IN THE SUPREME COURT OF MISSISSIPPI

DENNIS M. McLEMORE AND WIFE,
TAMMY C. McLEMORE — APPELLANTS

v. — NO. 2007-CA-00597

TALBOT BROS. CONTRACTING CO., INC.;
TALBOT BROS. GRADING CO., INC.; AND
THE MISSISSIPPI TRANSPORTATION COMMISSION — APPELLEES

BRIEF OF APPELLEE

On Appeal From the Circuit Court
of DeSoto County, Mississippi

(ORAL ARGUMENT REQUESTED)

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COMMISSION

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CERTIFICATE OF INTERESTED PARTIES

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. Mississippi Transportation Commission, its agents and employees, Appellee.

2. Jim Hood, Attorney General for the State of Mississippi, Richard G. Noble, Crosthwait, Terney & Noble, PLLC, Indianola, MS, J. Anthony Williams, Office of the Attorney General, Jackson, MS, attorneys for Appellee, Mississippi Transportation Commission.

3. Dennis M. McLemore and Tammy C. McLemore, Appellants.

4. J. Walker Sims, Southaven, MS, attorney for Appellants.

5. Talbot Brothers Contracting, Co. Inc., and Talbot Brothers Grading Co., Inc., Nesbit, MS, remaining defendants.

6. Shea Stewart Scott and Wilton V. Byars, III, Daniel, Coker, Horton & Bell,

Oxford, MS, attorneys for Talbot defendants.

7. Honorable Robert P. Chamberlin, Circuit Court Judge, Hernando, MS.

Respectfully submitted this the 17th day of October, A.D., 2007.

MISSISSIPPI TRANSPORTATION COMMISSION

BY: _____

RICHARD G. NOBLE, MB [redacted]
Counsel of Record for Appellee, MTC

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STATEMENT OF ISSUES

I. 1. Whether the trial judge was correct in his application of the Mississippi Tort Claims Act to the tort-based claims of Plaintiffs by granting the Motion for Summary Judgment of Mississippi Transportation Commission.

and/or

2. Whether Plaintiffs admitted failure to properly file their claims against MTC pursuant to the MTCA bars recovery against Mississippi Transportation Commission, causing summary judgment to be properly granted by the trial court.

II. 1. Alternatively, whether the eminent domain judgment in favor of the McLemores in the amount of $1,425,320.00 ($903,000.00 damages to the remaining property) constitutes all the damages due and bars the McLemores' suit.

2. Alternatively, whether the McLemores' lawsuit against Mississippi Transportation Commission is barred by the statute of limitations as set out in §11-46-11(3), Miss. Code Ann.

3. Alternatively, whether Mississippi Transportation Commission can be held liable for the negligence of Talbot, who was the prime contractor and was totally responsible for the highway construction.

4. Alternatively, whether Mississippi Transportation Commission is immune from federal constitutional claims.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is respectfully requested. Oral argument should be of assistance to the Court in distinguishing between the proper application of Mississippi law in this case as contrasted with unsupported conclusions.

STATEMENT OF THE CASE

This case is a damage lawsuit. Dennis and Tammy McLemore (hereinafter referred to as "McLemores") filed their Complaint against Mississippi Transportation Commission (hereinafter referred to as "MTC") and Talbot Bros. Contracting Co., Inc. and Talbot Bros. Grading Co., Inc., (hereinafter referred to as "Talbot") alleging negligent construction of a state highway and seeking money damages in the Circuit Court of Desoto County, Mississippi. This case comes on the heels of an eminent domain action against the McLemores by MTC where the McLemores were awarded just compensation including damages to their property in the amount of $1,425,320.00 on February 16, 2005. (R. 67. R.E. 48)

MTC filed its Answer and Defenses (R. 55, R.E. 36), and then filed its Motion for Summary Judgment and Addendum (R. 90, 108, R.E. 50, 56) on several grounds, but primarily that the McLemores failed to file their tort-based action pursuant to the Mississippi Tort Claims Act (hereinafter referred to as "MTCA"), §11-46-1, §11-46-7, Miss. Code Ann.[1] Other grounds included, the McLemores have been fully compensated in the eminent domain action for all damages to their property; the claims against MTC are barred by the statute of limitation set out in §11-46-11(3), Miss. Code Ann; MTC was immune from liability pursuant to §11-46-9(1)(p), Miss. Code Ann.; and finally, MTC is not liable for the negligence of the contractor, Talbot.

