IN THE MISSISSIPPI SUPREME COURT

JULIA W. LANGE, DAVID L. LANGE, JAMES S. WHITAKER, JR. and JAMES S. WHITAKER, SR., BY AND THROUGH THE EXECUTRIX OF THE ESTATE, JOYCE WHITAKER **Plaintiffs-Appellants**

versus **Case No. 2007-~~PS~~CA-00533**

CITY OF BATESVILLE **Defendant-Appellee**

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

A. The Affidavits Filed By The Appellants Should Have Been Considered By The Panola County Circuit Court.

The Appellee begins its argument concerning the Supervisors' Affidavits by citing the Mississippi Supreme Court case of *Neider v. Franklin*[1] for the proposition that the law in a contract case regarding parole evidence requires the trial court to first determine whether or not the Agreement is ambiguous, and in the event of ambiguity, to permit the jury to consider evidence of intent in resolving the ambiguity.[2] In the case at bar, it is clear that a disagreement exists as to the meaning attributed to the term "public road" as more fully set-forth in the Brief of Appellants.[3] In fact, it does not appear that the Appellee makes any serious argument that the term "public road" is not ambiguous, but rather, argues that the Appellants had a duty to insure that the minutes of the Panola County Board of Supervisors expressly stated all of the specific requirements of the Agreement necessary to resolve the ambiguity. Therefore, this Court is faced with deciding whether

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[1]844 So.2d 433, 436 (Miss. 2003).

[2]*See* Brief of Appellee at p. 5.

[3]*See* Brief of Appellants at pp. 10-16.

the line of cases supporting this proposition cited by the Appellee inadvertently render the *Nieder* decision, which was cited in *Lange v. City of Batesville*,[4] dealing with the two-step inquiry in contract law inapplicable to municipalities.

The cases that support the proposition that the minutes of a board are the evidence of what a board did are inapplicable to the case at hand. These cases stand for the proposition that individuals composing a board cannot act individually on behalf of the municipality. In other words, individual members of a board cannot unilaterally bind a board. There are obvious a policy reasons for this rule. This policy and principle is simply inapplicable to the facts of this case as the issue is not whether the County acted through its Board of Supervisors to enter into an agreement which the City became bound to perform. As discussed in the Brief of Appellants and as discussed more below, the City, acting through its Board, admittedly became obligated to perform whatever obligations the Board of Supervisors of Panola County owed to the Appellants under their Agreement. Therefore, the issue is what did in fact the parties to the Agreement agree and intend to by their terminology and not whether the City should be bound by some unauthorized, unilateral action of the Panola County Board of Supervisors who have executed the Affidavits. A ruling overturning the lower court's decision will not conflict with or overturn the cases cited by the Appellee as this precedent is simply inapplicable to the instant interpretation of an ambiguous term.

The Appellee cites the recent Mississippi Court of Appeals decision of *Burdsal v. Marshall County*.[5] [6] The facts of such a case illustrate why this line of cases is presently inapplicable due to not only factual differences, but also policy reasons. The issue in *Burdsal* was whether or not a road

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[4]160 Fed. Appx. 345 (5th Cir. 2005).

[5]973 So.2d 45 (Miss. Ct. App. 2006).

[6]*See* Brief of Appellee at p. 6.

was private or had by prescription become public.[7] The Chancellor allowed former and present supervisors and their employees to testify as to the maintenance of the road at issue by the board.[8] Such testimony was offered as the Court noted in an effort to show "what the board did" which was not reflected on its minutes.

In addition, the *Burdsal* Court noted other cases in which oral testimony had been allowed.[9] Therefore, it is clear that testimony from board members are, at times, not only necessary, but appropriate. This is one of those times.

Conversely, a holding by this Court affirming the lower court's order will overrule the well settled principle that parole evidence can be allowed where the minutes of a board certify the existence of a contract which contains ambiguity. As set-forth in the Brief of Appellants,[10] the rules of evidence and the rules of law applicable to ordinary contracts are applicable to municipal contracts, including the introduction of parole evidence. Specifically, the *Amite County* case held that when the construction of a contract is in doubt, testimony showing the facts existing at the time of the execution of the contract and circumstances is admissible.[11]

It is not as if the Appellants are attempting to require the City to perform a tenuous, verbal agreement that a supervisor unilaterally entered into. The Agreement was drawn by people other than the Whitakers, adopted by all involved, and actually recorded in the Batesville office of the Chancery

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[7]*See* Brief of Appellee at p. 3.

[8]*See* Brief of Appellee at p. 4.

