BEFORE THE COURT OF APPEALS
STATE OF MISSISSIPPI

CASE NO. 2007-CA-00693

GREENE COUNTY, MISSISSIPPI, JOHN MARSHALL EUBANKS, TOMMY ROBERTS and MARION PIERCE — APPELLANTS/ CROSS APPELLEES

VS.

CORPORATE MANAGEMENT, INC. — APPELLEE/ CROSS APPELLANT

Appeal from the Chancery Court of Greene County, Mississippi
Cause No. 2005-134PW

BRIEF OF APPELLEE/CROSS APPELLANT CORPORATE MANAGEMENT, INC.

ORAL ARGUMENT REQUESTED

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CORPORATE MANAGEMENT, INC.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee/Cross Appellant, Corporate Management, Inc., 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 this Court may evaluate possible disqualification or recusal:

APPELLANT PARTIES

1. Greene County, Mississippi Board of Supervisors
2. Tommy Roberts
3. Marion Pierce
4. John Marshall Eubanks

APPELLEE PARTIES

1. Corporate Management, Inc.

OTHER INTERESTED PERSONS

1. Larry Brown
2. Greene Rural Health Center
3. Rebecca Rylee
4. Safeco Surety

5. Town of Leakesville, MS
6. RLI Surety
7. I.D. Brown
8. Dorothy Woods
9. James Meadows

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TRIAL JUDGE

1. Honorable T. Kenneth Griffis, Special Chancellor Greene County Chancery Court
State of Mississippi, Greene County, Mississippi.
Court of Appeals P.O. Box 22847 Jackson, MS 39225

ATTORNEY OF RECORD FOR APPELLEE/CROSS APPELLANT

1. Honorable Darren E. Gray, P.O. Box 115 Wiggins, MS 39577

RESPECFULLY SUBMITTED, this the 17th day of March 2008.

CORPORATE MANAGEMENT, INC.
APPELLEE/CROSS APPELLANT

BY: _____
DARREN E. GRAY
ATTORNEY FOR
CORPORATE MANAGEMENT, INC.
APPELLEE/CROSS APPELLANT

REQUEST FOR ORAL ARGUMENT

Comes now, the Appellee/Cross Appellant, Corporate Management, Inc., and requests oral argument be heard on this matter. Oral argument would be beneficial to the Court's understanding of the facts as they apply to the law on the various issues raised in this appeal and cross appeal.

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STATEMENT OF THE CASE

I. Nature of the Case and Course of the Proceedings and Disposition in the Court Below .

On November 1, 2005 CMI filed its Complaint for Injunction, Damages and Other Relief and a Motion for Hearing on Preliminary Injunction. (RE 89)(TE 3-15). On March 7, 2006 each of the Chancellors of the Sixteenth Chancery District recused themselves and on March 17, 2006 Mississippi Court of Appeals Judge T. Kenneth Griffis was appointed by Chief Justice James W. Smith, Jr. of the Mississippi Supreme Court to serve as Special Chancellor. On March 20, 2006 a hearing was conducted on Corporate Management, Inc.'s (CMI's) Motion for Temporary Restraining Order. The parties agreed to the entry of an Agreed Order holding the Motion for Temporary Restraining Order in abeyance until such time as the Motion for Preliminary Injunction could be heard. The Motion for Preliminary Injunction was held March 29 and 30, 2006. The Court determined that CMI had met the prerequisites of MRCP 65 and that a Preliminary Injunction should be issued. On April 27, 2006 the Court entered an Order granting Preliminary Injunction. On May 15, 2006 a Motion for Declaratory Relief, Modification of Injunction and Sanctions was filed by the Appellants, Greene County et al,. On June 2, 2006 a hearing was held on the Motion for Declaratory Relief. On June 30, 2006 the Court issued an Order stating Danks, Dye, Mills and Pittman represented the Board of Trustees and denied the Motion to Modify the Injunction, denied attorney's fees and denied sanctions. (CP 239).

