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-Appellant

versus

Case No. 2007-TS-00533 CA

CITY OF BATESVILLE

Defendant-Appellee

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Plaintiffs-Appellants, Julia W. Lange, David L. Lange, James S. Whitaker, Jr. and James S. Whitaker, Sr., by and thorough the Executrix of the Estate, Joyce Whitaker, certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of the Mississippi Supreme Court may evaluate possible disqualification or recusal.

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THIS, the 9th day of July, 2007.

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STATEMENT REGARDING ORAL ARGUMENT

The Appellants believe that an oral argument would be helpful to adequately explain the somewhat confusing facts and extensive procedural history as well as the complex legal issues in this case. In short, oral argument would help facilitate the Court's understanding of the facts and issues.

STATEMENT OF ISSUES ON APPEAL

The Statement of Issues before this Court are as follows:

1. Whether the Panola County Circuit Court properly held that affidavits filed by the Plaintiffs should not be considered by the Court under the parole evidence rule;

2. Whether the Panola County Circuit Court properly held that collateral estoppel applies to bar the Plaintiffs' claim; and

3. Whether the Panola County Circuit Court properly held that the Plaintiffs have failed to show any evidence of damages based on a breach of contract.

STATEMENT OF THE CASE

A. Statement of the Facts.

The Plaintiffs-Appellants ("Plaintiffs," "Plaintiffs-Appellants" or "Whitakers") own property that adjoins the Defendant-Appellee's ("Defendant," "Defendant-Appellee" or "City") property on the Whitaker Property's western border. The City property, located just south of Highway 6 and east of Interstate 55 in Panola County, Mississippi, is often referred to as the "Arena Property" as the City has constructed an arena on the property. Panola County ("County") originally owned the Arena Property and also intended, at one time, to construct a coliseum or arena there.

To secure the Whitaker Property, the County entered into an Agreement for Temporary Easement ("Agreement") with the Whitakers, relating to a strip of land owned by the Whitakers adjacent to the Arena Property. R. 109-111. In the Agreement, the Whitakers agreed to allow the

County to remove 70,000 cubic yards of dirt from the Whitaker Property and move it onto the Arena Property.[1] R. 109 In exchange, the County promised the Whitakers that they would be allowed to donate a strip of land adjacent to the Arena Property, and that on the strip a road would be constructed. R. 110.

Before entering the Agreement, the Whitakers expressed concern about the dimensions of the road to be constructed on the strip of land they would later donate. The County commissioned The Warrior Group, Ltd., an engineering firm in Memphis, Tennessee, to draw topographical maps ("the Warrior Group Plats") showing the soil to be transferred from the Whitaker property, the road, and structures to be constructed.

The Warrior Group Plats show a four-lane road crossing Highway 6 at a major intersection, and running generally from the northwest corner of the Whitaker property to the southwest part of the Whitaker property, along the eastern border of the Arena Property. R. 107-108. It was the Warrior Group Plats that were provided to the Whitakers, and upon which they relied, when they entered into the Agreement. The Agreement provided:

> The purpose of this easement is to allow Panola County to excavate and remove approximately seventy thousand (70,000) cubic yards of dirt, ***as calculated by The Warrior Group, Ltd.,*** from the above described property. R. 109.

Further, the road as contemplated was to continue south of the Whitaker property and north of Highway 6 as a connector which paralleled the I-55 and joined Highway 35.

Later, the City specifically acknowledged that it was accepting the obligation to the Whitakers as outlined in the Agreement. As early as August 3, 1998, Robert Avant, President of the County Board, wrote a letter to the City, stating:

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[1] The dirt, taken from the future road bed, was used directly for the benefit of the County and its successor in interest (the City) to level the Arena Property during site preparation.

> 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. 63 and 132. 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 building of Whitaker Road. R. 67 and 146.

Other proof that the City understood the dimensions and configuration of the road it had promised to build is found in the 1997 "Agreement between Batesville Project, Inc., South Panola Community Hospital, and the City of Batesville" ("the Hospital/City Agreement") between the City and a different party. The Hospital/City Agreement in no way affected the plans to build the Whitaker Road. However, an examination of the exhibits included with the Hospital/City Agreement once again demonstrates the City's clear understanding of the scope of the road to be built adjacent to the Whitaker Property. The Hospital/City Agreement included as an exhibit a plat ("Tri-Lakes Study Plat") which is referred to numerous times in the Hospital/City Agreement. Like the Warrior Group Plats that the County had provided to the Whitakers, the Tri-Lakes Study plat once again indicated a four-lane road crossing Highway 6 ***at a major intersection***, along the western boarder of the Whitaker Property and the eastern border of the Arena Property. The Tri-Lakes Study Plat is more clear evidence that the City understood the scope, nature, and configuration of the road promised to the Whitakers.