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[1]The effect of MTCA is to provide the exclusive remedy for damages for the McLemores' claims. This statutory requirement is strictly applicable to MTC as a governmental entity.

The McLemores responded by admitting that their lawsuit was not filed under the MTCA, but rather on constitutional grounds.

On July 28, 2005, the Motion for Summary Judgment was argued before the trial judge, and on August 18, 2005, summary judgment was granted for MTC. Final Judgment, pursuant to MRCP 5 (B), was granted on March 13, 2007. Consolidation of Cause No. 2005-CA-2076-SCT and this case sub judice was granted on March 8, 2007. R. 17, R.E. 124) This appeal followed.

Correctly stated, the pertinent facts are as follows:

1. MTC is a governmental entity as defined in §11-46-1, Miss. Code Ann. (R. 6, R.E.6)

2. MTC can only be sued in accordance with the MTCA.

3. The MTCA has a one (1) year statute of limitations. (§11-46-11(3) Miss Code Ann.)

4. The Complaint filed by the McLemores demands recovery of damages from MTC as compensation for injuries to their property and person due to highway construction. (R. 6, R.E. 6)

5. The McLemores recovered in an eminent domain action Case No. 99-0711, Special Court of Eminent Domain an award of $1,435,320.00, as just compensation for acquisition of 174 acres and damages to the 1,806 acres of remaining property. The damage to the remaining property totaled $903,000.00 (1,806 acres x $500.00 per acre). (R. 67, R. E. 48)

6. Talbot was the prime contractor for the highway construction through the McLemore property and was totally responsible for the construction work. (R. 94, R.E. 54)

7. MTC did not perform any work on the construction project. (R. 94, R.E. 54)

8. All excavation and erosion and siltation control matters were the sole responsibility of the contractor Talbot. (R. 94, R.E. 54)

9. The McLemores' Complaint is a negligence tort action seeking money damages from MTC and Talbot. (R. 6, R.E. 6)

10. The MTCA applies to all claims for the recovery of damages for injury to property or person (tort claim) against a governmental entity.

11. MTCA is the remedy for claims for money damages against MTC by the McLemores, exclusive of any other civil action or proceeding.

12. The McLemores admit that they did not file their claims against MTC pursuant to the MTCA, but rather on constitutional grounds (R. 351, R.E. 20) (Appellant Brief 9).

13. The trial court found the McLemores' claims against MTC are tort-based and are subject to the MTCA. (R. 352, R.E. 121)

14. The McLemores' claims are barred by the applicable statute of limitations set forth in §11-46-11(3), Miss. Code Ann., because the McLemores' did not proceed properly under the MTCA. (R. 352, R.E. 121)

15. The plans and specifications for the highway project were in conformity with the engineering and design standards in effect at the time. (R. 94, R.E. 48)

16. On August 18, 2005, the trial court granted MTC's Motion for Summary

Judgment (R. 351, R.E. 120), and dismissed the McLemores' Complaint and claims against MTC on September 23, 2005. (R. 354, R.E. 123) Talbot remains a defendant in the lower court action.

17. On March 13, 2007, the trial court entered Final Judgment with respect to MTC, after granting summary judgment in favor of MTC on August 18. 2005. (R.E. 124)

SUMMARY OF ARGUMENT

There is no genuine issue of fact or law to dispute that the McLemores' Complaint is clearly tort-based, and subject to the Mississippi Tort Claims Act. Mississippi Transportation Commission is sued, along with its contractor, Talbot, for money damages based on allegations of negligence. Mississippi Transportation Commission's position is that the Mississippi Tort Claims Act is the exclusive remedy for claims for monetary damages against it. The McLemores admit that they did not file their Complaint pursuant to the Mississippi Tort Claims Act.

