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 BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Terry Y. McMillin, Plaintiff/Appellee
2. Leslie S. (Susan) McMillin, Plaintiff/Appellee
3. City of Tupelo, Mississippi, Defendant/Appellant
4. Bradley T. Golmon, counsel for Plaintiffs/Appellees
5. Stacey W. Golmon, counsel for Plaintiffs/Appellees
6. Holcomb, Dunbar, Watts, Best, Masters & Golmon, P.A., counsel for Plaintiffs/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/ Martha Bost Stegall
Attorney of Record for Appellant,
City of Tupelo, Mississippi

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STATEMENT OF THE CASE

I. Brief Overview of the Nature of the Case, Course of Proceedings, and Disposition in Lower Court

Dr. Terry Y. McMillin and Leslie S. McMillin ("Plaintiffs") filed a lawsuit against the City of Tupelo ("Tupelo") based on events associated with construction of a Residence they purchased on August 24, 2006 from James T. Ewing, III ("Ewing") which Plaintiffs alleged was not constructed in a workmanlike manner. It was undisputed that construction commenced and continued for several months under Joey Guyton ("Guyton"), a licensed contractor. However, nine months after the building permit for construction of the Residence was issued to Guyton by Marilyn Vail ("Vail"), Tupelo's permit manager, Guyton withdrew use of his residential contractor's license and released the permit on the Residence as well as several other projects to be used by a successor licensed contractor.

As the result of a misunderstanding, Vail believed that construction of the Residence would continue under Lawrence Deas ("Deas"), a licensed contractor; instead, construction continued under Jamie Ewing, who was not licensed until some point after Plaintiffs purchased the Residence.

Five years after purchasing the Residence, in October 2011, Plaintiffs filed their lawsuit against Tupelo alleging Tupelo negligently (but not knowingly or maliciously) (1) failed to follow Miss. Code Ann. §73-59-17 by not reporting to the State Board of Contractors that Ewing was operating as an unlicensed contractor, (2) failed to properly maintain its permit file by not requiring and filing documentation evidencing either Ewing's licensure or that Deas was succeeding Guyton as licensed contractor, and (3) through Vail, made misrepresentations to Terry McMillin in November 2006 to the effect that Ewing was licensed and had six months to obtain his license from Guyton's withdrawal of use of his license. Though not alleged in the Complaint, Plaintiffs also contended at trial that Vail should have responded to questions Terry McMillin claimed he posed concerning whether or not Deas was involved in construction of the Residence.

Plaintiffs sought as damages the cost of roof repair, costs of work performed on the Residence in 2012 and 2013, costs associated with purchase and maintenance of the Residence, and attorney's fees incurred in litigation with Deas, as well as punitive damages and attorney's fees incurred in prosecuting this action.

Trial was held before Judge Jim S. Pounds in March 2014. Judge Pounds requested that both parties separately submit a proposal of Fact and Conclusions of Law as to the issue of liability, a proposal of Fact and Conclusions of Law as to the issue of damages, and a proposed Timeline of Undisputed Facts, which each party did on May 12, 2014.

On August 28, 2014, Judge Pounds rendered judgment (entitled Findings of Fact and Conclusions of Law, largely taken verbatim from those proposed by Plaintiffs) awarding Plaintiffs judgment in the amount of $115,238.62, including $9,319.23 as costs of repair (but excluding $15,000 for roof repair because the proof showed the roof was constructed while construction was overseen by Guyton), and attorney's fees incurred in litigation with not only Deas but also Ewing and two banks sued by Plaintiffs, in the amount of $105,894.39. Judge Pounds denied Plaintiffs' claim for costs associated with the purchase and maintenance of the Residence, as well as their claims for attorney's fees incurred in this action and for punitive damages.

II. Statement of Facts

A. Introduction

This lawsuit, filed October 13, 2011, arises out of construction of a Residence located at 4848 Market Street (being Lot 19 of Charleston Gardens subdivision), in Tupelo, Mississippi that was purchased by Plaintiffs from Jamie Ewing on August 24, 2006. Significantly, Plaintiffs' claims were based on two separate series of events, those that occurred in April 2006 prior to Plaintiffs' purchase of the Residence, and those that occurred after Plaintiffs purchased and were residing in the Residence. Plaintiffs sought damages generally related to allegedly defective construction as a result of the former, and damages in the form of attorney's fees incurred in litigation with Deas as a result of the latter. Why it is important that the types of damages sought were based on a separate series of events, and how it affects the claims for damages, is discussed below.

B. Events Prior to Purchase of the Residence

The building permit for the Residence was originally issued on July 5, 2005, to Guyton, a licensed residential contractor and Ewing's business partner. (Ex. J-1, #0087). Ewing was

involved in actual construction work on the Residence under Guyton's oversight as licensed contractor. (Tr. 294).

A document colloquially known as "the blue card" was created by the City's permit office when the building permit was issued, as is done for every issued permit. (Ex. J-1, #0089). A blue card reflects certain information concerning the construction project, including permit number, applicable zoning information, contractor's name, and street address or lot number, and is intended to be left at the construction site to provide building inspectors with easy access to pertinent information, such as the results of prior inspections. (Tr. 149-152).

For the following nine months, construction continued under Guyton. However, because the Guyton/Ewing partnership was dissolving, on April 4, 2006 Guyton provided a handwritten note to Vail, whose responsibility it was to issue building permits to licensed contractors, seeking to release building permits issued to him. (Ex. J-1, #T0087, Ex. P-11) Vail had never before been faced with the release of a residential permit by the licensed contractor, and there was no proof of any local or state policy, procedure or guideline for Vail to follow that pertained to such a situation. Vail advised Guyton she wanted something more formal than his handwritten letter. (Tr. 265-267).

The next day, April 5, 2006, Deas, who held a residential contractor's license, along with Ewing provided to Vail a jointly-signed, notarized letter stating,

> Lawrence Deas has been **hired by Harvester's Square Developers,** LLC, to temporarily oversee construction of **all residences under construction** until such time as another licensed contractor is found to take over said jobs.

(Ex. P-12)(emphasis added). This letter did not, contrary to the trial court's Findings of Fact, specify by address, parcel number, lot number or in any other manner the projects to be temporarily overseen by Deas.

On April 11, 2006, pursuant to Vail's request for something more formal than what he submitted on April 4, 2006, Guyton submitted a notarized letter to Vail releasing certain building permits issued to Guyton on projects that were specified by permit number and address or lot number. Specifically, Guyton's letter stated, in part,

> I release the listed permits **for the Harvester's Square developer** to use another licensed general contractor **to finish the projects.**

(Ex. D-13)(emphasis added). .

Vail mistakenly thought that the April 5 letter from Ewing and Deas and the April 11 letter from Guyton both concerned all of the same projects, and that Deas was temporarily overseeing as licensed contractor all projects listed in Guyton's April 11, 2006 letter, including the Residence. (Tr. 200-206). As a result, construction continued under the existing permit[1], and on April 11, 2006, a replacement blue card for the Residence listing Deas as the building contractor was created. (Tr. 273-280; Ex. J-1, #T0089).

It was undisputed that it was not until after construction was complete and Plaintiffs were living in the Residence that Vail was made aware that Deas was temporarily overseeing only those projects located in Harvester's Square subdivision, which did not include the Residence (nor one other project listed in Guyton's April 11 letter), that her understanding otherwise had been a mistake, and that whatever construction on the Residence that occurred after April 11, 2006 was overseen by Ewing, an unlicensed contractor.

On August 18, 2006, Lynda Ford ("Ford"), a City of Tupelo building inspector, disapproved the Residence's initial final inspection, something that is not uncommon for residential construction. (Ex. J-1, #T0051, Tr. 158, 174-175). Six days later, on April 24, 2006, Plaintiffs purchased the Residence for $439,900.00 (Ex. P-8), after having pushed back closing

[1] It was uncontradicted that, because Guyton released the permits as opposed to withdrawing them, a new permit was not required nor was it necessary that construction be stopped. (Tr. 267).

from August 18 until August 24 because, as Dr. McMillin testified, the Residence was not yet ready to move in on August 18. (Tr. 110, 342-343).

C. Events After Purchase of the Residence

On August 26, 2006, two days after closing, Plaintiffs discovered in a drawer at the Residence a copy of the replacement blue card. The replacement blue card showed it had been replaced on April 11, 2006, showed Deas as the contractor, and showed that the Residence failed final inspection on August 18, 2006. (Ex. J-1, #0089).

Also shortly after closing, a series of punch lists were created and provided by Plaintiffs or their realtor, Sue Gardner, to Ewing for attention.[2] As testified by Gardner, there are always punch lists following residential closing to be addressed by the contractor, believed by Plaintiffs and Gardner to be Ewing based on his representations as such. (Tr. 113-114, 130, 355). Gardner described Ewing as generally unresponsive to requests to address punch lists, and eventually, Plaintiffs refused to allow Ewing back on their property. (Tr. 117-118, 122-123).