At the Board meeting on May 2, 2000, the City voted to move forward "on the agreement between the County and Mr. Whitaker that the City has agreed to honor." R. 63. At the September 5, 2000, Board meeting, the Board voted to determine "the layout of roads in the Civic Center

Area...at a later date." R. 63. By this time, it was widely known that the out-of-state developer was trying to lure Wal-Mart to place an outlet on his land. Both Wal-Mart and an out-of-state developer were placing pressure on City officials to redesign the road plans for the area including the location of a major intersection west of the planned location of Whitaker Road, a location that would favor Wal-Mart to the exclusion of the Whitaker property located to the east of the Arena Property.

In light of the potential for a subsequent breach of the City's contract with the Whitakers, certain members of the Board demanded that the City reaffirm its promise to the Whitakers. Those members wanted a written affirmation of the contract with the Whitakers *in the public record* in case other members of the Board were later inclined to breach the agreement. Thus, on September 5, 2000, a majority of the Board still intended for the City to perform under its agreement, so they voted to build ***"the main road [as] the east most road agreed to in the original agreement."*** R. 64 (emphasis added). In doing so, the City acknowledged publicly - and in writing - that building a road through the Arena property to serve the out-of-state developer's property would not obviate their previous obligations to the Whitakers, and the City reaffirmed its intention to stand by those obligations.

Unfortunately, the vote did not settle the issue. On the morning of October 3, 2000, the City heard testimony from Mississippi Department of Transportation ("MDOT") officials that it would be unlikely for them to approve two roads of the dimensions promised for the Whitaker road with equal access to Highway 6 within 430 feet of each other where both of those roads were less than a half mile from I-55. The City's dilemma was now framed squarely: stand by its contractual obligations to the Whitakers, who had fully performed their part of the bargain, or yield to the pressure of the out-of-state-developer and Wal-Mart at the risk that they might subsequently be unable to honor their obligations to the Whitakers.

Later that day, apparently in response to continued demands by the out-of-state developer, the City went into executive session to discuss "the location of a large retail outlet near the new hospital." R. 64. Afterwards, in open session, a motion was made that would have enhanced a smaller existing opening to the Civic Center property located closer to the out-of-state developer's property. R. 64. The motion was defeated as another idea inconsistent with the obligation to build the main road into the Arena Property on the strip of land conveyed to the City by the Whitakers. Instead, the Board ordered the City Engineer to draw a road design that placed the main entrance to the Arena Property along the western border of the Whitaker property which was in line with the agreement between the parties. R. 64.

In spite of valiant efforts, the board members trying to prevent a breach of the contract with the Whitakers would lose their battle two weeks later. Although placement of the road serving the Arena Property was not on the agenda for its regular meeting of October 17, 2000, the issue of placement of the first road into the Arena Property was heard as the third item on the City's Agenda, in regular session. R. 64-5. No public comment was invited (or heard, other than the objection by counsel for the Whitakers), yet a vote was taken to adopt a plan for a major intersection proposed in a plat previously submitted by the out-of-state developer that had been previously rejected by the City. R. 64-5. The plan in question called for a major road to intersect Highway 6 near the middle of the Arena Property, before crossing through the Arena Property, and turning southwesterly to serve the out-of-state developer's land located to the west to the exclusion of the Whitaker Property. The Whitakers were never provided with a copy of this plan.

The Whitakers finally received a road on January 14, 2004, over seven years after the execution of the Agreement and over three years after their property was taken. Moreover, the road differs from what the Whitakers were originally promised as it is not a main intersection or access

to the south of Highway 6, it has no stop light, and is not, and never will be, part of a connecting artery joining Highway 35 and Highway 6. As such, the Whitakers have suffered a serious devaluation of their property as a result of not receiving a road as originally agreed to in a reasonable amount of time.

B. Course of Proceedings and Disposition Below.

On October 27, 2000, the Whitakers timely filed a Bill of Exceptions, appealing the action of the Board. R. 163. The Whitakers provided the City with a Notice of Claim on March 14, 2001, and filed a complaint for damages in the District Court on April 4, 2001, stating certain federal claims and reserving the right to join State tort claims once administrative prerequisites under the Mississippi's Tort Claims Act ("MTCA") were satisfied. On April 16, 2001, the Whitakers filed with the Circuit Court in which the Bill of Exceptions was pending a Motion to Reserve the Right to Have Constitutional Issues Adjudicated in Federal Court, pursuant to *Jennings v. Caddo Parish Sch'l Bd.*, 531 F.2d 1331 (5th Cir. 1976). The action in District Court was stayed and the Whitakers then amended the federal action to include State tort claims.

The Panola County Circuit Court ("Circuit Court") handed down its Order on May 31, 2001. R. 202. The only findings of fact made by the Court was that the City had not acted arbitrarily and capriciously by approving the location of a road to service a community hospital and other commercial developments as the primary road. R. 202. The Whitakers timely filed their Notice of Appeal.