[9]*Burdsal v. Marshall County,* 973 So.2d 45 (Miss. Ct. App. 2006) (citing *George County v. Davis,* 721 So.2d 1101, 1107 (Miss. 1998) (chancellor allowed admission of testimony from board members); *Lee County Bd. of Supervisors v. Scott,* 909 So.2d 1223, 1226 (Miss. Ct. App. 2005) (circuit court judge allowed admission of testimony from board members)).

[10]*See* Brief of Appellants at pp. 15-16.

[11]138 Miss. 222 (Miss. 1925).

Clerk of Panola County, Mississippi. There are no "unwritten terms" as argued by the Appellee.[12] Rather, the Appellants insured the terms and conditions of the Agreement were included. However, there subsequently arose an issue as to the interpretation of one of those terms and conditions - the definition of "public road" – which requires the admission of parole evidence which is clearly allowed not only under Mississippi law, but also under the law from other jurisdictions across the country as cited in the Brief of Appellants.[13] This is more particularly so whereas here the ambiguity arises based upon the interpretations of a stranger to the original Agreement who is now by assumption of the original parties' obligations required to perform. The City can not deny its minutes reflected assumptions of the County's obligations to the Whitakers nor should it be able to now hide behind its own misinterpretations of such obligation to successfully breach the Agreement.

For the first time, it appears that the Appellee may be arguing that it is not bound by the Agreement between the Whitakers and the Panola County Board of Supervisors.[14] Yet, the City specifically acknowledged early on that it was accepting the County's obligation to the Whitakers as outlined in the Agreement. As early as August 3, 1998, Robert Avant, President of the Panola County Board of Supervisors, wrote a letter to the Mayor and Board of Aldermen of the City, stating, "James Whitaker has entered into an agreement for the donation of right-of-way along the east line of the arena property for the construction of a road. The city would be requested to honor this agreement." R.63. On June 16, 1999, in the final contract between the County and the City, the City agreed to "Abide by and honor the Agreement for Temporary Easement between the County and James S. Whitaker et al dated July 31, 1996...." R. 132.

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[12]*See* Brief of Appellee at p. 7.

[13]*See* Brief of Appellants at p. 16.

[14]*See* Brief of Appellee at p. 7.

Any argument that the City did not understand that it must honor the Agreement for Temporary Easement, including the specified road, is also undermined by the City's own minutes and other City documents that show the City's understanding of the type of road to be built. For example, in the minutes for the City board meeting on February 18, 2000 (a mere three months before the City took the land from the Whitakers), the City publicly acknowledged the scope of the road it intended to build on this property: "The need and placement of roads in the area was also discussed. ***Whitaker Road is to be a five lane road.***" R. 63.

These minutes from February 18, 2000, not only prove that the City understood the dimensions of the road to be constructed, they also gave the Whitakers another public representation to rely on three months later when the City asked them to convey 4.81 acres to it. By the time the actual conveyance took place, the Whitakers were no longer just relying on the representations of the County; they were relying on representations directly from the City as well.

The Appellee attempts to rebut the "consideration" argument made by the Appellants by stating there is no proof that the consideration for the donation of the land used in the Agreement was the building of the main road.[15] This begs the question of why else would the Whitakers have donated this land? The City disingenuously argues that "the purpose of the Agreement for Temporary Easement was to facilitate the construction of the Civic Center." This was not the purpose of the Whitakers who while are fine and upstanding citizens who might wish the best for the local area, were in this instance motivated to convey a parcel of their land in order to receive the main road into the area so that their land could be developed. A main traffic light regulated road was their consideration. What they have received is a road that borders their property that simply dead

[15]*See* Brief of Appellee at p. 7.

ends to a civic center parking lot which serves only to service the same and does nothing to enhance the value of the Whitakers' land.

As set-forth in the Brief of Appellants, true consideration for conveyance may by shown by parole evidence.[16] Therefore, a dispute has arisen as to the nature of the consideration which results in the admission of extrinsic evidence regarding the proper consideration under Mississippi law.

B. Collateral Estoppel Does Not Apply To Bar The Appellants' Claim.

Although somewhat unclear, it appears the City now argues that the Mississippi Court of Appeal's opinion results in collateral estoppel and not the opinion rendered by the Fifth Circuit. However, in an abundance of caution, undersigned counsel directs this Court to the language of the Fifth Circuit opinion whereby the Whitakers were specifically directed to file this breach of contract issue in state court. Specifically, the Fifth Circuit recognized that the Whitakers asserted two claims: (1) claims under 42 U.S.C. §1983 for violations of (a) the substantive and procedural components of the Due Process Clause, and (b) the Takings Clause; and (2) pendant state law claims. As to these pendant state law claims, the Fifth Circuit specifically vacated the District Court's grant of summary judgment, dismissed for lack of subject matter jurisdiction, and directed the Appellants to seek compensation through state court in Mississippi. As such, the Appellants filed this action for breach of contract in the Circuit Court of Panola County on January 19, 2006. Therefore, the only issue before this Court is whether the opinion from the Mississippi Court of Appeals results in collateral estoppel.