On September 6, 2006, Ewing passed the residential contractor's test and provided the City with his contractor's bond. However, Ewing was not formally issued his residential contractor's license by the State of Mississippi until the Board of Contractors met at its next quarterly meeting on October 27, 2006 (which was the first quarterly meeting held after Ewing passed his test). (Tr. 133-136).

During this same time frame, Butch Cobb was hired to inspect the Residence from foundation to attic, and prepared a Home Inspection Report, dated October 9, 2006, that listed items needing maintenance or repair. Cobb, testifying as Plaintiffs' expert, stated that all items on his report (Ex. P- 3) list would take "a couple of days" to complete. (Tr. 49). Cobb testified about each item listed in his report which included, among other things, caulking that was

[2] These punch lists are contained in Ex. J-1 at #T-0058, 0061, 0064, 0065.

needed in certain areas, an inoperable dead bolt, damaged weather stripping, a drain pan in the attic into which insulation had been blown and from which insulation needed to be removed, replacement of an A/C unit filter, a sink stopper that did not work, chips in counter/cabinet tops that presented a cosmetic issue only, a suggestion that there be extensions to the gutter system, and a recommendation that exposed water pipes in the attic be insulated (Tr. 21-36). Cobb also listed issues with construction of the roof, which the proof showed Plaintiffs eventually replaced at a cost of $15,000.00, but testified he did not know whether any of the items he listed as needing repair occurred before or after Guyton withdrew use of his contractor's license in April of 2006. (Tr. 38, 48). Because the evidence was clear that the roof was constructed while Guyton was contractor and, therefore, while construction occurred under a licensed contractor, the trial court rejected Plaintiffs' claim for this expense. (ROA.386-389).

Because Ewing was essentially unresponsive to requests of Plaintiffs and their realtor to return to address items on the punch lists, as well as items listed in the contract for sale that were to be completed after closing (Ex. P-7), in October 2006, Plaintiffs contacted the State Board of Contractors to complain about Ewing, at which point Plaintiffs discovered Ewing was not licensed when the Residence was constructed. (Tr. 118-120, 358). As a result, on October 21, 2006, Plaintiffs wrote a letter to Ewing, Deas, and Guyton, stating, among other things, that Plaintiffs had "made the City aware" that Ewing, as contractor of the Residence, was not licensed. The letter, which demanded Ewing return the purchase price to Plaintiffs within ten days, explained it was written to Guyton because he was the original contractor, to Ewing because he was the actual, successor contractor, and Deas because he was listed as contractor on the replacement blue card that Plaintiffs had discovered on August 26, 2006. (Ex. J-1, #T0085-T0086; Tr. 360-361).

In response to the October 21 letter, Plaintiffs received a letter from Guyton advising Guyton's partnership with Ewing had dissolved in April 2006 and providing a copy of Guyton's April 11 letter. (Ex. J-1, #T0087, Tr. 362). Because he had not received a response from Deas to the October 21 letter, on October 30, 2006, Dr. McMillin telephoned Deas and they had a heated telephone conversation concerning construction of the Residence during which Deas denied any involvement. (Tr. 363-365). That same day, Deas wrote a letter to Plaintiffs denying any involvement with construction of the Residence and advising that inclusion of his name on any city records was the "result of a clerical error." Deas suggested that Plaintiffs verify this fact with Marilyn Vail. (Ex. J-1, #T-0095). Plaintiffs claimed not to believe Deas' denials of involvement. (Tr. 365,420, 430).

Almost a month later, on November 20, 2006, Dr. McMillin angrily confronted Vail in the permit office while Vail was busy helping several customers. (ROA. 6-15 at Complaint ¶ XIII, Tr. 299-301, 312, 338, 348-349, 410, 485). Dr. McMillin testified that Vail did not respond to his inquiry about whether or not Deas was involved in construction. (Tr.367).

On December 7, 2006, two weeks after Dr. McMillin's confrontation of Vail, Plaintiffs filed a lawsuit in Chancery Court against Jamie Ewing for breach of contract and fraud, and against two banks for breach of fiduciary duty ("the Chancery Court action"). Plaintiffs' Complaint alleged Ewing built the Residence while an unlicensed contractor, failed to perform certain construction-related obligations set forth in the Contract to Purchase between Plaintiffs and Ewing, and that Ewing sold the Residence while knowing, and without disclosing, it had failed final inspection. (ROA. 725-732). Plaintiffs eventually voluntarily dismissed the two banks but their claims against Ewing were still pending at the time of trial. Plaintiffs did not name Deas as a defendant despite Dr. McMillin's testimony that he did not believe, as early as

October 2006, Deas' denials of involvement with construction (a disbelief Dr. McMillin testified was merely confirmed by Vail's January 2007 memo, discussed hereinbelow). (Tr. 426, 430).

In August 2007, eight months after filing the Chancery Court action, and after their attorney reviewed the records at City Hall pertaining to the Residence (Tr. 425-426), Plaintiffs served a Notice of Claim on Tupelo contending Vail's negligence allowed construction to continue under Ewing. (Ex. D-15). However, Plaintiffs chose not to file a timely lawsuit against Tupelo.

D. The Lawsuit Against Deas

In December 2007, one year after filing the Chancery Court action and after retaining new counsel,[3] Plaintiffs issued a subpoena in the Chancery Court action for various city records, including the permit file for the Residence. As a result of records received pursuant to the subpoena, Plaintiffs discovered filed in the permit file maintained on the Residence a memo by Vail dated January 10, 2007, which stated in full as follows:

> Approximately one year ago, Joey Guyton and Jamie Ewing dissolved their partnership. Joey held the license for their business. Under state law, Jamie had 6 months to obtain a license before he would be in violation of the law for not having a contractor's license. **In the meantime, Jamie's attorney, Lawrence Dees [sic], agreed to take responsibility for his projects until Jamie could obtain his license.** Jamie did obtain his state and local license in September of 2006. I transferred all the previous permits to his responsibility.[4]

(Ex. J-1, #T0108)(emphasis added). Dr. McMillin testified he disbelieved Vail's memo except as to the sentence highlighted above, upon which he claimed Plaintiffs relied in deciding to sue

[3] Plaintiffs' original counsel was the Moffett Law Firm. As discussed below, even though Moffett had no involvement with filing or defending against litigation with Deas, and even though Plaintiffs made no claim for charges incurred in litigation against Ewing or the two banks, the trial court awarded Plaintiffs over $8,000 in attorney's fees charged by Moffett.

[4] Vail explained this memo was placed in each of the files corresponding to the permit numbers listed in Guyton's April 11 letter. (Tr. 486)

Deas. (Tr. 429). A year later, in December 2008, Plaintiffs joined Deas as a defendant in the Chancery Court action.

From December 2007, when Plaintiffs discovered Vail's January 2007 memo, to December 2008, when Plaintiffs joined Deas in the Chancery Court action, Plaintiffs did not undertake any effort to determine whether it was the sentence in Vail's January 2007 memo concerning Deas' involvement, or Deas' letter of October 30, 2006 disclaiming any involvement with the Residence, that was correct.

> Q: So you sued Lawrence Deas [--] based upon you saying that you sued Lawrence Deas without taking any investigation, without taking any discovery, without deposing Marilyn Vail, not writing any letters, not writing any communications, based upon a memo stuck in the file from somebody who you thought at least on two other instances in that same memo was not telling the truth and who you accused of being a liar in an email communication to [newspaper reporter] Emily Le Coz [Ex. D-10] six months before you filed your lawsuit against Lawrence Deas?
>
> A: I guess, yes, sir, that's correct.

(Tr. 508-509).

On January 6, 2009, less than a month after joining Deas in the Chancery Court action, Plaintiffs' counsel was provided and reviewed an affidavit by Ewing confirming that Deas had no involvement with construction of the Residence. (Ex. D-17 and Ex. P-29 (1/6/09 time entry)). Thereafter, little activity occurred in the Chancery Court action until over a year later, in March 2010,[5] when Plaintiffs' counsel received and reviewed an affidavit by Vail also confirming that Deas had no involvement in construction of the Residence and explaining how Vail came to make the mistake of understanding Deas to be successor licensed contractor. (Ex. D-17, Ex. P-29

[5] The lack of activity is borne out by counsel's time entries, Ex. P-29.

(3/19/10 time entry)). Vail's affidavit, offered by Deas under cover letter dated March 18, 2010,[6] was submitted in conjunction with Deas' request that he be voluntarily dismissed.

Despite Deas' letter of October 30, 2006 denying involvement, despite Ewing's and Vail's sworn affidavits confirming Deas' lack of involvement, and contrary to Dr. McMillin's trial testimony that he "absolutely" would have walked away from the lawsuit against Deas if only he had had affirmation from Vail that she made a mistake concerning Deas' involvement,[7] the reality is that when provided just such affirmation through Vail's March 2010 sworn affidavit, Plaintiffs not only refused to dismiss Deas but, instead, moved to amend their chancery court complaint to assert additional allegations against Deas for fraud. (Tr. 509). Significantly, it was only ***after*** Plaintiffs refused to dismiss Deas and accused him of fraud that Deas filed his Answer and Counterclaim (Ex. D-24), alleging damages resulting from slander. Nearly all of the attorney's fees that Plaintiffs seek to recoup from the Deas litigation were incurred after they had the two sworn affidavits affirming Deas' claim that he had nothing to do with construction of the Residence and after they had accused him of fraud.