The Mississippi Court of Appeals ruled on the Whitakers' appeal on September 3, 2002. R. 265-270. The Court noted that the matter was not ripe for adjudication as their had not yet been established a breach of the agreement. R. 269. In this regard, the Court specifically noted that since there was no time limitation contained within the contract; a reasonable time for performance should

be implied. R. 270. As there had been no evidence offered as to what would constitute a reasonable time to perform under a development contract, the Court had nothing to review with regard to timeliness. R. 270. Moreover, the Court noted that at some point, delay in and of itself could constitute a breach of the City's duty to build the road. R. 270.

In short, the Mississippi Supreme Court of Appeals recognized that one could not assume a breach of the City's obligation to build the road which it was obligated to build for the Whitakers, and that until the City gave notice of its intention to not comply with its obligation or until an impossibility of performance was proven, any question of breach was premature. Such an impediment to interpretation of the contract and determination of breach no longer exists. The City has now tendered a road which it contends complies with its contractual obligations. For the first time, the question is ripe for consideration as to the precise nature of the City's obligations with respect to Whitaker Road and whether the road tendered satisfies the obligations as to description and configuration as well as timeliness.

Following the rendering of this opinion by the Mississippi Supreme Court of Appeals, the stay in the District Court was lifted. On January 30, 2004, the City filed a Motion for Summary Judgment based upon these same legal principles. The District Court denied the same on August 11, 2004.

Shortly before trial, the City filed its Motion in Limine to Exclude Parol Evidence. The "primary issue raised by the instant motion is whether or not the phrase 'a public road' creates an ambiguity in the July 31, 1996, Agreement...." The District Court denied the Defendant's Motion in Limine and concluded that the Whitakers could proffer parol evidence to aid the jury's decision as to what was intended by the phrase "public road" as promised to the Whitakers. However, the District Court made other "important rulings" and expanded the scope of its Order. Specifically, the

District Court held that the Whitakers could:

> attempt to prove that their constitutional right to just compensation for the taking of their property was violated because the defendant breached their agreement by (1) building the road in an untimely matter; and/or (2) not constructing the road according to the specifications agreed upon (as decided by the fact finder after hearing the parol evidence).

However, in offering proof of the second prong, the District Court held that "the plaintiff may not argue that the specifics were to include a 'main' or 'primary' road since the state courts have already ruled otherwise."

Following this Order, the District Court entered its Order Certifying Interlocutory Appeal dated January 3, 2005. The Whitakers' filed their Petition for Permission to File Interlocutory Appeal on January 13, 2005, which was denied by the Fifth Circuit Court of Appeals.

Following this denial, the parties held a teleconference with the District Court Judge who requested that the Defendant renew its Motion for Summary Judgment. This was done which lead to the District Court's Order of April 11, 2005, and an appeal to the Fifth Circuit Court of Appeals. The District Court recognized that he had "denied the defendant's motion for summary judgment on essentially the same grounds as presently set forth in the instant motion." R. 321. However, he reversed his initial reasoning and decided that the Mississippi Court of Appeals had already ruled on whether the Whitakers were to receive the "main" or "primary" road. R. 323. He further held that "all other issues" "are inextricably intertwined with the state court's decision in *Lange*, thereby precluding a trial in federal court under the *Rooker-Feldman* doctrine." *Id.*

On appeal, the Fifth Circuit recognized that the Plaintiffs 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 Plaintiffs to seek compensation through state court in Mississippi. R. 324. As such, the Plaintiffs filed their action for breach of contract in Panola County Circuit Court on January 19, 2006. R. 3.

In the Panola County Circuit Court action, the Plaintiffs alleged in their Complaint that "[T]he City failed to construct Whitaker Road as the main road into the area in question in a timely manner despite the Whitakers providing the dirt as required under the agreement." R. 7. As discovery was already complete, the Defendant moved forward with the filing of its Motion for Summary Judgment. In doing so, the Defendant asserted collateral estoppel, res judicata, ripeness and exhaustion of remedies. R. 93. In finding for the Defendant, the Panola County Circuit Court did not consider the affidavits filed by the Plaintiffs based upon the parole evidence rule, found that collateral estoppel applies, and held the Plaintiffs failed to show any evidence or damages based on a breach of contract. R. 406. This ruling led to the instant appeal.

SUMMARY OF ARGUMENT

The Panola County Circuit Court improperly held that affidavits filed by the Plaintiffs should not be considered by the Court under the parole evidence rule as the term "public road" is susceptible to more than one interpretation, the Agreement is incomplete as it fails to set forth the specifics of the "public road," and the parties to this case dispute the nature of the consideration bargained for.

Collateral estoppel does not apply to bar the Plaintiffs' claim as the bill of exceptions process does not take away the Whitakers' right to litigate. The issue of breach of contract was not essential to the decision of the Mississippi Court of Appeal which specifically declined addressing the issue as being premature until such time as the road was completed or the City indicated its intention not to perform.