In defining collateral estoppel, the Appellee notes that "{I}t must be applied cautiously on an *ad hoc* basis in order to preserve the critical component of due process, i.e., the requirement every

[16]*See* Brief of Appellants at pp. 13-14.

party have an opportunity to fully and fairly litigate an issue."[17] The Appellee goes on to state that collateral estoppel is only applied where it can be shown that in the previous case the issue "was actually litigated and determined."[18] In other words, preclusion is only allowed when the specific issue was "actually litigated, determined by, and essential to the judgment in a former action, even though a different cause of action is the subject of the subsequent action."[19] Applying the facts to the case law cited by the Appellee clearly shows that the breach of contract claim that was before the Circuit Court was never "actually litigated and determined" and to hold otherwise, would clearly leave the Appellants without ever having had the "opportunity to fully and fairly litigate an issue."[20]

After citing the definition of collateral estoppel and setting forth the four elements required to be satisfied before collateral estoppel can be applied, the Appellee glibly concludes that each are satisfied. An application of the facts of this case to each element results in the conclusion that none have been satisfied, a result which should compel reversal of the Circuit Court's Order.

1. The Appellants are not seeking to re-litigate the breach of contract issue.

It appears much of the Appellee's argument involving the first factor revolves around the fact that the Appellants have continued to plead similar background facts at each stage of the litigation.[21] However, the point that the underlying facts have remained relatively unchanged is of no consequence or issue to the question of whether the breach of contract claim has been litigated. The factual allegations concerning the existence of a contract and the Whitakers entitlements thereunder

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[17] *See* Brief of Appellee at p. 8.

[18] *See* Brief of Appellee at p. 8.

[19] *See* Brief of Appellee at p. 8.

[20] *See* Brief of Appellee at p. 8.

[21] *See* Brief of Appellee at pp. 9-10.

have been resolved. Specifically, the allegations regarding the terms of the Agreement accompanied the filing of the original Bill of Exceptions which challenged the City's adoption of a plan to build House-Carlson Road. The Court of Appeals obviously found the decision to not be arbitrary and capricious. No action was taken or decision reached as to the breach and contract related to Whitaker Road. To the contrary, the Court eschewed consideration of the case as being premature. Since the time of the filing of the Bill of Exceptions, two roads have been completed and commercial development has occurred off of House-Carlson Drive as opposed to Whitaker Road. As the facts have evolved through the discovery process and the passage of time, the pleadings have been modified to reflect the precise breaches of contract which have ultimately occurred. Specifically, discovery has confirmed the existence of a breach of the terms of the Agreement as ultimately performed.

As recognized by the Appellee, the "timeliness" claim is a new claim based upon the lapse of time since the original claims were made.[22] The Appellee incorrectly argues that collateral estoppel applies to the "timeliness" claim since the Appellants attribute their damages to the existence of House-Carlson Drive.[23] To the contrary, the Appellants' claim is that had Whitaker Road received a traffic light and become the main intersection entering the area in question development would have occurred along Whitaker Road as it obviously has along House-Carlson Drive. The deposition testimony of the realtors below supports this proposition. Therefore, the timeliness argument further supports the Whitakers' proposition that collateral estoppel is inapplicable.

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[22]*See* Brief of Appellee at p. 10.

[23]*Id.*

2. The breach of contract issue has not been litigated in any prior lawsuit.

As to this factor, it appears that the Appellee challenges the Appellants to explain to this Court why the appeal from the bill of exceptions to the Mississippi Court of Appeals included a claim for breach of contract action seeking money damages.[24] As recognized by the Appellee, this was an "alternative" argument made with the Bill of Exceptions.[25] The fact is that the breach of contract action was not litigated at the Court of Appeals level, but rather pled as an "alternative" argument to insure that it was not waived by a failure to plead. At that time, the Whitakers had not had any opportunity to present evidence or to examine witnesses to prove conclusively the wrongdoing by the City and the road had not been built so no comparison of the finished product to the specifications was possible. Since that time, discovery has been conducted that reveal the true terms of the Agreement and the road as provided does not comply with the City's contractual obligations under the Agreement. Only now is the case ripe to be presented to a jury.