Deas remained a defendant in the Chancery Court action for another 20 months, until he was dismissed by summary judgment in November 2011, the chancellor finding that Plaintiffs had failed to "prove that Deas somehow had a connection to the home," and Deas was listed as contractor "only because of a clerical mistake." (Ex. 26, pp. 4-5).

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[6] Attached to Plaintiffs' Complaint as an exhibit is Deas' letter of March 18, 2010, which provided Vail's March 2010 affidavit and stated, "Based on the information contained in the affidavits of Mrs. Vail and Mr. Ewing, it should be clear that your clients' claims against me are frivolous. I request that you dismiss me as a defendant immediately." (ROA.21; R.E.Tab 2).

[7] "Q: And so your testimony is that if you had had affirmation from Marilyn Vail you would have walked away from Mr. Deas?
A: Absolutely." (Tr.433). Additionally, and incongruously, Dr. McMillin testified that his attorney had requested this affidavit from Vail as to Deas' lack of involvement, but because it took 15-16 months for the affidavit to be provided, Dr. McMillin was "surprised" by it. (Tr. 374).

The trial court's judgment against Tupelo awarded all attorney's fees incurred in litigation with Deas, including those incurred after Plaintiffs' receipt of Vail's sworn affidavit confirming Deas' lack of involvement, which constituted approximately 80% of the fees awarded against Tupelo, as well as all attorney's fees incurred in litigation with Ewing and the banks.[8]

E. The Lawsuit Against Tupelo

In August 2007, Plaintiffs, through their first attorney, submitted their first Notice of Claim to Tupelo, alleging Vail improperly maintained the permit file which allowed Ewing, while unlicensed, to operate as contractor in construction of the Residence. (Ex. D-15).[9] Plaintiffs chose not to file a timely lawsuit against Tupelo.

In an attempt to circumvent the fact that the lawsuit against Tupelo was time barred, Plaintiffs contended that receipt of Vail's affidavit on March 18, 2010 started a new limitations period, and on March 17, 2011, submitted a second Notice of Claim to the City of Tupelo, largely duplicative of their August 23, 2007 Notice of Claim. (*Cf.* Ex. D-15 and Notice of Claim attached to Complaint, ROA.16-20; R.E.Tab 2). The only substantive difference between the two Notices of Claim is that the 2011 Notice of Claim referenced Vail's 2010 affidavit, which Plaintiffs characterized as an "admission" by Tupelo that the permit file was negligently mishandled which "allowed an unlicensed contractor to construct the McMillin's home. * * *

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[8] As shown below, the attorney's fees incurred in litigation with Deas prior to receipt of Vail's affidavit in conjunction with Deas' request that he be voluntarily dismissed totaled less than $4,000.00.

[9] Plaintiffs also claimed that Vail lied to Dr. McMillin during his November 2006 "confrontation," as the meeting was described in the Notice of Claim, regarding when Ewing became a licensed contractor. Logically, even if made, statements about Ewing's license after Plaintiffs were living in the Residence neither proximately caused defective construction nor caused Plaintiffs to sue Deas. Additionally, these supposed statements were not identified by the trial court as a basis for its award of damages. As such, Tupelo does not address the statements' irrelevance.

Plaintiffs would not have closed on the home had they known that the City of Tupelo allowed an unlicensed contractor to continue construction of their home." (ROA.18; R.E.Tab 2).

Of note, Plaintiffs made no reference in their 2011 Notice of Claim to Vail's January 2007 memo or to any alleged reliance on this or any other factor causing them to sue Deas and/or refrain from timely filing suit against the City of Tupelo based on the 2007 Notice of Claim. Plaintiffs also did not contend they had been damaged by incurring attorney's fees in litigation with Deas. Indeed, at the time the 2011 Notice of Claim was submitted, Plaintiffs were still pursuing Deas in the Chancery Court action, and strenuously, but unsuccessfully, opposed Deas' Motion for Summary Judgment (Ex. D-26), despite alleging in the second Notice of Claim that Ewing, not Deas, constructed the Residence.

SUMMARY OF APPELLANT'S ARGUMENT

Vail's mistake in naming Deas as contractor on the replacement blue card and placing a memo in the permit file concerning her understanding of Deas involvement in construction of the Residence resulted from her misunderstanding of the April 2006 documentation submitted to her by Guyton and by Deas and Ewing. Vail's actions, while negligent, were not arbitrary and capricious. As a result, Tupelo is immune from liability under Miss. Code Ann. §11-46-9(1)(h).

Even if Tupelo were not immune, Plaintiffs failed to prove that any damages claimed by them were the proximate result of a breach of any duty owed them by Tupelo. Finally, Plaintiffs' claims are time barred.

Even if Tupelo were not immune and if Plaintiffs had proven they suffered damages proximately caused by the actions or inactions of a Tupelo employee, the trial judge erred in awarding Plaintiffs $9,319.23 for repairs when most of the charges related to painting and carpet cleaning done at the suggestion of their realtor in preparation for placement of the Residence on

the market in 2013, seven years after purchase. Furthermore, there was no proof that any of the charges related to allegedly defective construction that occurred after April 11, 2006, until which time construction indisputably occurred under a licensed contractor.

The trial judge erred in awarding Plaintiffs $105,894.39 in attorney's fees incurred in litigation against Ewing, two banks, and Deas. First, the lawsuit against Ewing remains pending and attorney's fees related thereto, if recoverable, are proper only against Ewing; there is no joint and several liability between Tupelo and Ewing, and Tupelo is not vicariously liable for any allegedly defective construction by Ewing.

Second, there was no basis to award Plaintiffs' attorney's fees incurred in improvidently suing two banks.

Third, Plaintiffs made no claim against Tupelo for attorney's fees incurred in litigation against Ewing and the two banks; Dr. McMillin's testimony regarding damages in the form of attorney's fees related solely to litigation with Deas. At most, Plaintiffs might have been entitled to a judgment against Tupelo for those attorney's fees incurred by Plaintiffs in litigation with Deas up to receipt of Vail's affidavit, which, as shown below, amount to less than $4,000.00. However, Plaintiffs not only could have mitigated any damages (as they were under a duty to do) but likely wholly avoided incurring attorney's fees in litigation with Deas by undertaking any effort - whether informally or through the discovery process in the Chancery Court action - to question the discrepancy between Vail's January 2007 memo and Deas' October 30, 2006 letter, later confirmed by two sworn affidavits, denying all involvement.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review is stated as follows in *City of Jackson v. Sandifer,* 107 So.3d 978, 983 (¶16) (Miss. 2013):

> A circuit court judge sitting without a jury is afforded the same deference as a chancellor. We will not disturb a circuit court's findings after a bench trial unless "they are manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." The proper application of the MTCA is a question of law, which we review de novo.

Whether actions or inactions were arbitrary and capricious is a question of law, subject to de novo review *Lowe v. Lowndes County, infra,* 760 So.2d at 712 (¶6).

B. THE LESSENED DEFERENCE GIVEN TO FINDINGS OF FACT AND CONCLUSIONS OF LAW WRITTEN BY THE PREVAILING PARTY

A comparison of the Findings of Fact submitted by Plaintiffs with the trial court's Findings of Fact reveals that large portions of the trial court's Findings of Fact were lifted verbatim from those proposed by Plaintiffs (hereinafter "Plaintiffs' proposal"), though some of the paragraphs were moved around. As such, they are not entitled to full deference. As stated in *Univ. of Miss. Med. Ctr. v. Peacock*, 972 So.2d 619, 629 (¶¶25-26) (Miss.Ct.App. 2012):

> [W]hen [a judge sitting as fact finder] adopts a litigating party's proposal of fact verbatim, there is nothing to suggest that any of the findings except in broad outline are the product of the trial court's adjudicatory process. [cit. omit.]. In this case, we must "engage in [a] much more careful analysis." [cit. omit.] "We must keep a keen eye for gratuitous slants. Common sense suggests our duty of "deference to such findings is lessened." [cit. omit].
>
> In its brief, UMC itemizes seven statements in the trial court's findings of fact which it claims are erroneous. * * * We agree with UMC that each of the enumerated findings must be subjected to a more strict standard of review, as they were adopted verbatim from the plaintiff's proposal of fact.

After applying a stricter review to the court's findings that were taken verbatim from the plaintiff's proposed findings, the court of appeals in *Peacock* determined that the challenged findings were not supported by the record and, therefore, rejected them as clearly erroneous. *Id.* at. 631-633 (¶¶ 33-42, 47-48).

Those findings of fact by the trial court that were taken from those proposed by Plaintiffs (hereinafter "Plaintiffs' proposal") and/or were erroneous and affected the trial court's determination that Tupelo was liable for damages are addressed below.