Finally, the Plaintiffs have proven the existence of questions of fact as to: (1) the conformity

of the road to the contract requested and (2) the untimeliness of the building of Whitaker Road. The Plaintiffs' damage proof addresses damages caused both by compliance deficiencies and untimeliness.

ARGUMENT

A. The Affidavits Filed by the Plaintiffs Should Be Considered by the Court under the Parole Evidence Rule Which Creates a Question of Fact as to Whether the City Breached its Contract with the Whitakers.

Based upon extensive discovery, a question of fact exists as to whether the City breached its contract. As stated above, the City specifically acknowledged time and time again that it accepted the obligations of the County to the Whitakers. In determining the nature of those obligations, this Court must determine, as District Court Judge Pepper did, that an ambiguity exists making the parole evidence rule inapplicable and requiring a look outside the four corners of the Agreement.

Whenever the terms of a contract are susceptible to more than one interpretation, or an ambiguity arises, or the intent and object of the contract can not be ascertained from the language employed, parole evidence may be introduced to show what was in the minds of the parties at the time of the making of the contract. *See Hadad v. Booth*, 82 So.2d 639, 643 (Miss. 1955). The ambiguity may arise from words which are uncertain when applied to the subject matter of the contract. *Id.* Specifically, the Mississippi Supreme Court has stated the following:

> Where a contract is to construed by its terms alone, it is the duty of the court to interpret it; but where its ***meaning is obscure***, and its ***construction depends upon other and extrinsic facts*** in connection with what is written, the ***question of interpretation should be submitted to the jury***, under proper instructions. *Id.* (emphasis added).

The Mississippi Supreme Court went on to state that "[I]t is for the jury to determine what is the agreement of the parties, where there is uncertainty in a written contract because of ambiguity or doubtfulness." *Id.*

This situation has arisen in defining simple words in several different settings. For example, several cases have dealt with the definition of the word "timber" in timber contracts. In *Kerl v. Smith* 51 So. 3 (Miss. 1910) involving a written contract for the sale of timber, the Mississippi Supreme Court said:

> [I]t was competent for the Plaintiff to show what was meant by the word 'timber' in this contract, and it was error for the Court to exclude testimony offered for this purpose. The use of the word 'timber' in the contract, with nothing to explain in the contract what kind of timber is meant, it is not so accurate designation of what was sold as to preclude investigation as to what was meant by it in this ambiguous contract. *Id.* at 4.

The Mississippi Supreme Court went on to hold that "[S]uch testimony is in no sense contradictory of the terms of the contract, but ***it is essential to explain its meaning, since the contract itself does not do that.***" *Id.* (emphasis added).

Whether parole evidence should be allowed in a contract to put down an artesian well was the issue in *Hattiesburg Plumbing Co., v. Carmichael & Co.*, 31 So. 536 (Miss. 1901). The Court held that the word "artesian," became a term of equivocal significance, standing unexplained in the contract. *Id.* at 537. The Mississippi Supreme Court held that it was, therefore, competent to introduce parole testimony to show what meaning it had in the particular contract. *Id.* Therefore, the lower court was reversed, with the Mississippi Supreme Court stating that the lower court "should receive all parole testimony allowing what meaning this word 'artesian' had as used by the parties in this contract." *Id.*

These two cases are analogous to the case before this Court. As stated, all are in agreement that the City had an obligation to build a "public road", but there is disagreement at to the meaning attributed to that term in the minds of the Board and the Whitakers at the time of the making of the Agreement. Just as the term "timber" or "artesian well" "are susceptible to more than one

interpretation or meaning," "public road" is as well, a term which requires the introduction of parole evidence of the understanding of those involved in making the Agreement to show or clarify its intent.

The Agreement is incomplete as it does not set forth the specifics of the "public road" to be built. Mississippi law is clear that this Court must not only determine whether the Agreement is ambiguous, but also determine whether or not it is incomplete on its face. Specifically, under Mississippi's general parole evidence rule, a document which is first found to be ***incomplete*** or ambiguous may be explained, but not contradicted, by extrinsic evidence. *See Hooker & Signs, Inc. v. Roberts Cabinet Co., Inc.*, 683 So.2d 396, 400 (Miss. 1996). Obviously, the Agreement is incomplete as the specifics of the "public road" are not included in the contract. Specifically, the Agreement is silent as to the location, description and date of completion and whether the "public road" agreed to was to be the only road, the main road, the first road, or a road controlled by a stop light. The Whitakers contend its public road was to be the first and main access road and would be controlled by a stop light. The Defendant argues it simply had to eventually provide any sort of "public road" which it chose to build. Therefore, the Agreement is incomplete and the testimony of the parties to this Agreement (i.e. the Whitakers and the County Board of Supervisors) is necessary to complete the terms of the Agreement.

