incurred in litigation against Tupelo] without any discussion at all." Motion for Rehearing, p. 11. To the contrary, this Court understandably and reasonably noted that, "[b]ased on the application of the statute of limitations and the City's immunity from liability, it follows that analysis of the McMillins' cross-appeal is unnecessary." (¶29) Only if the McMillins were entitled to and granted a rehearing might analysis of their claim for attorneys' fees incurred in their lawsuit against Tupelo be warranted. But, as Tupelo showed in its appeal briefs, none of the three bases argued by the McMillins for why the trial court erred in not awarding them attorney's fees incurred in this lawsuit had merit.

CONCLUSION

The appeal and cross-appeal do not warrant rehearing under the narrow purpose of M.R.A.P. 40. The McMillins' Motion for Rehearing is largely a rehashing of their earlier arguments that relied in large part on events that were not proven by any evidence at trial but,

instead, were wholly contradicted by the evidence (such as the argument that Vail knew Ewing was taking over from Guyton as contractor), and otherwise misconstrues and misapplies the applicable standards of review.

As to the argument that this Court did not defer to and instead improperly substituted its opinion for that of the trial court's findings of fact concerning mistake, to the contrary, this Court agreed with the trial court's finding that construction continued as a result of Vail's mistake. A mistake, which is inherently based on a misunderstanding of facts, cannot equate to conduct rising to the level of being arbitrary and capricious. That this Court used the phrase "genuine mistake" instead of the word "mistake" used by the trial court does not alter this fact.

As to the argument that this Court erred in rejecting the trial court's determination that Vail's actions rose to the level of being arbitrary and capricious, the McMillins continue to make contentions and argue the existence of duties that were neither supported by any trial evidence, nor established by any local policy or ordinance or by state statute. This Court fulfilled its duty of determining whether the findings were supported by evidence. As this Court noted, these findings were not based in the evidence presented at trial. (¶22).

As to the argument that this Court erred in not deferring to the trial court's ruling that Tupelo was equitably estopped from raising the defense of statute of limitations, first, the trial court's Findings of Fact and Conclusions of Law did not pertain to this pre-trial ruling and this pre-trial ruling, concerning an issue of law, properly received de novo review, and second, the McMillins do not dispute this Court's statement that, notwithstanding Vail's January 2007 memorandum, they were aware of the confusion, shown by other documents in the same file that contained the memorandum, concerning Deas' involvement and yet chose not to pursue a timely lawsuit on their First Notice of Claim. In any event, even if the McMillins had met their burden

of showing each element of the doctrine of equitable estoppel, receipt of Vail's 2010 affidavit explaining her mistake did not re-commence the limitations period. Instead, even when assuming that the doctrine of equitable estoppel could be based on the McMillins' receipt of the January 2007 memorandum, the limitations period did not start over (notwithstanding the McMillins' attempt to cause it to do so by submitting a Second Notice of Claim), but was only tolled, continued upon the McMillins' receipt of Vail's 2010 affidavit, and ran before the McMillins filed their complaint against Tupelo.

Finally, because this Court properly analyzed the issues on appeal and reversed and rendered the case, the cross-appeal was rendered moot and does not warrant analysis.

For each these reasons, it is respectfully submitted that the Motion for Rehearing should be denied.

RESPECTFULLY SUBMITTED,

CITY OF TUPELO, MISSISSIPPI
APPELLANT

BY: ___*/s/ Martha Bost Stegall*_______________
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CERTIFICATE OF SERVICE

I 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:

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WITNESS MY SIGNATURE hereto this the 4th day of May, 2016.

/s/ *Martha Bost Stegall*
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