The trial judge found that the McLemores' claims fell within the purview of the Mississippi Tort Claims Act based on the plain language of their Complaint. Additionally, the trial court ruled that there was basis for the constitutional allegations of a taking, and finding that the claims were barred by the applicable statute of limitations.

Following the established and controlling law of the Mississippi Tort Claims Act and numerous decisions, particularly City of Jackson v. Sutton, 797 So.2d 977 (Miss. 2001), the trial judge correctly dismissed the claims against Mississippi Transportation Commission, leaving Talbot as the remaining defendant for a remedy for the McLemores. In the Sutton decision, the Supreme Court paid no attention to the feeble attempt to make a constitutional claim.

Alternatively, Mississippi Transportation Commission is immune from liability pursuant to §11-46-9(1)(p), Miss. Code Ann.; MTC cannot be held liable for the negligence of its independent contractor; McLemores' claims are barred by their eminent domain

recovery and all liability rests with Talbot.

MTC, as a state agency, has immunity from federal constitutional claims under the Eleventh Amendment and because it is not a "person" under Section 1983.

The granting of summary judgment and final judgment in favor of Mississippi Transportation Commission is amply supported by credible, substantial and reasonable evidence, and the trial judge's decision should be affirmed.

ARGUMENT

The trial court's granting of summary judgment and final judgment in favor of MTC is to be reviewed here de novo. South Central Regional Medical Center v. Guffy, 930 So.2d 1252 (Miss. 2006), Parker v. Horace Mann Ins. Co., 949 So.2d 57, (Miss. App. 2006), and Delahoussay v. Mary Mahoney's, Inc., 696 So.2d 689 (Miss. 1997) The paramount issue is the exclusive application of the MTCA to the claims against MTC. MTC submits that the provisions of MTCA are controlling in this case. Because there is no genuine issue that the MTCA is the exclusive remedy for tort claims against governmental entities, and the McLemores' Complaint is clearly tort-based, and subject to the MTCA, summary judgment in favor of MTC was the proper and required disposition of this case.

I.

THE McLEMORES FAILED TO REBUT SUMMARY JUDGMENT

A. The Summary Judgment Standard

A motion for summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Saucier through Saucier v. Biloxi Regional Medical Center, 708 So. 2d 1351, 1354-1355 (Miss. 1998). M.R.C.P. 56© requires that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The rule does not provide for evidence which *might* be introduced or developed at trial. The party resisting summary judgment must produce any such evidence in opposition to the motion. It is thus

incumbent upon a plaintiff to respond to a motion for summary judgment by demonstrating material factual disputes. Commercial Bank v. Hearn, 923 So.2d 202, 210 (Miss. 2006). The comment to Rule 56 provides that summary judgment "serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either a claim or defense ..." Commercial Bank v. Hearn, 923 So.2d 202, 210 (Miss. 2006).

The evidence must be viewed in the light most favorable to the non-moving party. However, the non-moving party cannot just sit back and remain silent. He must rebut the motion by producing significant probative evidence showing that there are genuine issues of material fact. Murphree v. Federal Insurance Co., 707 So. 2d 523, 529 (Miss. 1997) In other words, "[t]he non-moving party may not defeat the motion merely by making general allegations or unsupported denials of material fact.... The party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed issues for trial.'" Commercial Bank v. Hearn, 923 So.2d 202, 204 (Miss. 2006). "[t]he mere existence of a disputed factual issue, therefore, does not foreclose summary judgment. The dispute must be genuine, and the facts must be material." Williams v. Bennett, 921 So. 2d 1269, 1272 (Miss. 2006).

B. The McLemores' Lack of Proof

The McLemores did not offer any sworn testimony to rebut the motion for summary judgment. They did not offer any affidavits. They likewise did not offer any sworn deposition testimony. Rather, they relied on the conclusory allegations of their Complaint.