This Court in an analogous case has held that parole evidence should be allowed in a situation such as this. Specifically, in *Quick and Grice v. Ashley,* 86 So.2d 40 (Miss. 1956), suit was filed for the recovery of damages for the breach of a warranty in a contract for the drilling of a water well to supply the appellee's home. The parties entered into a written order for the drilling of a well. A question arose as to the terms of the written order as they were indefinite as to the kind and size of the well to be drilled. *Id.* The Court held that the "order was so uncertain and indefinite that it was

subject to be explained by oral testimony" and "the order did not state whether it was to be a water well, a well, a gas well, or a sulphur well." *Id.* at 42.

The facts in this case are similar as a question has arisen as to the meaning of the term "public road" as it is indefinite as to the specifics surrounding the "public road" to be built. Therefore, it is "subject to be explained by oral testimony" of the Whitakers and the County Board who were instrumental in the formation of the Agreement.

The Agreement begins with the statement, "For and in consideration of the sum of ($10.00) and *other good and valuable consideration.*" Mississippi law has long been clear that the principle that parole evidence is not admissible to vary terms of a written contract has no application to the consideration recited in the contract, and true consideration for conveyance may by shown by parole evidence. *See Raleigh State Bank v. Williams*, 117 So. 365 (Miss. 1928). In other words, if a dispute arises as to the nature of the consideration to a contract, extrinsic evidence regarding the proper consideration is admissible. The case of *Management, Inc., v. Crosby*, 197 So.2d 247 (Miss. 1967) dealt with two deeds with almost exact language. *Id.* at 248. Specifically, both deeds stated "consideration of ($10.00) cash in hand paid, and other good and valuable consideration." The question arose as to whether a 6% covenant was a part of the consideration for the two deeds. *Id.* at 251. The Court, noting that the deed stated "a consideration of ($10.00) and other good and valuable consideration," held that parole evidence was admissible to show the true consideration. *Id.* (citing *Morehead v. Morehead,* 75 So.2d 453 (Miss. 1954)).

Here, the Whitakers dispute whether they have received the true consideration bargained for. Specifically, the Whitakers bargained to receive the main public road to this area which was going to be controlled by a stop light in consideration for giving the County, and later the City, dirt to be used to build the Arena and land on which to construct the road. As a dispute exists as to the true

consideration running between the Whitakers and the County, parole evidence is necessary to show the true consideration bargained for.

In conclusion, the term "public road" is susceptible to more than one interpretation, the Agreement is incomplete as it fails to set forth the specifics of the "public road", and the parties to this case dispute the nature of the consideration bargained for. As a result, parole evidence from the parties to the Agreement – the Whitakers and the County Board – is admissible to clarify the term "public road"or to supply the specifics of the "public road"as the consideration for the Agreement.

While any of these three individual factors standing alone would result in the oral testimony of the parties to the Agreement being admissible at trial, the combination of these factors certainly results in the admissibility of this oral testimony. Judge Pepper agreed when this same issue arose in the federal case. He expressly denied the City's request and held that the phrase "a public road" is ambiguous and the Whitakers "will be allowed to offer parole evidence to the jury to define what the Plaintiffs argue was meant by 'a public road'." He reasoned:

> In this instance, "public road" could mean anything from a gravel to a multi-lane boulevard. But that is all the Court may legally do: decide whether the agreement is ambiguous, not what was actually meant by "a public road." What was meant by "a public road" is a decision that can be made only by the jury. Accordingly, the Court concludes that the plaintiff can proffer parole evidence to aid the jury's decision as to what kind of public road was promised to the plaintiffs.

It is clear from the affidavits of Mr. Land, Mr. Garner, and Mr. Chandler that the Whitakers have not received what they bargained for:

> [A]n access road which would be the ***main road or primary*** access to the property being developed in the southeast quadrant of the intersection of Interstate 55 and Mississippi Highway 6. The road was to be a five lane road ***controlled by a traffic signal*** on Mississippi Highway 6.... (emphasis added). R. 346-48.

They are expected to further testify that:

> [T]he ***present road configuration*** that is currently built ***does not satisfy*** either the

terms of ***the agreement*** as two roads now exist with House-Carlson Road being the primary and main road controlled by a stop light.... R. 346-48.

Finally, they have discussed with the Mayor and several Board members of the City of Batesville "that the placement of House-Carlson Road in its current configuration with a stop light was not Panola County's intent and does not comply with the agreement between the parties." R. 346-48.

In sum, it is clear from those who actually negotiated the contract between Panola County and the Whitakers that the City did not uphold its end of the Agreement. At a very minimum, a question of fact is created for the jury who must be allowed to hear this testimony and decide whether the Agreement was breached. Yet, the Panola County Circuit Court found these affidavits inadmissible and did not consider the same since the minutes of the Panola County Board of Supervisors failed to reflect these sentiments. R. 412. In doing so, the Panola County Circuit Court cites cases that are inapplicable and fails to address the issue.