The opinion from the Mississippi Court of Appeals supports the Whitakers' argument. Although the opinion contains some gratuitous language dealing with whether the City has as yet breached its contract with the Whitakers, that dictum does not equate to any actual litigation and decision of the issues presented to this Court today. First, the Court of Appeals' "review of [the Board's decision was] limited to the record created by the bill of exceptions" which was "prepared by the parties" and contained only those facts, judgments, and decisions involved in the Board proceedings. R. 268. The Whitakers were not given the opportunity to investigate or present extrinsic evidence beyond that which was self-servingly reviewed by the Board following an off-the

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[24] *See* Brief of Appellee at p. 10.

[25] *Id.*

record executive session which was closed to the public. The required road had not been built and it was impossible to compare the performance to the obligation either in character or timeliness. Therefore, the essential elements of litigation - discovery and trial - had not remotely occurred at the time the Mississippi Court of Appeal's opinion.

3. The breach of contract issue was not actually determined in any prior lawsuit.

The Whitakers' breach of contract claim cannot be collaterally estopped as it was never determined by the Mississippi Court of Appeals. While the Court speaking before any road had been supplied but without a refusal of the City to comply or a showing of impossibility to perform said that "we are satisfied that no breach of those obligations has occurred" it went on to note that the City may not "absolve itself of a possible claim for breach of contract by simply never beginning construction" and that "[a]t some state, delay itself can be the breach of the duty to build the road within a reasonable time." R. 269-70. Clearly, such qualified language cannot constitute an actual determination of the issue of breach of contract. The Court itself noted that it was not deciding the issue when it wrote that "No evidence of a reasonable time to perform under a development contract was introduced, and thus we have nothing to review." R. 270. In fact, it appears the Appellee agrees when it states " ...after September of 2002 (the date that the Court of Appeals ruling that *at that time there had not been a breach).*[26] Therefore, the actual language from the opinion of the Mississippi Court of Appeals supports the Whitakers' argument that the ultimate breach of contract issue as to compliance with specifications and timeliness was not actually determined in any prior suit.

4. The determination of the breach of contract issue was not an essential decision made by the Mississippi Court of Appeals.

The final reason that the Whitakers are not collaterally estopped from presenting all of their

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[26]*See* Brief of Appellee at p. 13 (emphasis added).

claims is that the Mississippi Court of Appeal's deliberation on this issue of breach was not essential to its judgment. To understand this point, it must be remembered that the Whitakers are not claiming in this Court that the City breached the Agreement by building House-Carlson Road, but rather, by failing to build Whitaker road, as the main road, within any semblance of a reasonable time and as set forth in the Warrior Group Plans. The Court of Appeals was addressing only the former point (construction of House-Carlson Road) and not the latter (not building the Whitakers' road, as the main road, in a reasonable amount of time pursuant to the Warrior Group Plan). For these reasons, the decision of the Mississippi Court of Appeals was entirely collateral, neither addressed nor decided the issues of this case and thus should not bar the full and fair litigation of the Appellant's claims. Therefore, the Appellee fails to satisfy any of the four required elements when all that is required is failure of one, resulting in reversal of the lower court's decision that collateral estoppel was applicable.

C. The Appellants Have Presented Evidence Of Damages

1. A question of fact is presented as to whether the Agreement was performed in a reasonable amount of time.

The Appellee argues that simply because Whitaker Road was completed prior to the Civic Center, that the Agreement was preformed in a reasonable amount of time.[27] Yet, the fact remains that the Whitakers did not receive their road until January 14, 2004, over seven years after the execution of the Agreement and over three years after their property was taken. As stated earlier, the Appellants did not donate the land to simply provide access to the Civic Center; but rather, donated the same so that commercial development could start immediately on their property. As proof the beneficial effect of the existence of a road, House-Carlson Drive was built much earlier

[27] *See* Brief of Appellee at p. 12.

and extensive development has occurred in the Batesville/Panola County area during the same time frame during which the Appellants have been unable to properly market their property as they would have been able to do had they received the road originally promised in a reasonable amount of time. Such a question of damages is for the jury to determine and not for the Panola County Circuit Court.

The Appellee cites the *Fortune Furniture Manufactures, Inc.*, v. *Pates Electronic Co.*,[28] decision for the proposition that "a reasonable time for performance when there is no time specified in the contract is a question of law for the court."[29] However, the *Fortune* Court goes on to state that where there is a question whether the written contract was the final and complete expression of the agreement between the parties and can only be decided on the basis of the evidence and where the evidence in the case is conflicting, a jury issue is presented.[30] Such is obviously the case here where there is conflicting evidence from the Whitakers and the supervisors as to the timeliness of the road built.