When a motion for summary judgment is made and supported, an adverse party may

not rest upon the mere allegations or denials of his pleadings. His response must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment shall be entered against him. Barrentine v. Mississippi Department of Transportation, 913 So.2d 391 (Miss. App. 2005), Corey v. Skelton, 834 So.2d 681, 684 (¶ 7) (Miss. 2003) (citing Miller v. Meeks, 762 So.2d 302, 304 (¶3) (Miss. 2000) (citing Brown v. Credit Ctr., Inc., 444 So.2d 358, 362 (Miss. 1983)). Here, the McLemores' offered nothing to create any doubt as to MTC's proof.

C. The McLemores' Admission

The principal question of law presented to the trial judge was whether the MTCA was the McLemores' exclusive remedy, or whether they made a claim under the Mississippi Constitution.

In oral argument, the McLemores admitted that they did not proceed under the MTCA. At page 28, line 18-19, (R.E. 98) of the summary judgment transcript, McLemores' counsel stated:

> . . . Your Honor, nor has the *City of Jackson*, which is also cited and -- and because of the immunities, one of which is a design, and exactly what Mr. Noble was talking about, a design and building things to certain codes, we haven't proceeded under the Tort Claims Act.
>
> We, very clearly in our complaint, set forth that we thought that the Highway Department had a second taking of this property, a second taking, inverse condemnation, whatever particular jargon you want to put to it. . . (emphasis added)

Then at pages 32-33, Line 3-4, (R.E. 102-103) counsel said

> . . . the silt coming into the channels and ditches that are there, which are going to have at some point be remediated, and just general disruption of his farming.
>
> So those are -- we concede, Your Honor, and have conceded in our brief that there is not a claim under the Tort Claims Act. We've got a claim in tort against the Talbots, but what we're doing here is saying that this is a claim that precedes from the Constitution of Mississippi, . . . (emphasis added)

The trial judge sitting as the finder of fact, found that the MTCA was the McLemores' exclusive remedy. In light of the McLemores' admissions on this issue of law, their appeal completely fails.

II.

THE MTCA IS THE McLEMORES' EXCLUSIVE REMEDY

The McLemores' allegations in their Complaint are straight-forward claims of negligence which constitute a tort. In fact, the Complaint is replete with negligence allegations and the primary focus of the suit is to recover money damages. (R. 6, R.E. 6-35)

MTC submits that it is appropriate for this Court to review the McLemores' Complaint for all the references to negligence, inter alia:

1. "Talbot defendants ... unreasonably and **negligently** interfered with surface water drainage" (R.8, R.E.8)

2. "using **negligent** and unreasonable construction practices..." (R.9, R.E.9)

3. "**negligently** constructing ditches and barriers..." (R.9, R.E.9)

4. "failing to construct..., failing to use... due to the **negligence** of the Talbot defendants." (R.9, R.E.9)

5. "The Talbot defendants have committed **negligent** acts which have

proximately caused damage to the McLemore property, growing crops... and to the McLemores." (R.9, R.E.9)

6. "The Talbot defendants have performed a number of actions which have unreasonably and **negligently** interfered with surface water drainage..." (R.9, R.E.9)

7. "using **negligent** and unreasonable construction practices..." (R.10, R.E.10)

8. "**negligently** constructing ditches and barriers..." (R.10, R.E.10)

9. "failing to construct..., failing to use... due to the **negligence** of the Talbot defendants." (R.10, R.E.10)

10. "The **negligent** actions of the Talbot defendants are the proximate cause and/or proximate causes of the damages to the McLemore property..." (R.10, R.E.10)

11. "Damages in the form of **negligent** infliction of mental distress and mental anguish." (R.11, R.E.11)[2]

MTC cites the parallel case B&W Farms, Inc. V. MTC, 922 So.2d 857 (Miss. App. 2006) where the Court of Appeals affirmed the lower court's granting of summary judgment just as in this case.[3] There the Court said the Complaint and its allegations "point to negligence", at p. 859. The McLemores explicitly say that Talbot and MTC are negligent. The Court, in B&W Farms, supra, noted that the Complaint was also void of references to a taking. Further emphasizing that the MTCA should apply to this case, MTC would point out that the damage portion of the Complaint seeks various monetary damages for the negligent actions set out.