The Panola County Circuit Court stated that Panola County's "acts must be evidenced by an entry on their minutes" and the onus was on the Plaintiffs "to see that the contact was legally and properly recorded on the minutes of the board." R. 412. The Plaintiffs recognize that Mississippi law supports the proposition that the minutes of a board are the evidence of what a board did. Hence, the individuals composing the board cannot act individually on behalf of the municipality. However, it is also equally as well settled that where the minutes of a board are ambiguous, parole evidence is allowed. This is so as the rules of evidence and the rules of law applicable to ordinary contracts are applicable to municipal contracts. *Amite County v. Mills*, 138 Miss. 222 (Miss. 1925). Specifically, in *State Dep't v. Duckworth*, the Mississippi Supreme Court stated, "As we understand the law of this State, parole evidence may always be introduced to show to what extent the parties actually intended that an accord and satisfaction should reach." 172 So. 149 (Miss. 1937). An issue

(>cites from appellee's argument, not the opinion which is contrary

arose as to whether oral proof of the agreement should be allowed. *Id.* at 150. The Mississippi Supreme Court did not rule that parole evidence is never allowed in interpreting the intent of a board, but rather, individual members of a board cannot unilaterally bind a board. This Court can also look to the case of *Amite County* decision where it was said 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. 138 Miss. 222 (Miss.1925). Finally, case law from other jurisdictions support the proposition that parole evidence can be allowed to interpret an ambiguous term in the minutes of a municipality.[2]

In the case at hand, there is no issue that the City, as successor in interest to the County, is bound by the Agreement between the County and the Whitakers. Rather, the issue is the interpretation of the ambiguous term "public road" as used in the Agreement. Therefore, the rule that boards are bound by their minutes is inapplicable to the issue at hand and a jury must be allowed to here the damming testimony of those who actually negotiated the Agreement, resulting in reversal of the Panola County Circuit Court's decision.

B. Collateral Estoppel Does Not Apply to Bar the Plaintiffs' Claim.

Two federal judges have already determined that the Mississippi Court of Appeal's decision does not result in the applicability of *res judicata* or collateral estoppel to the Plaintiffs' breach of

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See Mobile County v. Linch, 198 Ala. 57 (1916) (allowing parole evidence to settle a dispute about the balance due where their was uncertainty that grew out of resolutions of the board of revenue and road commissioners recorded on the minutes); *see also, Ratledge v. Blount County Bd. of Educ.*, 1995 Tn. App. Lexis 643 (1995) (holding that parole evidence is allowed to supplement a boards' minutes when there is an ambiguity; *see also, Zaskey v. Town of Whatley*, 61 Mass.App.Ct. 609 (2004) (holding that courts do not have to rely only on the specific wording of a town's resolution if it is ambiguous, extrinsic as parole evidence can be used); *Bartolacci Appeal*, 37 PA.D.&C.2d 764 (1964) (where landowners challenged the decision of a Pennsylvania zoning board, parole evidence was introduced to show what was in fact done where minutes appeared on their face or were shown to be incomplete, incorrect, or otherwise failed to show what actually occurred).

contract claim and the Fifth Circuit explicitly squelched in its opinion any argument that its own decision resulted in *res judicata* or collateral estoppel.

Notwithstanding such prior determinations, the Panola County Circuit Court has accepted the Defendants argument that the Plaintiffs' breach of contract claim is barred as being previously decided. Unlike *res judicata*, the lower Court recognized that collateral estoppel "applies only to questions actually litigated in a prior suit, and not to questions which might have been litigated." R. 412. Accordingly, the narrow scope of the bill of exceptions procedure should not preclude the Whitakers' breach of contract claim from being brought in a trial in Circuit Court. In fact, the Panola County Circuit Court recognized that Mississippi law only precludes a party from re-litigating "a specific issue *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." R. 411 (citing *Dunaway v. W.H. Hoper & Assoc., Inc.*, 422 So.2d 749, 751 (Miss. 1982) (emphasis added)).

Mississippi preclusion doctrine prevents the *re-litigation* of claims and issues. If an aggrieved party has never been given the chance to litigate in the first place, there can be no preclusion. Accordingly, while the Panola County Circuit Court found that the Plaintiffs were not precluded from bringing a breach of contract cause of action separate and apart from their appeal by the bill of exceptions procedure, the bill of exceptions process only provided an opportunity for the Circuit Court to determine whether the act of the municipality was arbitrary or capricious and accordingly beyond its power. R 411. If the Circuit Court had determined that the City's act was arbitrary or capricious, the bill of exceptions remedy was to require the City to reverse its decision or rescind its act. The bill of exceptions procedure was never designed to take away or become a substitute for a party's *right to litigate* a breach of contract claim against the City. To hold otherwise

would allow municipalities to use the limitations inherent in a bill of exceptions procedure to avoid the consequences of subsequently breaching contracts. A breach of contract action does not address the same issues or seek the same relief as a bill of exceptions (i.e., the subsequent reversal of a board's decision), but seeks instead compensation from the breaching municipality. Acceptance of the Defendant's argument and the lower court's decision would deny the Whitakers the opportunity to ever present evidence of breach and examine witnesses concerning the wrongdoing of the City, and the damages resulting from the City's breach of contract.