A final hearing on CMI's Complaint was held on July 19 and 20, 2006. On December 18, 2006 the Court entered a Memorandum Opinion, which shall be and is incorporated by reference in the Second Amended Final Judgment, detailing the Court's finding and setting forth lucid and salient reasoning. (RE 8-66 CP 692). After CMI filed a Motion for Attorney's Fees and Cost of Litigation on January 5, 2007, the Court entered its Final Judgment on February 9, 2007 granting CMI reasonable attorney's fees. (CP 852). On February 16, 2007 Greene County

et al. filed a Motion to Alter or Amend Judgment or in the Alternative For a New Trial. (RE 121)(CP 860). On February 28, 2007 CMI filed a Motion to Dismiss and/or To Show Cause. (CP 904). On March 5, 2007 CMI filed a Motion for Contempt. (CP 946). On March 12, 2007 Trustee John Marshal Eubanks filed a Notice of Appeal. (CP 971). After hearing argument on the post trial motions filed, an Amended Final Judgment was entered on March 19, 2007. (CP 977). Greene County et al. filed a Motion for Stay on March 16, 2007. (CP 987). A ruling was issued denying the Motion for Stay on March 19, 2007 and also held Larry Brown was to be immediately restored to the Board of Trustees and GRHC Trustees shall take no action to terminate this litigation. (CP 994). A Notice of Cross Appeal was filed by CMI on March 23, 2007. In response to a Motion to Vacate Order on Stay and Motion Regarding Clerical Mistake (CP 999) filed by CMI on March 30, 2007 the Court issued its Second Amended Judgment.

CMI filed a Notice of Cross-Appeal and Designation of the Record on April 26, 2007. (CP 1018). A Second Amended Final Judgment was entered *nunc pro tunc* the 16th day of March, 2007 and filed on April 20, 2007. (RE 8)(CP 1010). On May 23, 2007 the Court denied Greene County et al.'s Motion for Stay to stay the removal of I.D. Brown and to stay Greene County from being required to offer for sale or long term lease the facilities owned by Greene County basing this denial on the Court's interpretation of the contractual provision at issue. (CP 1025).

II. Statement of the Facts

Approximately April of 2004, Appellee, Corporate Management, Inc. (hereinafter referred to as "CMI"), began discussions with Greene County Board of Supervisors regarding reopening Greene County Hospital. (T-17). Over the next several months CMI met several times with representatives of Greene County and Greene Rural Health Center (hereafter referred to as "GHRC). (T-18). These discussions led to a Request for Proposals being issued by the

Greene County Board of Supervisors in August of 2004 which required responses be submitted by October 25, 2004 with a decision being made as to which respondent to enter contract negotiations with by November 16, 2004. (TE P-4 pg. 357-60). On October 4, 2004, CMI submitted its Response to Request for Proposal and was the only respondent to the request for proposals.

At the Supervisor's October 6, 2004 meeting, the minutes reflect that "the Board received the request for proposals for the lease, purchase or lease with option to purchase Greene Rural Health Center at this time. One proposal was received from Corporate Management, Inc., Wiggins, MS." At the Supervisor's October 28, 2004 meeting, the minutes reflect the board employed attorney Paul D. Walley, of Pierce and Walley "to evaluate the options of the Nursing Home/Hospital sale or lease." (RE 696). A November 5, 2004 letter by attorney Paul D. Walley informed the Supervisors that:

> After a preliminary review of the Request for Proposals ("RFP") that went out on August 23, 2004, the proposal from Corporate Management, Inc. ("CMI") received in response to the FRP and the documentation and findings of the board and its consultants, this firm is of the opinion that the requirements of §41-13-15 of the Mississippi Code of 1972 have been substantially complied with to this point. In fact, we believe the process up to this point, has been administered in a most competent fashion and has placed the board in a position to proceed as it deems fit. In particular, the board is left as a crossroad from which it should direct this firm as to which direction to pursue.....
>
> This firm stands ready to proceed in whatever direction the board decides to proceed. Negotiations regarding the facility will certainly be attended by the usual ebb and flow of negotiations, as wee as the desire for additional documentation and the need, from time to time, of the involvement of the board and/or its officers and consultants.

(TE 3 pg 55).