2. The Appellee's have presented evidence as to contract damages.

The Appellants have obviously suffered damages due to the actions of the Appellee. This is not only supported by the expert opinion of Dr. Lindeman discussed in the Appellants' Brief, but also confirmed by the testimony of the two realtors, Jeff Meek and Larry Crestman, who were involved in attempts to sell the Whitakers' property. Both attempted, but failed to sell any of the Whitakers' property due to the failure of the City to provide a main access road in a timely manner. Each testified by deposition that the Whitakers' property was difficult to sell on the open market due to the City's actions with respect to the location of the roads and traffic light as each affected the

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[28]356 So.2d 1178 (Miss. 1978).

[29]*Fortune Furniture Manufactures, Inc.*, v. *Pates Electronic Co.*, 356 So.2d 1176, 1178 (Miss. 1978).

[30]*Id.*

saleability of the property.

According to Mr. Meek, several factors are critical to the saleability of property including location, the general area, the nearby businesses, traffic flow and the amount of frontage property. R. 357. Mr. Meek attempted and discussed potential sales with several potential buyers including the placement of a Krystal fast food store on the Whitakers' property which never materialized. R. 355. In addition, he discussed the placement of a hotel with Vince Vigla who chose to place the hotel elsewhere. R. 355. He also discussed with a Mr. Liteman the placement of a Malco Theater on the Whitaker property. According to Mr. Meek, the sale fell through due to a decrease in traffic and visibility on Whitaker Road. R. 358. Specifically, Mr. Meek stated "you've got a road there, but there's not much traffic." R. 358. Mr. Meek summed up the situation well when he stated that House-Carlson Drive has more traffic which results in the property surrounding it to be worth more than the Whitakers' property. R. 362.

Mr. Crestman also noted that between the two roads, House-Carlson Road has much more traffic. R. 365. As a result, his attempted sales of the Whitaker property for approximately four years failed due to the fact that Whitaker Road had no red light and received little flow of traffic. R. 365-66.

Clyde Whitaker, brother of the one of the original Plaintiffs in the case, Doc Whitaker, was "very involved" in the marketing of this property as well. R. 368. He opined that the placement of the only traffic light on House-Carlson road as opposed to Whitaker Road was fatal to the development of the subject property. According to Mr. Whitaker, the placement of a red light on an access road makes the land surrounding it the "A location" of the area and the property adjacent to a non-protected secondary road a "very B location." This made negotiations difficult. Specifically, he assisted in the marketing of the property to Wal-Mart that ultimately chose the neighboring

property that was accessed by House-Carlson Road. R. 370. In his opinion, Wal-Mart's decision to purchase the property off of House-Carlson Road as opposed to Whitaker Road was based upon the placement of the red light. R. 371. In fact, he stated having worked many years in commercial real estate that he did not know of a Wal-Mart Supercenter that was not located at a red light. R. 371. Mr. Whitaker went on to opine that "the major part of the decision [that Wal-Mart did not purchase the Whitaker property] was where the road [is]." R. 376.

The actions of the City also thwarted Mr. Whitaker's attempts to sell the property to various hotel, restaurant, drug store, and other business owners. R. 381. When asked why these businesses chose not to locate on the Whitakers' property, the response was that they were not interested in the Whitakers' property due to the fact that Whitaker road lead nowhere except into the civic center. R. 382. He noted that the civic center is a "destination site" which is unattractive to commercial businesses. R. 382. He further recognized the road structure is totally different for a destination site as opposed to a restaurant site. R. 383. In other words, the set-up of Whitaker road is not conducive for businesses which has been proven by the lack of development compared to the flourishing areas that surround the Whitakers' property.

Obviously, the combination of the testimony of an expert economist, two realtors, and a life long commercial developer rebuts the Appellee's argument that "not one scintilla of proof" has been presented. Hard proof has been presented. Clearly, there is testimony that the Appellants have attempted to market this property since the completion of Whitaker Road with little success. At worst, this testimony results in a jury question which requires this Court reverse the lower court's decision.

THIS, the 8th day of August, 2007.

Merkel & Cocke, P.A.
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BY: _____
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have this day mailed postage prepaid a true and correct copy of the above and foregoing document to:

Circuit Court Judge Jimmy McClure
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202 French's Alley
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Ben Griffith, Esq.
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Justice Ann H. Lamar, MS Supreme Court
Former Panola County Circuit Judge
P.O. Box 249
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This, the 8th day of August, 2007.

_____
EDWARD P. CONNELL, JR. (MSB #[redacted]