C. ISSUES ON APPEAL

Issue 1. Did Plaintiffs present evidence sufficient to support a verdict awarding $9,319.23 for repair work?

As a matter of law, Tupelo could only be liable for those damages proven by Plaintiffs to have arisen from a tort committed by Tupelo from which it was not immune. As discussed below, Plaintiffs failed to present proof that the sum awarded for repairs had anything to do with allegedly defective construction. Even if they had presented such required proof, immunity under Miss. Code Ann. §11-46-9(1)(h) nevertheless shielded Tupelo from liability.

It is Vail's mistake related to substitution of Deas as contractor, occurring in April 2006, *prior* to Plaintiffs' purchase of the Residence, that Plaintiffs claim allowed Ewing to operate as unlicensed contractor and resulted in unworkmanlike construction. (Plaintiffs did not claim that any action or inaction occurring *after* their purchase of the Residence led to any defective construction, nor could they, construction being complete and Plaintiffs residing in the Residence by that time.) Of course, it does not follow that because a contractor is licensed, defective construction will not occur; case law is replete with decisions of lawsuits against licensed contractors who were sued for allegedly defective construction. Specific to this case, because Plaintiffs' roof, which they claimed was defectively constructed, was constructed while Guyton was contractor, the trial court rejected their claim for the cost of roof repair. (ROA.396-389).[10]

[10] Additionally, the trial court denied Plaintiffs' claims for damages arising from their purchase and maintenance of the Residence. The trial court's reasoning in that respect was sound, as was the trial court's basis for rejecting Plaintiffs' claim for punitive damages and attorney's fees incurred in prosecuting this action. (ROA.942-944, RE.Tab 9; Tr. 383, 454).

Even when assuming that defective construction occurring under the watch of an unlicensed contractor can render liable for the costs of repairs the governmental entity in whose jurisdiction construction occurred, there must be *proof* of proximate causation, i.e., that the cost of repairs *related to* the defective construction as opposed to, for instance, charges related to work to make a house more presentable for placement on the market. As stated in *Herrington v. Leaf River Forest Prods., Inc.*, 733 So.2d 774, 777-778 (Miss. 1999)

> On the issue of the fact of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough . . . .
>
> *Burnham v. Tabb*, 508 So. 2d 1072, 1074 (Miss. 1987) (*quoting* W. Keeton, *Prosser & Keeton on Torts*, § 41 (5th ed. 1984)).

See also, Ladner v. Holleman, 90 So.3d 655, 659 (¶13) (Miss.Ct.Ann. 2012)(negligence claim has four elements: duty, breach, proximate causation and damages; burden is on plaintiff to prove each). No such proof was made by Plaintiffs.

Plaintiffs placed the Residence on the market in March 2013 for $475,000.00. (Tr. 109). Plaintiffs were awarded $9,319.23 as damages, being the sum of three invoices from Lynn Bryan Construction for work performed both shortly before and after the Residence was placed on the market, in December 2012, January 2013 and April 2013. (Ex. P-29, McMillin 001407-001410, 001839-001840). Significantly, the trial court *did not* find that any work performed by Lynn Bryan Construction was to repair any defective construction.

The trial court stated the damages of $9,319.23 were "substantiated by Dr. McMillin and Curtis 'Butch' Cobb." (ROA.943). To the contrary, neither Dr. McMillin, a representative of Lynn Bryan Construction, nor any other witness testified about the work reflected in the invoices, except to say generally that some of the work performed by Lynn Bryan Construction

related to unspecified punch list items and was work the realtor recommended be done before listing the house for sale. (Tr. 91, 99, 419).[11]

Because there was no proof of the nature of the work performed by Lynn Bryan Construction (revealed by the invoices themselves to mainly relate to painting and carpet cleaning), nor of any correlation between that work and any item listed in Cobb's 2006 Home Inspection Report, the trial court's statement that the damages were substantiated must be rejected. *See, Peacock, supra.* For this same reason, Plaintiffs failed to meet their burden of proof on the elements of their tort claim, particularly as to proximate cause. Accordingly, the trial court's award of these expenses as damages should be reversed.

Issue 2. Even if there had been proof of repairs for defective construction occurring after April 11, 2006, would Tupelo be immune from liability under Miss. Code Ann. §11-46-9(1)(h)?

Even if there had been proof that work performed by Lynn Bryan Construction pertained to repair defective construction that occurred after April 11, 2006, Tupelo would be immune from such liability under Miss. Code Ann. §11-46-9(1)(h) unless Vail acted arbitrarily and capriciously in handling Guyton's release of his permits and substituting Deas as licensed contractor. As discussed below, the undisputed proof, and the trial court's findings of fact, was that Vail's actions amounted to nothing more than a mistake.

Section 11-46-9(1)(h) states as follows:

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> * * *

[11] Q: Were you aware of any reason that prevented Plaintiffs from listing the house until they actually did list it with you?
A: Well, they were having some work done on it that **I had suggested they do**. And so **after the work was done then we put the house on the market.**
Q: So there were some suggestions you made to them, correct?
A: There were.
(Tr. 91) (emphasis added).

> (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, revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature.**

(emphasis added).

The trial court concluded Tupelo (through Vail) breached the following duties owed to Plaintiffs related to licensing of the contractor responsible for construction of the Residence:

> (1) ensure that a licensed contract [sic] was working on the Home for the entirety of the construction; (2) on the withdrawal of the Guyton license, stop construction; (3) prevent construction from resuming until such time as a licensed contractor agreed to be responsible for construction; (4) properly process the Guyton withdrawal; [and] (5) stop construction when the Permit expired . . . .[12]

(ROA.935 quoting ¶ 43 of Plaintiffs' proposal, (ROA.911, RE. Tab 8)).

As to breaches (1) and (3), the proof showed, without dispute, that Vail thought a licensed contractor was involved throughout construction of the Residence. As shown below, her mistake in this regard was negligence from which Tupelo is immune from liability under §11-46-9(1)(h).

As to breach (2), there was no proof that Vail or any Tupelo employee had a duty to stop construction when Guyton withdrew use of his license. To the contrary, as shown herein, the undisputed proof was that construction could continue as long as a licensed contractor was in place, as Vail believed was the case.

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[12] The trial court also concluded Tupelo failed to "(6) refrain from placing in the file misleading untruthful papers," which relates to Vail's action of filing the January 2007 memo in the permit file, upon which Plaintiffs' claim of attorney's fees incurred in litigation with Deas, discussed below, is based. *Id.*

As to breach (5), there was no proof Vail or any Tupelo employee had a duty to stop construction when the permit expired, which occurred in July 2006, one year after issuance. (Tr. 155-160, 163, 175-180). Furthermore, even if such a duty had existed, it was incumbent on Plaintiffs to prove proximate causation -- that allegedly defective construction occurred *after* the permit's expiration -- and this Plaintiffs failed to do.

Finally, as to breach (4), concerning Vail's processing of Guyton's withdrawal, the trial court observed as follows:

> Upon receiving [Guyton's April 11] letter and the Deas/Ewing letter, she did not issue a new permit for any of the property referenced in the letters. Also Vail did not modify any of the existing permits to reflect a new contractor was "taking over." Furthermore, Vail did not secure the signature of, or consent of, Deas reflecting him as the licensed contractor on any of the records relating to any of the properties that were listed on the April 5, 2006 Ewing/Deas letter.[13] Vail did however, wrongfully/negligently substitute the name of "Lawrence Deas" as the contractor of record onto a blue card located at 4848 Market Street. On April 11, 2006, a replacement blue card was created reflecting Deas as the licensed contractor. No licensed contractor was then approved to oversee the construction of the Home.

(ROA.928, substantially quoting Plaintiffs' proposal, Findings ¶¶ 7-9, Conclusions ¶3 at ROA.903, 912). While, in hindsight, Vail could have taken some or all of these actions, there was no proof that Vail was *required*, i.e., had a duty, to undertake any of these specific actions. To the contrary, it was undisputed that Vail had not before faced such a situation and did not have any guideline or policy to guide her. (Tr. 295-297). Furthermore, there is no dispute but that Vail's actions were appropriate as to those projects listed in Guyton's April 11 letter that Deas did agree to temporarily oversee. But for her mistake in believing Deas had agreed to oversee construction of the Residence, her actions related to the Residence's permit would have been no less appropriate.

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[13] The trial court's Findings of Fact make repeated reference to the projects listed in the Deas/Ewing letter of April 5, 2006, as was repeatedly stated in and quoted from Plaintiffs' proposal. As noted above, and revealed by Ex. P-12, no projects were identified in the Deas/Ewing letter.