While the Mississippi Court of Appeals opinion contains some discussion of whether the City had already breached its contract with the Plaintiffs, the issue was determined to be premature and no decision rendered thereon. The Mississippi 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 Plaintiffs were never given the opportunity to investigate or present extrinsic evidence beyond that which was self-servingly reviewed by the Board following an off-the-record executive session which was closed to the public.

The lower court found collateral estoppel applicable because breach of contract was merely mentioned in the Plaintiffs' bill of exceptions. R. 411. However, the Plaintiffs' claims cannot be collaterally estopped as they were never presented to, let alone determined by, the Mississippi Court of Appeals. While the Court 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 stage, delay can itself be the breach of the duty to build the road within a reasonable time." *Id.* at 270. Clearly, such qualified

language cannot be construed as 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 on a reasonable time to perform under a development contract was introduced, and thus we have nothing to review." *Id.* at 270.

The lower court failed to discern that the Plaintiffs are not collaterally estopped from presenting all of their claims inasmuch as any commentary by the Mississippi Court of Appeals on the issue of breach was not essential to its judgment. To understand this point it must be remembered that the Plaintiffs are not claiming in this Court that the Defendants breached their contract *by building* House-Carlson Road, but rather, *by failing* to build Whitaker Road, as a main intersecting road controlled by a traffic light, within any semblance of a reasonable time and as set forth in the Warrior Group Plats. The Court of Appeals, in reviewing the bill of exceptions procedure, was addressing the authority of the Board to approve and build a road to serve a hospital. The Court was not rendering an advisory opinion as to the hypothetical question of whether ultimately not building the Plaintiffs's road, as the main road, in a reasonable amount of time pursuant to the Warrior Group Plats would constitute a breach of contract. 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 can not bar the full and fair litigation of the Plaintiffs' claims.

The Panola County Circuit Court cites in support of its decision *Bd. of Trustees of State Insts. of Higher Learning v. Brewer*, 732 So.2d 934 (Miss. 1999). R. 411. The *Brewer* case, where no bill of exceptions process was followed, does not support the Defendant's argument. It appears that the Panola County Circuit Court cites *Brewer* for the proposition that the Plaintiffs could have elected either to pursue a bill of exceptions process or file in circuit court. However, case law is clear that

the present Plaintiffs never had such a choice. Had these Plaintiffs chosen to initially file in circuit court for a breach of contract, this action would have been met with a Motion to Dismiss that would have been granted. In *Davis v. City of Baldwin,* 2000 WL 994469, *2 (N.D. Miss.), a plaintiff brought a suit under various federal and state law. Judge Davidson found that the plaintiff failed to pursue an appeal of the decision of the City of Baldwin pursuant to *Miss. Code Ann.* §11-51-75. *Id.* Therefore, Judge Davidson found that the plaintiff's federal claims were not ripe as the owner of the property had failed to pursue the state law judicial remedies and dismissed the plaintiff's takings claim. *Id.*

In *Houck v. Tate County,* 1999 WL 33537173, *2 (N.D. Miss.), the plaintiff's claim was that his property had been taken without just compensation. Citing the same cases that Judge Davidson had in the *City of Baldwin* case, Judge Neal Biggers held that the plaintiff had failed to pursue an appeal of any decision of the board of supervisors pursuant to *Miss. Code Ann.* §11-51-75. *Id.* Accordingly, Judge Biggers held that the plaintiff's Fifth Amendment takings claim was not ripe as he had failed to pursue state law judicial remedies, dismissing the plaintiff's takings claim. *Id.* Therefore, it is clear that the Whitakers did not voluntarily choose to bring their state action first as had they not done so, the Defendant would have filed a motion to dismiss for failure to pursue state claims.

The *Brewer* decision in fact lends support to Plaintiffs' claim of entitlement to a trial of its breach of contract claim before a jury of their peers. The *Brewer* case clearly rejected the notion that a plaintiff's rights to due process can be satisfied by a compulsory appearance before an administrative tribunal subject only to a limited review of the circuit court. Specifically, the *Brewer* Court stated:

> Our notions of due process would be impugned by requiring Brewer to pursue a breach of contract claim against the Board in an administrative tribunal ultimately answerable to the Board itself and subject to the limited review of the circuit court allowed under § 11-51-93. *Bd. Of Trustees of State Insts. Of Higher Learning v. Brewer*, 732 So.2d at 937.

For the same reasons stated above regarding *res judicata*, the Fifth Circuit's opinion does not collaterally estop the Plaintiffs' breach of contract claim.