At the Supervisor's December 9, 2004 meeting, the minutes reflect that Supervisor Dearman made a motion "to recommend Board of Trustees to move forward for a period of at

least one year contract with a consultant to assist in aiming UPL monies toward building an emergency room/hospital." The motion passed unanimously. (RE 14)

The GRHC Board of Trustees held a meeting on March 30, 2005. The minutes reflect that all members were present except James Meadows. Also in attendance were Supervisors Hill and Pierce, among others. The minutes reflect the following actions took place:

> Mr. Morris Hill, President of Supervisors, then asked the chairman for the floor. He informed the board that the Board of Supervisors were still waiting for a budget from Thames and Associates and the were also waiting on a full fiscal year budget.
>
> Motion was then made by Marshall Eubanks to adjourn the meeting. Motion failed for lack of second.
>
> Motion was made by Rick Neel to hire local Attorney Chris Dobbins, a second was made by Dorothy Woods, motion carried with a vote of 4 for and 2 against.
>
> Verbal proposal from Chris Dobbins was made for legal services.... Mr. Dobbins also informed the board that if a conflict arose between the Trustees and the Supervisors that he would have to refuse the Trustees. A motion was made to accept the verbal proposal by Dorothy Woods seconded by Ricky Neel, motion carried with a vote of 4 for and 2 against.
>
> Consultant contract was brought up for discussion. A motion was made by Dorothy Woods for CMI to make a proposal for Consultant Agreement a second was made by Ricky Neel, motion carried with a vote of 4 for and 2 against.
>
> Presentation was given by Mr. Cain. Mr. Cain informed the board that the contract was given out several months ago and it spells out the terms for the agreement for consultation services between Green Rural Health Center and CMI.
>
> Motion was made by Dorothy Woods to hire CMI for Consulting Services for facility, a second was made by Larry Brown. Mr. Roberts stated that the proposal received earlier from Mr. Cain was not for consultant management, discussion held.
>
> A motion was again made by Ricky Neel to hire CMI to take over consulting effective April 1, 2005, seconded by Dorothy Woods, motion carried with a 4 for and 2 against.
>
> Contract with CMI signed under protest by Tommy Roberts, Chairman, Greene Rural Health Center Board of Trustees, also signing was Mr. Ted Cain, CMI.

Some concerns the board expressed regarding the agreement was as follows:

1. Escape Clause needed to be added.

2. Monthly reporting issue.

3. Fair Market Value if sold.

4. Five year management instead of fifteen year.

Order of the Board

Motion by Supervisor Dearman: After a **lengthy** discussion, that when the above corrections are made to the Contract, the Contract be accepted.

An unsigned copy of the Hospital Agreement was attached to the minutes. The Motion passed by a vote of 3 for and 2 against. Supervisor Dearman then made the motion "to allow the Nursing Home to borrow money for the new construction of a hospital for Greene County." The Motion passed with the same vote. (RE 19).

At the June 30, 2005 meeting of the GRHC Board of Trustees, the minutes reflect all members were present except James Meadows. The President of the Board of Supervisors Morris Hill was also in attendance among others. After a lengthy discussion, as detailed in the Minutes of the Board of Trustees, which included Supervisor Hill, legal counsel for the Board of Trustees and all Trustees present the Hospital Contract was executed by Ted Cain on behalf of CMI, Tommy Roberts on behalf of the Board of Trustees and Morris Hill on behalf of the Board of Supervisors. (TE P-9 401-04). During this meeting Trustees Roberts and Eubanks went on record as officially opposing re-opening the hospital. *Id.* at 403. A copy was attached to the minutes and filed with the Chancery Clerk.

The Hospital Agreement executed included and further defined and built upon and referenced the Nursing Home Agreement ~~signed in April of 2005,~~ and mirrored the Nursing Home Agreement with some additional language concerning the opening and management of the

Critical Access Hospital and provided detailed terms regarding the opening and management of Greene County Hospital as a Critical Access Hospital. (RE 110) (TE 1 pg. 24).

The waters were calm until the October 17, 2005 Trustee meeting during which the Trustees voted to terminate the Nursing Home Contract without discussion. (TE 5 pg 58). On October 31, 2005, the Trustees voted to reinstate CMI's contract, after Trustee Larry Brown changed his vote in favor of reinstating CMI's contract.