Regardless of whether there was a breach of any duty owed Plaintiffs regarding continuation of construction after Guyton left the project, Tupelo is immune from liability for any resulting damages because the trial court expressly found Vail's actions prior to Plaintiffs' purchase of the Residence constituted a mistake, stating as follows:

> Mistakes can be made in any office. That the office placed Deas' name as the contractor of record was, at first, **a mistake.** However, when the office was put on notice by Deas that such a mistake had been made, ordinary care required the Defendant to notify the people concerned and not subsequently file a paper in plain contradiction of the truth. * * * Ordinary care, at the very least, would require Vail to call, mail a letter or email the Plaintiff s about the issues they were having with their home.[14]

(ROA.941; RE Tab 9)(emphasis added). While this finding addressed Vail's actions both before and after purchase of the Residence (the latter of which, is discussed hereinbelow, Plaintiffs claimed gave rise to their claim for attorney's fees incurred in litigation with Deas), it expressly found Vail's actions prior to their purchase was a mistake. Plaintiffs can hardly complain about the trial court's characterization of Vail's actions in April 2006 as a mistake, since this was quoted from Plaintiffs' proposal. *See*, ROA.925 at ¶69.

Necessarily, a mistake does not rise to the level of behavior that is arbitrary and capricious which, instead, has been defined as follows:

> The arbitrary-and-capricious standard has been defined by this Court to mean:
>
> When an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious[,] and an administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone. An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles.

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[14] The trial court's analysis of Vail's use of ordinary care, quoted from ¶¶69-71 of Plaintiffs' proposal, was erroneous. Ordinary care is considered in determining whether immunity exists under §11-46-9(1)(b), which applies to ministerial duties, being duties "positively designated by statute, ordinance or regulation." *Moss Point Sch. Dist. v. Stennis*, 132 So.3d 1047, 1050 (¶13) (Miss. 2014).

> *McNeel,* 869 So. 2d at 1018 (quoting *Miss. State Dep't of Health v. Natchez,* 743 So. 2d 973, 977 (Miss. 1999); *see also Burks v. Amite County Sch. Dist.,* 708 So. 2d 1366, 1370 (Miss. 1998)).

Hinds County Sch. Dist. Bd. v. R.B., 10 So.3d 387, 396 (¶20) (Miss. 2008). Vail had substantial evidence and made a decision based upon reason and judgment, not in a whimsical manner. Mistaking the effect of the evidence - by believing the generality of the April 5 letter pertained to all of the specific projects listed in the April 11 letter - cannot under any reasonable analysis be said to arise to the level of arbitrary and capricious behavior.

As the trial court observed, anyone can make a mistake, and that is what Vail did in substituting Deas for Guyton and allowing construction to continue. Because the trial court expressly found that Vail's substitution of Deas as licensed contractor of record was a mistake, *i.e.*, negligent, then, as a matter of law, Tupelo is immune under §11-46-9(1)(h) from liability for damages related to alleged defective construction.

Issue 3. Was there any proof that Vail violated Miss. Code Ann. §73-59-17?

As a matter of law, Tupelo cannot be liable for violation of Miss. Code Ann. §73-59-17, which required Vail to report to the State Board of Contractors those persons known to be operating as unlicensed contractors, for the simple reason that Vail did not know that Ewing was acting as an unlicensed contractor.

Plaintiffs alleged, and the trial court found, that Vail violated §73-59-17, which states as follows:

> The building office, or other authority charged with the duty of issuing building or similar permits, shall also report to the [state] board [of contractors] the name and address of any person who, in his opinion, has violated this chapter by accepting, or contracting to accomplish, work which would classify the person as a residential building or remodeler under this chapter without a license or acknowledgement.

It is unclear whether any damages awarded by the trial court were based on a violation of this statute, but presuming they were, the trial court was clearly erroneous in finding that the statute was violated. Specifically, the trial court stated,

> The actions by the City of allowing Ewing to continue to perform work on the Home when they knew he was not licensed and without a valid Permit rises to the level of arbitrary and capricious. Vail has admitted that Ewing was not licensed until October 27, 2006. She has also admitted that Guyton withdrew the only valid license on the Home on April 11, 2006 and that Deas never agreed to "take responsibility" for construction of the Home. Vail also admitted she never notified the Mississippi Board of Contractor's [sic] of Ewing's lack of a license when he built homes in 2006.

(ROA.943; *cf.*, Plaintiffs' proposal, Findings ¶34, Conclusions ¶2 ROA.908, 912). All of this is incorrect and, for the following reasons, must be rejected as clearly erroneous. *Peacock, supra.*

First, there was nothing preventing Ewing from "continu[ing] to perform work" on the Residence, just as, it was undisputed, Ewing had before Guyton withdrew use of his license and released the permit. It would only have been impermissible for Vail either to have issued a permit to Ewing or substituted Ewing as successor licensed contractor on the Residence while *knowing* Ewing was unlicensed, or to have substituted Deas as the successor licensed contractor *knowing* that Deas would have no involvement with the Residence, *i.e.*, was impermissibly "loaning" his license to Ewing. *See, Lowe, infra.* However, there was no proof, or even an allegation, that Vail knew, prior to completion of construction and Plaintiffs' purchase of the Residence, either that Deas had no involvement with the Residence, or that Ewing was acting as licensed contractor. To the contrary, the following direct examination by Plaintiffs' counsel of Vail made clear that Vail made an understandable mistake in thinking that the permits specifically listed in Guyton's April 11, 2006 letter were the same, unspecified projects that the Deas/Ewing letter stated Deas would be temporarily overseeing and, therefore, that construction was properly continuing under a licensed contractor:

It was undisputed, and proven through Plaintiffs' attorney's direct examination of Vail, that she did not know that the January 2007 memo was not accurate until some point thereafter. Specifically, Vail responded to Plaintiffs' attorney's direct examination as follows:

> Q Is it true that for some period of time two of the projects [listed in Guyton's April 11 letter, including the Residence] . . . were without a licensed building?
>
> A It appears that way now, but at the time we -- I thought it was covered by the Lawrence Deas' document.
>
> Q The chronology of these things can sometimes be important and perhaps it's important in this respect. Clearly by the time you signed your 2010 affidavit, which I think is in front of you as well.
>
> A Yes. * * *
>
> Q By the time you signed your 2010 affidavit you recognized the mistake, correct?
>
> A Yes. It had been pointed out to me.
>
> **Q When was it pointed out to you?**
>
> **A Close to the time that the affidavit was written. * * ***
>
> Q Now, you do see in the permit file a letter dated October 30 from Lawrence Deas, correct?
>
> A I've read it out of the file, in my review of the file I've seen it.
>
> * * *
>
> **Q You didn't think at the time you did the January 10, 2007 memoranda that the inclusion of Lawrence Deas' name was a mistake?**
>
> **A No, I didn't.**
>
> **Q You didn't think that?**
>
> **A Nuh-huh (Indicating no.) And at that point, as the memo states, Jamie had his license, he took responsibility for the house so I thought it was a dead issue.**
>
> Q As of --
>
> A I was just putting closure on that event basically.

Q Because by the time you did this memo Ewing was licensed?

A Uh-huh (Indicating yes.)

Q That January '07 memo is in part the opposite of what Lawrence Deas says in his letter, isn't it?

A Having read that letter, you know, later, I guess so. He said that there was an error made.

Q And you have subsequently agreed with him, correct?

A Yes. It was pointed out, my mistake was pointed out to me.

Q But up until the creation of the 2010 affidavit you continued to believe that Lawrence Deas had some responsibility for that file?

A Not anymore, because Jamie got his license, took over the responsibility for the
permits. And Lawrence would have only been responsible for a very short period of time. Jamie took ultimate responsibility for all of his projects.

* * *

Q So is it true that for a certain period of time from April 11, 2006 until either September or October of 2006, Jamie Ewing was an unlicensed builder working on the project that relates to the permit in front of you?

A He was working under another contractor.

Q And that other --

A And to my knowledge, to my knowledge. And my understanding was that he was working with a licensed contractor to continue that project.

Q And that other contractor was Lawrence Deas?

A Right. Just as he was working with Jamie Guyton before Jamie -- he and Jamie's partnership. He and Jamie -- that's -- I'm getting Jamie confused. Anyway, Jamie was the on-hands partner and Joey was the -- I guess you would call him almost like a business manager. A lot of our contractors worked that way. A lot of our licensed contractors were really no more than business managers. They had a crew that did physical labor. And Jamie, my understanding -- because Jamie would come by with the site plans and provide information about the permits, and then Joey would come in and do the financial part of it and sign the permit and process it. So it was a similar coexistence, I guess you could

say, for Jamie to continue and then Lawrence be doing the business management part of it.

* * *

Q But the first time you, number one, realized that it was a mistake was in preparation for preparing that affidavit, right?

A Correct.

Q And the first time you communicated that in a way that might eventually get to Dr. McMillin and his wife was when you signed the affidavit?

A I didn't -- it was done for Mr. Deas. I don't know who eventually was going to get it. I mean I did it at the request of Mr. Deas . . . through our attorneys.

(Tr. 269-270, 274-275, 279-280, 294).

Second, Tupelo has never denied that Vail was aware Ewing was not licensed when Guyton released his permits and when she substituted Deas in place of Guyton. Knowledge of Ewing's licensing status, however, had nothing to do with Vail's misunderstanding concerning Deas' involvement as successor licensed contractor. And while Vail *now* understands she made a mistake concerning Deas involvement, resulting in Guyton releasing "the only valid license on the home," there was no proof that she understood this mistake *at any time prior to Plaintiffs' purchase of the Residence*, as is implied by the trial court's statement quoted above.