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[2]Damages through erosion and siltation. Damages to growing crops for 2000, 2001, 2002, 2004, 2004 and future years. Damage from cost profits. Damages in diminution of value of land. Costs to restore drainage. Damage from negligent infliction of mental distress and mental anguish. (Paragraph 17 of Complaint) (R.11, R.E. 11)

[3]The B&W case only reaffirms the exclusive remedy of the MTCA to this case.

Taking all the negligence and damages allegations of the Complaint, the conclusion is clear that this case is a tort/damage suit, governed exclusively by the MTCA.

Consider the language of § 11-46-7, Miss. Code Ann., which states:

> **§ 11-46-7. Exclusiveness of remedy**
>
> (1) The remedy provided by this chapter against a governmental entity or its employee is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary. (emphasis added)

There are numerous cases in support of this clear statutory mandate. Wayne General Hosp. v. Hayes, 868 So.2d 997, 1003 (Miss. 2004); Black v. Ansah, 876 So.2d 395, 397-398 (Miss. App. 2003); Harris ex rel. Harris v. McCray, 867 So.2d 188, 190-191 (Miss. 2003); Mississippi Dept. Of Public Safety v. Durn, 861 So.2d 990, 994 (Miss. 2003); Kelley v. Grenada County, 859 So.2d 1049, 1052 (Miss. App. 2003); Titus v. Williams, 844 So.2d 459, 468 (Miss. 2003); City of Jackson v. Brister, 838 So.2d 274, 278 (Miss. 2003); Watts v. Tsang, 828 So.2d 785, 791 (Miss. 2002); City of Jackson v. Sutton, 797 So.2d 977, 980 (Miss. 2001); Maldonado v. Kelly, 768 So.2d 906, 909 (Miss. 2000); L.W. v. McComb Separate Mun. Sch. Dist., 754 So2d 1136, 1138 (Miss. 1999); and City of Tupelo v. Martin, 747 So.2d 822, 826 (Miss. 1999).

Specifically citing the Sutton case, the Suttons did not make any claim under the Tort

Claims Act, rather they asserted violations of their rights under the Mississippi Constitution. In the case at bar, The McLemores' Complaint is a demand for damages, although there is some language which attempts to plead relief under the Mississippi Constitution and laws of eminent domain. (Paragraph 15 of the Complaint, R. 10, R.E. 10-11) The Defendants in Sutton filed a Motion for Summary Judgment stating that the Mississippi Tort Claims Act was the sole and exclusive remedy for the McLemores, and that no other law would sustain the cause of action. The Supreme Court agreed and held that indeed, the Tort Claims Act is the exclusive remedy for filing suit against a governmental entity and its employees for tort-based actions, except in cases where injunctive relief is sought or there is no claim for money damages. The Court found that the Suttons were only seeking monetary relief, and therefore, the Tort Claims Act was their sole remedy.

McLemores' attempts to avoid the MTCA exclusive remedy provision has been rejected soundly by this Court and the Court of Appeals in recent decisions. Calcote v. City of Jackson, 910 So.2d 1103 (Miss. App. 2005) (domestic violence statutes), Jackson v. Payne, 922 So.2d 48 (Miss. App. 2006) (sheriff's liability) and Pounds v. Mississippi Department of Health, 946 So.2d 413 (Miss. 2006) (medical malpractice).

As the McLemores seek only monetary relief, their single method is the MTCA, which they admit they have totally failed to plead. Accordingly, the trial court did not err in granting MTC's motion for summary judgment.

III.

MCLEMORES' CLAIMS AGAINST MTC ARE BARRED BY THE STATUTE OF LIMITATIONS

Since the McLemores admit that they did not file their suit under the MTCA and they should have, the McLemores have failed to comply with the mandatory notice provisions of §11-46-11, Miss. Code Ann. It is uncontradicted that the McLemores sent no notice to MTC. Again, because The McLemores' failed to sue in accordance with the MTCA their claims are time barred by the applicable one year statute of limitations set forth in §11-46-11(3) Miss. Code Ann. No issue exists to contradict this fact, and the trial judge so noted by finding that the McLemores' claim was barred by the statute of limitations. (R. 352, R.E. 121) This one (1) year statute of limitations has been uniformly accepted where no notice of claim was filed within one (1) year of the claimed injury. Black v. City of Tupelo, 853 So.2d 1221 (Miss. 2003), Southern v. Mississippi State Hospital, 853 So.2d 1212 (Miss. 2003), and Southern v. Jones, 851 So.2d 395 (Miss. App. 2003).