On November 1, 2005 Larry Brown, a member of Greene Rural Health Center Board of Trustees was forced, under duress foisted upon him by his employer Supervisor Marion Pierce, to tender a resignation from the Board of Trustees. I.D. Brown was subsequently appointed by the Supervisors to fill Larry Brown's position on the Board of Trustees. Larry Brown attempted to rescind his resignation and he and his wife were ultimately fired by his employer Supervisor Marion Pierce. According to testimony of Larry Brown, Marion Pierce demanded he resign from the GRHC Board of Trustees and told Brown he had someone to take his place. (T 126-129). Supervisor Pierce drove Larry Brown to the Chancery Clerk's office and had Brown sign a resignation. Later that same day, Larry Brown tried to rescind his resignation and CMI offered a notarized statement of Larry Brown rescinding his resignation into evidence. (TE 12 pg. 95). The statement was notarized by Jeff Byrd, Greene County Justice Court Judge. Larry Brown later testified he thought he was still a member of the GRHC Board of Trustees. (TE 129). Also on November 1, 2005, CMI filed its Complaint and a Motion for Hearing on Preliminary Injunction.

At the January 16, 2006 meeting of the GRHC Board of Trustees, Marshal Eubanks made a motion "not to renew the contract with CMI for the Nursing Home Facility management that expires on April 1, 2006." (TE P9 pg. 463). By a vote of 4 for and 3 against the motion passed. By letter dated January 26, 2006 from Edwin Pittman, Jr., as attorney for the GRHC Board of

Trustees, advised CMI of the Board's decision not to renew the Operations/Consultant Agreement relating to the Nursing Home Facility.

By letter dated April 18, 2006, Darren E. Gray, General Counsel of CMI, sent a letter to GRHC and Greene County that read:

> Pursuant to the contract dated June 30, 2005 executed by and between CMI, the Board of Trustees and the Board of Supervisors, CMI is executing its option to extend the referenced contracts for successive one year increments. As provided in Section 25, second paragraph:
>
> > Owner/Agent and CMI further agree CMI shall have the option to extend the October 30, 2007 purchase date for a period of one (1) year and extend any management contract of which CMI and Greene County Rural Health Center Skilled Nursing Facility and Hospital Facility are parties to for successive one year increments until such time as CMI or an entity designated by CMI shall purchase the facilities or give written notice to Owner/Agent of the desire not to purchase the Skilled Nursing Facility and Hospital Facility.

After a Preliminary Injunction hearing and later a Permanent Injunction Hearing the Court issued it's a fifty eight (58) page Memorandum Opinion on December 11, 2006. (RE 8-66 CP 692-750) detailing its findings. The Court issued its Final Judgment. After various post-trial motions as set forth above in section I, the Court issued its Amended Final Judgment and on March 16, 2007 its Second Amended Final Judgment. Both parties appealed.

SUMMARY OF THE ARGUMENT

This matter presents a contract construction issue and the underlying Court interpreted the provisions of the Nursing Home Agreement and the Hospital Agreement and determined and enforced the rights, duties, obligations and responsibilities of the parties under the Agreements.

CMI, Greene Rural Health Center Board of Trustees and Greene County, Mississippi Board of Supervisors entered into a working relationship to bring a Critical Access Hospital to Greene County, Mississippi. CMI, GRHC and Supervisors executed valid and enforceable contracts to accomplish this joint goal. Later the Board of Supervisors acting through the Board of Trustees and usurping the authority of the Board of Trustees caused the Trustees, without cause, notice or reason of any type to immediately terminate the contract with CMI on October 17, 2005, a mere 14 days prior to the planned opening of the Hospital in a clear attempt to frustrate the bargain for which all three parties had contracted. At least two of the Trustees, Roberts and Eubanks had administration forcibly removed, cancelled at least one GRHC employee's paycheck and returned equipment ordered for the opening of the Hospital.

The Nursing Home Agreement and Hospital Agreement are valid and enforceable contracts that must be read as one agreement with at date of termination no sooner than December 31, 2007 as held by the Trial Court. The Trustees are statutorily granted broad authority to manage the GRHC Community hospital or contract with entities to provide management to the hospital. The Nursing Home and Hospital Agreement must be read as one contract as the Hospital Agreement incorporates by reference various terms in the Nursing Home Agreement and this was clearly the intent when counsel for both CMI and GRHC Trustees and Board of Supervisors deleted a Superseding Nature of Agreement Clause in the Hospital Contract. (RE 113). There was clearly an offer, acceptance and consideration and those contract requirements have not been challenged. The trial court allowed testimony of the thoughts and

reasoning of the contracting parties at trial and this was not objected to at the trial level. The two week termination of the Nursing Home Agreement was accomplished through coercion of the Supervisors and as such the contracts have not been terminated and the attempts to terminate the contracts twice in the first year are clearly designed to frustrate the purpose of the agreements and are a breach of the contractual terms.