Finally, the statement that Vail "admitted she never notified the [Board of Contractors] of Ewing's lack of license when he built homes in 2006" implies, again, that Vail knew Ewing acted as an unlicensed contractor during construction of the Residence. Again, to the contrary, uncontradicted proof showed that Vail was not aware Ewing acted as an unlicensed contractor. This lack of knowledge defeats the claim that Vail violated §73-59-17, as shown by *Lowe v. Lowndes County,* 760 So.2d 711 (Miss. 2000).

Lowe involved an allegation that the county was liable for having failed to report a person known to be operating as an unlicensed contractor. The county's motion to dismiss for failure to

state a claim, based on immunity under §11-46-9(1)(h) and lack of a duty under §73-59-17[15], was granted. In finding the allegations sufficient to state a claim, the Mississippi supreme court analyzed what is meant by "arbitrary and capricious" in the context of §11-46-9(1)(h), stating as follows:

> We have yet to define the terms "arbitrary and capricious" in the context of Miss. Code Ann. §11-46-9(1)(h) . . . . We have stated that arbitrary and capricious is "open-textured and not susceptible of precise definition or mechanical application." *Mississippi State Dep't of Health v. Southwest Miss. Med. Ctr.*, 580 So.2d 1238, 1239 (Miss. 1991). We found North Carolina's definition of the terms helpful:
>
> > 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 of things . . . 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 settle[d] controlling principles."

Lowe, 760 So.2d at 713 (¶11).

Lowe did not hold that immunity under §11-46-9(1)(h) was unavailable, nor did *Lowe* hold that violation of §73-59-17 constituted proximate causation of alleged defective construction. Instead, *Lowe* simply held that the plaintiff's complaint pleaded allegations sufficient to avoid dismissal under M.R.C.P. 12(b)(6), and which might not be protected by the immunity granted by §11-46-9(1)(h), thereby warranting remand for further proceedings, specifically because the complaint alleged the county *knew* the individual signing the construction permit application was the actual contractor and had no agency relationship with the named applicant, which was licensed, and *knew* that the named applicant would have no involvement with construction but despite having this knowledge, failed to notify the Board of Contractors as required by §73-59-17. *Id.* at ¶15. Though finding the complaint sufficient to

[15] The opinion did not specifically address the county's contention that §73-59-17 did not make it a guarantor of defective work by or under the direction of an unlicensed contractor. The holding, however, reveals that, at most, liability can exist only when the governmental entity was aware that an unlicensed contractor was operating.

avoid dismissal for failure to state a claim under M.R.C.P. 12(b)(6), the Court also observed as follows:

> We assume these facts to be true at this stage. Whether they are and, if so, whether the acts of the county were the proximate cause of injury to the plaintiff are issues yet to be resolved. We decide only that, [when] accepting the allegations as true, the county has engaged in arbitrary and capricious conduct violative of a statutory mandate.
>
> * * *
>
> As we stated earlier, we must take the Lowe's complaint as true. It is clear that **if** [Defendant] **knew**, as alleged, [1] that Lynn was not licensed and [2] that Lynn had contracted to performed [sic] the work, [Defendant] would be in violation of §73-59-17.

Id. at 714 (¶¶15, 17)(emphasis added).

Lowe teaches that even if a governmental entity's violation of §73-59-17 can proximately cause damages to the owner of a building constructed by an unlicensed contractor, it is first necessary that the governmental entity *know* an unlicensed contractor is operating since it is axiomatic that something cannot be reported unless it is known. Unlike *Lowe*, Plaintiffs never alleged nor provided any proof that Vail knew Deas had not agreed to be licensed contractor for the Residence, or that Ewing intended to operate as contractor while unlicensed.[16] In the absence of proof of such knowledge, Tupelo cannot be liable for any violation of §73-59-17 as a matter of law, and for this additional reason, the award for charges by Lynn Bryan Construction should be reversed.

Issue 4. **Did Vail's actions or inactions after Plaintiffs' purchase of the Residence breach a duty owed Plaintiffs from which Tupelo is not immune and that proximately caused them to incur attorney's fees in litigation with Deas?**

---

[16] Even if Plaintiffs had alleged and shown that Vail knew Ewing was operating as an unlicensed contractor in construction of their home, they had the burden of proving proximate causation between failure to report this to the Board of Contractors and any alleged damages. Plaintiffs did present any such proof. And, as noted above, even to the extent that any items listed in Plaintiffs' expert's report could be considered defective construction, there was *no proof* that any occurred after Guyton left the construction project.

It was Vail's alleged actions and inactions after Plaintiffs purchased the Residence that Plaintiffs contended caused them to sue Deas and sustain as damages attorney's fees incurred in litigation with Deas. The trial court found these actions and inactions to have been arbitrary and capricious, stating as follows:

> [1] If Vail had properly filed the April 5, 2006 Deas/Ewing letter, and [2] if she had refrained from placing the memo of January 10, 2007 in the file, and [3] if she had answered questions repeatedly asked by the Plaintiffs,[17] then they would have had no reason to sue Deas.
>
> * * *
>
> The Court finds that, but for the arbitrary and capricious actions of the Defendants [sic] the Plaintiffs would have never asserted their claims against Deas, and further had to defend themselves against Deas and in the process incur legal fees.

(ROA.935 quoting Paragraph 45 of Plaintiffs' proposal, (ROA.912)).

The trial court also concluded (quoting ¶70 of Plaintiffs' proposal, ROA.925) that Tupelo was not immune because Vail failed to act with "ordinary care to address the situation and relieve the confusion" (ROA.942) because she did not notify Plaintiffs that Deas was not involved in construction, and placed a memo in the permit file stating that Deas was involved which, it was proven through Plaintiffs' case in chief, Vail believed to be accurate at the time the memo was created and filed. The trial court's finding that Vail's actions and inactions were both arbitrary and capricious and were without ordinary care was presumably to reject immunity that existed under either §11-46-9(1)(h), discussed *supra*, or §11-46-9(1)(b), which provides that immunity exists

> [a]rising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance or, or

[17] There was no proof that Vail was repeatedly asked questions by Plaintiffs about Deas' involvement. Instead, the only proof presented was that Dr. McMillin questioned Vail during the November 2006 confrontation about both Ewing's licensing status and about Deas' involvement, with Vail (according to Dr. McMillin) answering questions about Ewing, but remaining "silent" to questions posed about Deas. (Tr. 367).

in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid.

Because all of Plaintiffs' damages arose out of the alleged failure to deny, suspend or revoke the building permit issued on the Residence, then Tupelo is immune under §11-46-9(1)(h) not only for Vail's actions in April 2006 but also for her post-purchase actions and inactions, rendering analysis of whether she used ordinary care is irrelevant. *See e.g., State v. Hinds County Bd. of Supervisors,* 635 So. 2d 839, 842 (Miss. 1994) ("State cannot be held liable for damages if the conduct falls within one of the exceptions found in Miss. Code Section 11-46-9"). Analysis of ordinary care under §11-46-9(1)(b) was also improper since this immunity pertains only to ministerial duties, which are duties "positively designated by statute, ordinance or regulation," which clearly does not entail decisions regarding papers filed or not filed in the permit file or decisions by a city employee about whether to respond to a citizen's inquiry.

Even if it could be said that Vail's actions or inactions regarding filing and responding to Dr. McMillin's inquiry about Deas were not protected by the immunity of §11-46-9(1)(h), as shown below, Tupelo is nevertheless immune under §11-46-9(1)(b) unless Plaintiffs proved Vail's actions or inactions were not discretionary because they (1) did not involve an element of choice and (2) did not involve social, economic or political-policy consideration. *Sandifer, supra,* 107 So.3d at 984 (¶20).

In *Sandifer*, parents of a teenager killed in an attack sued the City of Jackson alleging its police officers ignored city policy with regard to runaways and failed to apprehend the decedent and deliver her to her parents or a detention center, which allowed her to be subject to the beating that resulted in her death. After a bench trial, the trial court held the City was liable for the wrongful death claim. This decision was reversed and rendered on appeal because the plaintiffs failed to meet their burden of proof, with the supreme court explaining as follows:

> Governmental entities also are immune from liability for any claim "based upon the exercise or performance or the failure to exercise or perform a *discretionary* function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused." [cit. omit.] "A two-part 'public policy function' test is applied to determine whether conduct is considered a discretionary function subject to immunity." [cit. omit.] First, we must determine whether the conduct involved an element of choice; if so, we must then "determine whether that choice or judgment involved social, economic, or political-policy considerations." [cit. omit.] Each of these exceptions must be considered here and, to recover on their claims against the City, the Sandifers must prove that the officers' alleged misconduct was within the course and scope of their employment, was not criminal, was in reckless disregard of Tawanda's safety [since reckless disregard, and not arbitrary and capricious, is the standard under §11-46-9(1)(c) related to police protection], and was not discretionary.