A trial judges findings are safe on appeal where they are supported by "substantial, credible and reasonable evidence". Vede v. Delta Regional Medical Center, 933 So.2d 310 (Miss. App. 2006)

IV.

MTC IS IMMUNE FROM SUIT PURSUANT TO §11-46-9(1)(p)

§11-46-9(1)(p), Miss. Code Ann., states as follows:

"(1) A governmental entity and its employees acting within the

course and scope of their employment or duties shall not be liable for any claim:

> . . . **(p) Arising out of a plan or design for construction or improvements to public property, including but not limited to, public** buildings, **highways,** roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, **where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity** or by some other body or administrative agency, exercising discretion by authority to give such approval, **and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;** (emphasis added)

The McLemores' Complaint specifically alleges that construction by Talbot resulted in their alleged damages (see Complaint, Count I and Count II). (R. 9-10, R.E. 9-10) The actual construction work performed on this project was done by Talbot, not MTC. (See Affidavit of James Q. Dickerson, III, P.E. attached to the Motion for Summary Judgment.) (R. 94, R.E.54) The McLemores make no allegation that MTC is vicariously liable for any such damages or that Talbot is an employee or agent of MTC. Even so, MTC is immune from liability from deficiencies in design or construction on this project, pursuant to §11-46-9(1)(p) Miss. Code Ann. The allegations made by The McLemores are for damages due to construction on this project by Talbot. The means and methods of construction of this project, including the borrow pit, erosion control devices and roadway construction are solely the responsibility of Talbot.

Simply put, MTC is immune from any liability if the design of the highway was in

conformity with the engineering and design standards in effect at the time of the preparation of the plan or design of this project. The Affidavit of James Q. Dickerson, III, P.E., District Engineer for this project states that such plans were in conformity with the standards. (R. 94, R.E. 54) There is no proof to the contrary, therefore, MTC is immune from liability in this lawsuit. Furthermore, immunity under uncontradicted subparagraph (p) is clearly created in the factual situation of this case. Pearl River Valley Water Supply District v. Bridges, 878 So.2d 1013 (Miss. App. 2004)

V.

MTC IS NOT LIABLE FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR

MTC is not liable for the acts, omissions and negligence of Talbot. While The McLemores' Complaint fails to allege any vicarious relationship between MTC and Talbot, MTC submits that Talbot is neither an agent nor an employee of MTC. (See Dickerson Affidavit.) (R. 94, R.E. 55) Talbot is an independent contractor and is liable for its own negligence. Talbot is solely responsible for the construction of this project. The independent contractor statutes involving construction were thoroughly analyzed in Richardson v. APAC-Mississippi, Inc., 631 So. 2d 143 (Miss. 1994). The Supreme Court held that the hauling company for APAC was an independent contractor who was involved in an accident. There were no facts to establish an agency or employee relationship between the contractor and APAC.

Further, Talbot, the prime contractor, entered into a contract with MTC to construct this project in accordance with the plans and specifications of the contract. See § 104.01,

Mississippi Standard Specifications for Road and Bridge Construction, 1996 Edition, adopted by the Mississippi Department of Transportation, July 25, 1995. Recent cases have been decided by the Court of Appeals and the Supreme Court where the negligence of the contractor for injury or damage during construction is the sole responsibility of the contractor. See Checkers Drive-In Restaurants, Inc., v. Mississippi Transportation Commission, 755 So. 2d 1238 (Miss. App. 2000), citing Berry v. United Gas Pipeline Company, 370 So. 2d 235 (Miss. 1979).