C. The Building Of Whitaker Road Was Untimely Which Resulted In Damages to the Whitakers.

Both sides recognize that the primary issue for the jury in this case revolves around the obligations of the County, and subsequently the City. There is disagreement as to the meaning and specifics of the "public road" contemplated by the Agreement. On the one hand, the City contends it was required simply to provide a "public road" of some kind to the Whitakers. On the other hand, the Whitakers contend that their agreement with the County, which was subsequently adopted by the City, required the construction on their property of the main access road to the area south of Highway 6, which access was to be controlled by a stoplight. As support for this proposition, affidavits of Calvin Land and Lee Garner who were on the Board and involved in the negotiations with the Whitakers and David Chandler, who was the Panola County Administrator, have been provided. Each knew the intent of the parties with respect to the road and all support the Whitakers' version.

Should the jury side with the Whitakers as to liability, it will then, of course, be asked to assess damages. The Panola County Circuit Court, however, somehow found the seven year delay in the provision of the road resulted in no damages to the Plaintiffs. Obviously, the Plaintiffs have incurred damages not only from not receiving the "main road" into the area in question, but also due to the delay in receiving any road. In other words, the Whitakers have suffered damages due to devaluation of their property because of the undesirable access and the seven year delay in being able

to market their property due to a lack of any access. The Panola County Circuit Court found that no jury question exists as to the timeliness of the building of Whitaker Road. R 413. However, the Whitakers did not receive a road until over seven years after the execution of the Agreement and over three years after their property was taken. The reasonableness of such a delay results in a question of fact.

To assist with the issue of damages, the Whitakers hired Dr. Bruce Lindeman to analyze the issues of damages only. Dr. Lindeman was asked to assume that the jury's interpretation of the contract was consistent with Whitakers' interpretation of the Agreement. R. 281-82. Dr. Lindeman then proceeded to evaluate the Whitaker property from two perspectives: (1) as it would have existed had the contract been complied with in a timely fashion, and (2) as the same property existed until 2004 without any access and ultimately as it was devalued by the absence of a stop light and the existence of an alternative access road which was afforded a stop light. R. 295-97. Whitakers' damages are not based upon the approval and construction of House-Carlson Road, but upon the failure of the City to comply with its contractual obligations to the Whitakers with respect to their road.

The development of the Whitaker property was adversely affected by its lack of access until 2004 and the undesirable nature of the access that was belatedly provided. Dr. Lindeman simply compares what should have existed to what was ultimately provided and analyzes the effect of those differences upon the developmental value of the Whitaker property.

It is clear that Dr. Lindeman has made an excellent analysis of the situation and rendered a viable opinion as to damages. Specifically, Dr. Lindeman first assumed that the City complied with its contract with the Whitakers to build Whitaker Road as the "main road" in the expectation that a

traffic signal would be installed at the intersection when so warranted by traffic. R. 295-96. Under this scenario, Dr. Lindeman assumes a scenario based upon the Whitakers receiving a road of the type indicated in the earlier plats. R. 295-96. Dr. Lindeman then values the Whitaker property today. Dr. Lindeman then logically concludes that the Whitakers, as opposed to Hyneman (the out of state developer that sold his property to Wal-Mart), would have sold their property to the outlets which currently sit on Hyneman's property. R. 296-97. Therefore, whether or not the Mississippi Court of Appeals has held that the City's approval and construction of House-Carlson Road in and of itself did not result in a breach of any contractual obligation to the Whitakers is irrelevant. The issue is whether the Whitakers' contractual expectations were ultimately met by the construction of a "main" road accessing the area through an intersection controlled by a traffic signal. Dr. Lindeman logically concludes that had Whitaker Road been timely provided as the main protected access Whitaker Road would have received the sales. In other words, had the City upheld its end of the Agreement, Whitakers' property adjacent to Whitaker Road would have been developed just as the Hyneman's property currently is. R. 295-97. Such an opinion, taking into account the prices paid by the outlets on the Hyneman property, clearly is sufficient to defeat summary judgment as to contractual damages.

CONCLUSION

In conclusion, the Panola County Circuit Court should have considered the affidavits of the people who have the most knowledge of the Agreement between the parties. If the Panola County Circuit Court had done so, it would have found the existence of a question of fact as to whether the road ultimately provided complied with the Cities' obligation to provide a main road protected by traffic signals as all parties to the Agreement acknowledge was intended. Collateral estoppel is

inapplicable as it is clear that the Mississippi Court of Appeals has not rendered a decision as to whether the contract between the parties has been breached. Finally, the seven year delay in the building of Whitaker Road alone creates a question of fact of timeliness and the untimely delay obviously resulted in damages to the Plaintiffs.

THIS, the 9th day of July, 2007.

Merkel & Cocke, P.A.
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BY: Edward P. Connell, Jr.
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Attorneys of Record for Appellants

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:

Ben Griffith, Esq.
123 South Court
P.O. Drawer 1680
Cleveland, MS 38732

This, the 9th day of July, 2007.

Edward P. Connell, Jr.
EDWARD P. CONNELL, JR. (MSB #[redacted]