The October 17, 2005 breach of the Hospital Agreement by the Board of Trustees was also clearly a breach of the covenant of good faith and fair dealing which is present in every Mississippi contract. This breach was done without discussion and was deemed by the fact finder a material breach of the terms of the contract. The breach on October 17, 2005 was without notice, cause or discussion and clearly meets the standard as this Court has set forth as follows: "Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness, or reasonableness." *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss.1992).

The Board of Trustees approved both Agreements, executed both Agreements and filed same with the Chancery Clerk of Greene County, Mississippi. The Board of Supervisors participated in the process from the beginning by issuing a RFP to receive proposals to buy, sell, lease or lease with an option to purchase Greene Rural Health Center. (TE P-4 pg 357) CMI was the only respondent to the Request for Proposals. The Supervisors attended meetings and discussed the Hospital Agreement and spread the contract on their minutes as required under Mississippi law. The contract is enforceable against the Board of Supervisors and it must be noted, the Board of Supervisors have taken no official action to terminate the contracts. The Board of Supervisors has resorted to usurping the authority of the Board of Trustees to accomplish its devious intentions.

The Court correctly restored Larry Brown to the Greene Rural Health Center Board of Trustees. The Board of Supervisors decisions to appoint, terminate and restructure the GRHC Board violated the Supervisor's statutory obligations and authority to "appoint trustees for the purpose of operating and governing community hospitals." Miss. Code Ann. §41-12-29. The Board usurped the independent nature of the GRHC Board of Trustees and imposed their will on at least one Trustee that did not comply with their wishes to the point of duress and termination of employment for not acquiescing to the whims of the Board of Supervisors. The Supervisors removed Larry Brown from the Board in violation of the statutory means allowed for the Supervisors to remove Trustees. The Court correctly restored Larry Brown to the Board of Trustees as there was no other person authorized by law to hold that position.

The Court correctly held that Greene County and GRHC failed to present sufficient evidence to support the allegations that CMI violated Mississippi public bid laws. No evidence of such expenditures was submitted into evidence which would support a finding that any particular purchases violated any particular Mississippi statute. The post-trial motion for new trial based on new evidence clearly fails the standards set forth under Mississippi law and again did not present evidence that any particular purchases violated any particular Mississippi statute. Also the identity of James Aldridge was known to the Board of Trustees as he appeared at meetings and said every thing was being done on the up and up. (TE 465). To allow this claim of new evidence would flout the standard of Mississippi law on this issue.

APPELLEE ARGUMENT

I. WHETHER THE CONTRACTS MAY BE TERMINATED WITHOUT CAUSE, NOTICE, OR REASON.

The Agreements were not properly terminated under the terms of the contact and Mississippi law.

Relevant Law

The Mississippi Supreme Court provided the following precedent concerning a trial judge's findings of fact and has held that the Court employs a substantial evidence parlance, and have said repeatedly that they will not disturb a trial judge's findings of fact where there is in the record substantial evidence supporting the same. *Cotton v. McConnell*, 435 So.2d 683, 685 (Miss.1983); *Culbreath v. Johnson*, 427 So.2d 705, 707-09 (Miss.1983); *Richardson v. Riley*, 355 So.2d 667, 668 (Miss.1978). This is so concerning those findings which relate to matters of evidentiary fact or of ultimate fact. *Norris v. Norris*, 498 So.2d 809, 814 (Miss.1986); Carr v. Carr, 480 So.2d 1120, 1122 (Miss.1985).

Because the chancellor is in the courtroom and hears the evidence first hand, he is best positioned to judge the credibility of the witnesses and decide what weight the evidence ought properly to have. *Murphy v. Murphy*, 631 So.2d 812, 815 (Miss.1994). "Thus, this Court, on appeal, is permitted to disturb the chancellor's finding of fact only if we conclude that he was manifestly in error in his findings." *quoting UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc.* 525 So.2d 746, 753 (Miss.,1987), (citing *Murphy v. Murphy*, 631 So.2d 812, 815 (Miss.1994)).