The MTC submits that there is no issue here as to the fact that it did not do any work on the project and even the Complaint admits that Talbot was the prime contractor. Absent any allegations of an employment or agency relationship, taken with the allegations against Talbot in the Complaint charging Talbot directly with negligence, and not the MTC, then MTC was properly dismissed.

In Chisolm v. Mississippi Department of Transportation, 942 So.2d 136 (Miss. 2006), this Court addresses the independent contractor issue, and held that MDOT was not liable to the claimants for the negligence of its independent contractor, (at p. 144). The trial court's granting of summary judgment was upheld.

VI.

McLEMORES' EMINENT DOMAIN AWARD BARS CLAIMS AGAINST MTC

In the eminent domain action, the McLemores sought and recovered damages to their property. Part of the jury award was damages to the remainder of $903,000.00, or $500.00, per acre for 1,806 acres of remaining property. (R. 67, R.E. 48-49)

MTC submits that the case of King v. Mississippi State Highway Commission, 609 So.2d 1251 (Miss. 1962) completely forecloses The McLemores' claims for damages in this lawsuit against MTC. After an eminent domain trial, King filed another suit to recover alleged damages to his property. MTC filed a Motion for Summary Judgment stating King had been fully compensated in the eminent domain action. The lower court agreed and granted the motion.

Referring to the previous eminent domain lawsuit, the Supreme Court framed the issue on appeal in this manner: "The question today is whether the final judgment in that action precludes the present action." King at p.1253. The Court began its analysis by discussing the principle of *res judicata*, and its special variant in eminent domain proceedings, as follows:

> Our law has long held the final judgment of a court of competent jurisdiction conclusive of questions actually contested and litigated and, as well, of all matters that reasonably might have been presented and litigated by and between the same parties. Bowe v. Bowe, 557 So.2d 793, 794 (Miss.1990); Riley v. Moreland, 537 So.2d 1348, 1354 (Miss.1989); Walton v. Bourgeois, 512 So.2d 698, 702 (Miss.1987); Dunaway v. W.H. Hopper & Associates, Inc., 422 So.2d 749, 751 (Miss.1982); Standard Oil Co. v. Howell, 360 So.2d 1200, 1202 (Miss.1978).
>
> In the law of eminent domain, we find a special variant of this rule. In our seminal decision in Mississippi State Highway Commission v. Hillman, 189 Miss. 850, 198 So. 565 (1940), we held:
>
> The compensation awarded the landowner in an eminent domain proceeding is *conclusively presumed* to include all damages resulting to him from proper use of the land taken, here

> specifically from the proper construction of the contemplated highway. Hillman, 189 Miss. at 868, 198 So. at 570. [Emphasis added] King, at p.1253.

The Court went on to explain that these principles of *res judicata* fit very tightly with the principle of eminent domain damages, known as "before and after rule" by stating:

> the "before and after" rule swallows and absorbs all of the damages of every kind and character. Mississippi State Highway Commission v. Hall, 252 Miss. 863, 874, 174 So.2d 488, 492 (1965). King, at p.1253.

The importance of the before and after rule in the bringing of later inverse condemnation claims is clearly set out:

> Of importance today, we have consistently enforced this conclusive presumption in after-the-fact inverse condemnation actions. See Jackson Municipal Airport Authority v. Wright, 344 So.2d 471, 473 (Miss.1977); Curtis v. Mississippi State Highway Commission, 195 So.2d 497, 502 (Miss.1967); Swett v. Mississippi State Highway Commission, 193 So.2d 596, 599-600 (Miss.1967); Mississippi State Highway Commission v. Tomlinson, 223 Miss. 623, 78 So.2d 797, 799 (1955).
>
> Swett addresses the precise question before us today and holds: ...[The prior proceedings] and release [Swett gave] ··· referred to the plans for the use of the property on file with the Highway Commission [and] embraced all damages resulting from the proper use of the lands. King, at p.1253.

These same principles of *res judicata*, the before and after rule and the concept that eminent domain gives compensation for any damages to the remainder, completely foreclose McLemores' lawsuit against MTC. Just like the Kings, the McLemores were awarded money by a jury for the taking of certain portions of their property. Just like the Kings, the McLemores were awarded damages to the remainder of their property. And, just like the

Kings, the McLemores are now unable under the law to come back and recoup any alleged future damages that have occurred to their property following the eminent domain proceedings. Accordingly, there is no genuine issue of material fact, and MTC was entitled to summary judgment as a matter of law.