Id. Similarly, to avoid immunity granted to Tupelo, Plaintiffs had the burden of proving not only that Vail's actions were arbitrary and capricious, so that immunity under §11-46-9(1)(h) did not apply, but also that Vail's actions were not discretionary, so that immunity under §11-46-9(1)(d) did not apply. Plaintiffs presented no proof, and the trial court made no finding, that Vail's actions after Plaintiffs' purchase of the Residence were not discretionary. As a result, the judgment against Tupelo should be reversed because it is immune from any liability under §11-46-9(1)(h) and/or §11-46-9(1)(d).

However, the issue of whether Tupelo was immune from liability is reached only if Plaintiffs presented all four required elements of their negligence claim. As shown below, they failed to meet this burden.

A. <u>The absence of the April 5, 2006 letter did not cause Plaintiffs to sue Deas</u>

Omission of the April 5, 2006 letter simply could not have had any bearing on Plaintiffs' decision to sue Deas. If anything, had the letter been included in the file, it might have been reasonable for Plaintiffs, like Vail, to conclude Deas had agreed to take over this specific construction project.

Reference to omission of the April 5, 2006 letter from the permit file was apparently made because of the inaccurate, repeated finding by the trial court (quoting Plaintiffs' proposal) that this letter contained "specific addresses" that Deas agreed to take over, with the reasoning being that if this letter had been in the permit file, Plaintiffs would have seen that Vail had made a mistake since their Residence was not listed, and, therefore, would not have sued Deas. This finding was simply wrong. A review of the April 5 letter makes no reference to any specific project and, therefore, the trial court's finding otherwise must be rejected on appeal.[18] *Peacock, supra.*

B. Inclusion of the January 2007 memo did not cause Plaintiffs to sue Deas

Dr. McMillin testified that, all along, he believed Deas was involved as licensed contractor, he disbelieved Deas' denials of involvement made in October 2006 by phone and correspondence, that Vail's January 2007 memo merely confirmed what was already believed about Deas' involvement, and he would not have continued litigation with Deas if he had affirmation from Vail that Deas was not involved. However, the following undisputed proof (also referenced hereinabove) showed this was not the case and showed, instead, Plaintiffs never truly believed Deas had any involvement (but that he did, unlike Ewing, have money to pay a settlement or judgment):

1. Plaintiffs' October 21, 2006 letter advised the City that Ewing was not a licensed contractor when he constructed the Residence (if Plaintiffs believed Deas was the contractor, there would not have been any reason to question Ewing's licensure status);

[18]Vail testified that neither Guyton's April 4 letter, or Deas/Ewing's April 5 letter, neither of which made reference to any specific project, were filed in the permit file. Only Guyton's April 11 letter was placed in the permit files for those permits listed in the letter. (Tr. 272-274)

2. Plaintiffs' October 21, 2006 letter did not claim that Deas was the actual contractor, and no demand was made of Deas, but was of Ewing;
3. Plaintiffs submitted punch lists to Ewing, never to Deas;
4. Dr. McMillin questioned Vail on November 20, 2006 about when Ewing, as contractor of the Residence, became licensed -- again, if Plaintiffs had believed Deas acted as licensed contractor, then Dr. McMillin would not have continued to question Vail about Ewing's licensure status;
5. Dr. McMillin requested to see Ewing's contractor's bond but did not claim to have requested Deas' contractor's bond (Tr. 366) -- again, if Plaintiffs had believed Deas was involved, then Dr. McMillin would have requested to see Deas' contractor's bond instead;
6. In December 2006, Plaintiffs had received Deas' October 30, 2006 letter denying involvement with the Residence. That Plaintiffs believed this is supported by Plaintiffs' decision to sue Ewing, but not Deas, in December 2006.
7. ***After*** discovering Vail's January 2007 memo and before filing suit against Deas, Dr. McMillin had e-mail communications with a newspaper reporter not about Deas, but instead complaining that Vail was a liar and Ewing was not licensed *when he acted as contractor of the Residence*. (Ex. D-10, Tr. 441-443). It was only later, during the course of the lawsuit against Tupelo, that Plaintiffs claimed to have believed and relied upon one sentence in Vail's January 2007 memo (while disbelieving the remainder) in deciding to sue Deas.
8. No reference was made in Plaintiff's' 2011 Notice of Claim to either the January 2007 memo or reliance thereon resulting in damages in the form of attorney's fees with Deas in Plaintiffs' second Notice of Claim. Instead, as noted above the only

substantive difference between the 2007 Notice of Claim and the 2011 Notice of Claim was reference to Vail's March 2010 affidavit through which, Plaintiffs contended, Vail admitted negligence which allowed Ewing to continue construction as an unlicensed contractor. Specifically, the 2011 Notice of Claim made repeated complaints about Ewing, *e.g.*, of Ewing's "shoddy workmanship overall," of Ewing's failure "to perform certain other work on the house after closing," that Ewing was unlicensed, of discussions with Vail concerning Ewing's licensing status, that Vail's affidavit "for the first time admitted that negligence on behalf of her and the city permit office allowed an unlicensed contractor to construct the McMillin's home," and that "Vail failed to insure that a licensed contractor was building their home [which] resulted in damages. (ROA.17-18). The 2011 Notice of Claim did not make any claim of damages resulting from litigation with Deas, though Plaintiffs were, by then, in possession of everything they later claimed caused them to sue Deas.

C. Failure to respond to questions posed about Deas did not cause Plaintiffs to sue Deas (over two years later)

Vail denied that Dr. McMillin questioned her about whether or not Deas was involved in construction as licensed contractor. Vail instead testified that she was only posed questions about Ewing's licensing status and was not aware Dr. McMillin's questions pertained to the Residence (Tr. 312-316, 320-321). The trial court nonetheless found that these questions were asked and that Vail did not respond. However, Plaintiffs did not present any proof that there was a requirement, or duty, that Vail (or any Tupelo employee) respond to questions posed regarding Deas' involvement or lack thereof. Instead, as shown above, Vail's decision about whether or

not to respond to Dr. McMillin's questions about Deas was a discretionary function covered by immunity under §11-46-9(1)(d).

For the foregoing reasons, the trial court's findings that Vail's actions or inactions after purchase of the Residence caused Plaintiffs to sue Deas must be rejected. *Sandifer, supra.* Moreover, because Plaintiffs failed to present proof sufficient to overcome Tupelo's immunity, reversal of the judgment against Tupelo is warranted.

Issue 5. Even if an action or inaction by Vail after Plaintiffs' purchase of the Residence breached a duty that proximately caused Plaintiffs to sue Deas and no immunity applied, did the trial court err in awarding attorney's fees totaling $105,894.39?

Plaintiffs were awarded $105,894.39 for attorney's fees incurred in litigation with Deas. This included fees of $8,908.31 charged by Plaintiffs' original counsel, Moffett Law Firm; and $96,986.08 charged by their present counsel. (ROA.942). Why this award[19] should be reversed is explained below.

Plaintiffs are not entitled to recover attorneys' fees incurred as a result of representation by Moffett Law Firm, or by their trial counsel regarding litigation against Ewing or the two banks, for the following reasons: First, representation by Moffett Law Firm pertained to Plaintiffs' lawsuit against Jamie Ewing and two banks. Plaintiffs later voluntarily dismissed the two banks, which had been sued for breach of fiduciary duty.[20] Tupelo cannot be responsible for fees incurred in an ill-advised lawsuit against two banks based on a non-existent cause of action. Second, unlike their claims against the banks, Plaintiffs' lawsuit against Ewing remains outstanding over seven years later. Nothing the City of Tupelo did or did not do caused

[19] This award was based on Exhibit P-19, being invoices submitted by Moffett Law Firm before any litigation with Deas commenced, and Exhibit P-20, which included two invoice summaries by Plaintiffs' trial counsel (each entitled "Ledger Report"), with some (but not all) corresponding detailed invoices.

[20] Plaintiffs' Notice of Claim explained, "The McMillins dismissed the initially named BancorpSouth Bank and Superior Bank on the belief that they did not owe a fiduciary duty to the McMillins." (Ex. D-16). This dismissal occurred in September 2009, as reflected by time entries on Ex. P-20, #1476.

Plaintiffs to sue either Ewing or the banks, and Plaintiffs do not claim otherwise. And third, Plaintiffs made no request for an award of attorney's fees incurred in litigation with either Ewing or the banks, and the trial court did not award fees on this basis, instead specifically referencing only fees incurred in litigation with Deas, and stating, as quoted hereinabove, "but for the arbitrary and capricious actions of the Defendants [sic] the Plaintiffs would have never asserted their claims against Deas, and further had to defend themselves against Deas and in the process incur legal fees."

Furthermore, and as a matter of law, Plaintiffs are not entitled to recover attorney's fees incurred in litigation with Deas, but before explaining why Plaintiffs are not entitled to any fees incurred in litigation with Deas, it is appropriate to first examine those fees incurred prior to Vail's March 2010 affidavit and Deas' accompanying request for dismissal, and those incurred after.