VII.

THE ERRONEOUS "SECOND TAKING" THEORY

The McLemores assert a second taking theory, which has no basis in law or fact. It is merely an attempt by the McLemores to call their claims anything but a tort/damage lawsuit.

The McLemores reliance on Parker v. State Highway Commission, 162 So. 162 (Miss. 1935) is totally misplaced as to any basis of second taking theory. Parker is not analogous to the case at bar for there was no previous eminent domain proceeding with the property. Parker involved an adjoining landowner who claimed damages to his property and that property was not being acquired for any public use. There was no taking involved. Again, there was a statutory remedy for the McLemores and that vehicle was the Tort Claims Act.

The McLemores efforts to relabel this tort lawsuit as something else to avoid the MTCA are totally ineffective. [4] Prior to the enactment of the Mississippi Tort Claims Act,

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[4]Nowhere in The McLemores' Complaint are there any references to any specific article of the Mississippi Constitution or amendment to the United States Constitution. The McLemores offered no proof of such constitutional violations, just numerous allegations of negligence by the defendants.

suits against state government and political subdivisions were permitted by various statutes. Since the MTCA became effective (with revisions), any suit filed in tort against a governmental entity (as is the case at bar) must now be filed under the MTCA. Alexander v. Taylor, 928 So.2d 992 (Miss. App. 2006). MTCA is the exclusive remedy for this suit. The McLemores did not pursue their claim under the proper statute. Instead of a suit on constitutional grounds, the McLemores' actions allege negligence on the part of Talbot was the "proximate cause and for proximate cause of the damages to the McLemore property..." (R.11, 352, R. E. 11, 120-121)

The McLemores still have a claim pending against Talbot, the contractor.[5] The McLemores admit that they have a claim in tort against the Talbots. (Tr. 33, R.E. 103) The McLemores sought and received $1,425,320.00, for acquisition of its property and damages to the remaining property in the eminent domain suit. (R. 67, R.E. 48) The McLemores are not left without a remedy, and the trial court's summary judgment ruling has yet another reason to stand.

VIII.

MTC IS IMMUNE FROM ANY FEDERAL CONSTITUTIONAL CLAIMS

McLemores' federal constitutional allegations are not supported by any facts or law for three reasons:

(1) MTC is a state agency, and therefore, immune from suit under the Eleventh

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[5]As The McLemores indicate in their Brief, they still have Talbot party defendant and is seeking more damages.

Amendment of the United States Constitution. Cooley v. Mississippi Department of Transportation, 96 F.Supp.2d 565 (S.D. Miss. 2000)

(2) As a state agency, MTC is not a "person" as defined in 42 U.S.C. §1983. Inyo County v. Paiute - Sho-Shone Indians, 538 U.S. 701 (2003)

(3) The record in void of any proof or evidence to support any constitutional claims. Therefore, any Fifth and Fourteenth Amendment claims fail.

CONCLUSION

The MTCA provides the exclusive remedy for The McLemores' claims. MTC submits and both the statutes and Mississippi case law support that the MTCA was the only route for this action. For whatever reason, The McLemores chose not to file under the Mississippi Tort Claims Act and that was a fatal error, and the judgment below should be affirmed.

Alternatively, The McLemores' claims against MTC are also barred on statute of limitation grounds, negligence of Talbot, immunity grounds and recovery from eminent domain grounds, and the judgment below should be affirmed.

The trial court was correct in its detailed analysis and findings, and the ruling contains no errors of law. The final judgment below dismissing all claims against MTC should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Richard G. Noble, one of the attorneys for the Appellee, do hereby certify that I have this day placed a true copy of the above and foregoing **BRIEF OF APPELLEE** in the United States mail, postage prepaid, to the following:

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Circuit Court Judge
P. O. Box 280
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This the 17th day of October, A.D., 2007.

RICHARD G. NOBLE