Holcomb Dunbar invoices (Ex. P-20) corresponding to the review of subpoenaed city records through the date of receipt of Vail's affidavit and Deas' request for dismissal in March 2010, are as follows:

December 12, 2008, when review of subpoenaed records revealed Vail's January 2007 memo (fees of $1,093.50),

January 8, 2009 (fees of $491.75), February 24, 2009 (fees of $297.50),

October 6, 2009 (fees of $735.00), January 12, 2010 (fees of $385.00),

March 12, 2010 (fees of $203.00), and

April 12, 2010, which revealed a time entry for "review of letter from Lawrence Deas with attached affidavit of Marilyn Vail" (fees of 1,351.00). (Ex. P-20, #1469-1483).

These invoices total $4,556.75. Of these, all time entries on the invoice dated October 6, 2009 reflecting fees of $735.00 related to Plaintiffs' decision to voluntarily dismiss the banks

pursuant to M.R.C.P. 41, and were unrelated to their claims against Deas, thereby reducing fees to $3,821.75. The figure is likely even less, but Plaintiffs failed to meet their burden of proof as to the amount of damages claimed because they chose not to present any testimony concerning what fees related to litigation with Deas as opposed to litigation with Ewing and the bank, making it impossible to tell from the generality of the time entries reflected in Ex. P-20 the specific amount of attorney's fees incurred in litigation with Deas during this time frame.

Regardless, for the following reasons, Plaintiffs are not entitled to recover any amount on their claim for attorney's fees:

First, Plaintiffs failed to mitigate their damages of attorney's fees (which, instead, could have been wholly avoided) in the following respects:

1) Plaintiffs chose to rely on a single sentence in a January 2007, memo by Marilyn Vail which they discovered only by subpoena without making any effort, even as minimal as contacting Tupelo's attorneys, to determine whether Deas' letter of October 30, 2006 disavowing involvement was correct, or one sentence in Vail's memo was correct (the remainder of which Dr. McMillin testified at trial he continued to be of the opinion did not contain true or accurate statements).

2) Just as Plaintiffs used the discovery process in their ongoing Chancery Court action to discover Vail's memo, they easily could have, and should have, either used other discovery avenues available to them, or at a minimum simply placed a telephone call either to City Hall or to Tupelo's city attorneys, to determine why Vail's 2007 memo contradicted Deas' October 2006 letter or (upon receipt of Vail's affidavit) why her affidavit did not correspond with her 2007 memo. Had Plaintiffs done so, Plaintiffs likely could have avoided lengthy and costly litigation with Deas. By failing to do so, they failed to undertake any attempt to mitigate their damages.

Instead, they chose to do nothing to discover the truth, and then recklessly accused a member of the Bar of fraud.

3) Plaintiffs ignored Deas' request for dismissal, but instead accused Deas of fraud despite having two sworn affidavits stating that Deas was a stranger to construction of the Residence, and chose to continue litigation. It was Plaintiffs' decision to continue with litigation against Deas, but the decision was unreasonable. The associated attorney's fees cannot be properly placed on Tupelo and should be rejected for failure to mitigate just as was a claim for storage fees rejected in *J. L. Teel v. Houston United Sales, Inc.*, 491 So.2d 851 (Miss. 1986). In *J. L. Teel,* the counterplaintiff was lessee of a copier that ceased to work. The counterplaintiff refused to release the copier to the lessor, instead placing the copier in storage because the lessor refused to release the counterplaintiff from the terms of the lease agreement. Rejecting the claim for storage fees, the supreme court stated as follows:

> Houston was obligated to mitigate its damages. If it had surrendered the copier to Teel, it would have had no storage expenses. Our law will not reward obstinence by assessing Teel for Houston's unnecessary storing of the copier in Houston's office. There was no proof of any other damages. Therefore, we affirm the Circuit Court's denial of Houston's counterclaim.

Id. at 861. Similarly, Plaintiffs cannot be rewarded for their obstinate decision to continue litigation against Deas.

Second, the proof showed approximately 80% of Plaintiffs' attorney's fees were incurred *after* Deas filed his answer and counterclaim (and of the approximately 20% incurred before, less than $4,000 related to litigation with Deas).[21] The proof further showed that Deas did not file an answer or counterclaim until *after* Plaintiffs received Marilyn Vail's affidavit but refused Deas'

[21] Of the $105,894.39 awarded for attorney's fees, approximately $9,000 were incurred with Moffett Law Firm, and approximately $14,000 were incurred with Plaintiffs' trial counsel through the time of receipt of Vail's affidavit in March 2010, which sum included trial counsel's fees related to litigation against Ewing and the two banks, as well as the fees, totaling less than $4,000, related to litigation against Deas. (Ex. P-19 and Ex. P-20).

request for dismissal. It was Plaintiffs' decision to reject Vail's affidavit and continue with litigation against Deas, to the point of requesting summary judgment against Deas. If Plaintiffs had been successful in their quest for a judgment against Deas, there would not have existed any legal basis upon which they would have been entitled to recover related attorney's fees from Tupelo, *see e.g., Fulton v. Miss. Farm Bureau Cas. Ins Co.,* 105 So.3d 284, 287-288 (Miss. 2012)(Mississippi has long followed the American rule of attorney's fees, meaning fees are not recoverable in the absence of statutory authority, contractual provision, or award of punitive damages); *this is no less true simply because they were unsuccessful in obtaining a judgment against Deas.*

Nothing Tupelo did caused Plaintiffs to pursue litigation against Deas or to continue litigation against Deas in the face of two sworn affidavits confirming Deas' lack of involvement. The decision to do so was unreasonable and the associated attorney's fees cannot properly be placed on Tupelo, since to do so would reward Plaintiffs for an unreasonable decision. *See, J. L. Teel, supra.*

Issue 6. Was the Plaintiffs' Complaint barred by the statute of limitations?

Plaintiffs' lawsuit is governed by the Mississippi Tort Claims Act which provides a one-year limitations period. Miss. Code Ann. §11-46-11. Plaintiffs' claim for allegedly defective construction arose in 2006, no later than their receipt of the Cobb inspection report (upon which Plaintiffs relied to support their claim of damages arising from defective construction). Plaintiffs timely filed a Notice of Claim in August 2007, but did not thereafter file a lawsuit within the time limitations prescribed by the Mississippi Tort Claims Act. Nothing that occurred after 2006 proximately caused any defective construction. Instead, subsequent events - the Vail 2007 memo and 2010 affidavit - pertain solely to the claim for attorney's fees. Because Plaintiffs failed to file a timely lawsuit on their claim for defective construction, this claim was barred. *Id.*

(And, as shown above, their claim for defective construction fails for a variety of other reasons, including failure to prove all elements of this tort claim.)

Even if it could be said that Plaintiffs had any claim against Tupelo for attorney's fees incurred in litigation with Deas and that this claim arose upon receipt of Vail's affidavit, as discussed in detail above, Plaintiffs are either not entitled to any of those fees or, at most, only for those that Plaintiffs proved (1) they incurred in reasonable reliance on Vail's January 2007 memo, (2) related to litigation with Deas, (3) did not relate to litigation with Ewing or the banks and (4) occurred before receipt of Vail's 2010 affidavit. Plaintiffs proved none of these factors, and instead simply submitted invoices, with time entries providing little detail concerning whether or not legal representation applied to litigation with Deas as opposed to another defendant, and without any testimony by either of the Plaintiffs or their counsel providing any clarification.

CONCLUSION

The trial court's findings of fact must be scrutinized closely since they largely quoted those proposed by Plaintiffs. This scrutiny shows that much of the trial court's findings of fact were erroneous and wholly unsupported by proof.

Simply because Plaintiffs claim there was defective construction does not mean that it occurred after Guyton released the building permit. Plaintiffs' implication otherwise is insufficient to support a claim for damages for costs of repairs, even if Plaintiffs had met their burden of presenting any proof of charges incurred for repair of defective construction instead, as the proof showed, for painting and carpet cleaning.

Nothing Vail did or did not do caused Plaintiffs to sue Deas. Testimony at trial to the contrary was completely undermined by undisputed proof of the Plaintiffs' actions, including but

not limited to omission from the 2011 Notice of Claim of any reference to damages incurred in litigation with Deas.

The award of over $100,000.00 in attorney's fees not only erroneously included fees that Plaintiffs had not requested they be awarded (because they were unrelated to litigation with Deas), but also were not warranted in light of Plaintiffs' complete failure to mitigate.

Tupelo was immune under Miss. Code Ann. §11-46-9(1)(d) and (h), and Plaintiffs failed to overcome the immunity.

Finally, Plaintiffs' lawsuit was barred by the applicable statute of limitations. For these reasons, the judgment of the trial court should be reversed and rendered.

RESPECTFULLY SUBMITTED,

CITY OF TUPELO, MISSISSIPPI
APPELLANT

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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 February, 2015.

/s/ *Martha Bost Stegall*
JOHN S. HILL, MB# 2451
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