The general rule is when the legislature has authorized the State's entry into a contract, the State necessarily waives its immunity from suit for a breach of contract. Where the state has lawfully entered into a business contract with an individual, the obligations and duties of the contract should be mutually binding and reciprocal. There is no mutuality or fairness where a

state or county can enter into an advantageous contract and accept its benefits but refuse to perform its obligations. Rather, by contracting with a private party, the agency promises to abide and be governed by the terms of the contract. *Gulfside Casino Partnership v. Mississippi State Port*, 757 So.2d 250, 256 (Miss. 2000).

The first rule of contract interpretation is to give effect to the intent of the parties. *Sumter Lumber Co. v. Skipper*, 184 So. 296, 298 (1938). More correctly stated, our concern is not nearly so much what the parties may have intended as it is with what they said, for the words employed are by far the best resource for ascertaining intent and assigning meaning with fairness and accuracy. *UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc.* 525 So.2d 746, 755 (Miss. 1987). In other words, "[l]egal purpose or intent should first be sought in an objective reading of the words employed in the contract to the exclusion of parol or extrinsic evidence." *Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 752 (Miss.2003) (citations omitted). In applying the "four corners" test, "[o]ur concern is not nearly so much with what the parties may have intended, but with what they said, since the words employed are by far the best resource for ascertaining the intent and assigning meaning with fairness and accuracy." *Id.* (citing *Simmons v. Bank of Miss.*, 593 So.2d 40, 42- 43 (Miss.1992)). "Only if the contract is unclear or ambiguous can a court go beyond the text to determine the parties true intent." *Id.* at 752-53 (citing *Pursue Energy Corp. v. Perkins*, 558 So.2d 349, 352 (Miss.1990)). Where what the parties have said is less than clear and definite in material part, the court can resort to extrinsic evidence aids to assign meaning to contract terms. *Barnett v. Getty Oil Co.*, 266 So. 2d 581,586 (Miss. 1972).

In *Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 419 (Miss. 1987) the court held "[t]he most basic principle of contract law is that contracts must be interpreted by objective, not subjective standards. A court must interpret a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties." The

termination of a contract is an "extreme" remedy and should be sparsely granted. *UHS-Qualicare, Inc at 756.*

Mississippi Code Ann. §41-13-35 **Board authority and responsibilities**

> (5)(g) To contract by way of lease, lease-purchase or otherwise, with any agency, department or other office of government or any individual, partnership, corporation, owner, other board of trustees, or other health care facility, for the providing of property, equipment or services by or to the community hospital or other entity or regarding any facet of the construction, management, funding or operation of the community hospital or any division or department thereof, or any related activity, including, without limitation, shared management expertise or employee insurance and retirement programs, and to terminate said contracts when deemed in the best interests of the community hospital.

Analysis

Based on the law asserted above and statutes that regulate entities involved in the current litigation, when the court analyzed the contracts and law, the court correctly concluded the terminations of the contract by the Board of Trustees was not proper and could not be done without reason, notice or cause. Although § 41-13-35(g) permits the Trustees to terminate management contracts if the Trustees, acting as a board, deem it to be in the hospital's best interest, the Defendants have not put forth any evidence and have not to this day put forth Board Minutes which show that the Board deemed it in the best interest of the hospital to terminate the contracts. As a public body, the board of trustees can only speak through its minutes. *Rawls Spring Util. Dist. v. Novak*, 765 So. 2d 1288, 1291 (Miss. 2000). During the trial of this matter, the Court specifically asked the Trustees' counsel what evidence there was that the Board had acted in the best interest of the hospital to terminate the contracts. (T 421-422).

Contract to be read together

From an objective reading of the Nursing Home and Hospital Agreements the trial court correctly deemed the Agreements to be companion agreements which built upon each other. In Paragraph 25 of the Nursing Home Agreement signed on April 1, 2005, the parties agreed:

> Critical Access Hospital CMI agrees to work in good faith with the Board of Trustees and Board of Supervisors to obtain the goal of opening a critical access hospital on the premises of Greene Rural Health Center.
>
> Upon the execution and during the term of this Agreement CMI, the Board of Trustees and Board of Supervisors agree to utilize all resources of Greene Rural Health Center to accomplish the goal of opening Greene County Hospital with after hours emergency services to be open within six (6) months of the effective date of this contract. Opening and provision of said services is contingent upon Greene County obtaining all permits, licenses and certifications required by city, county, state and federal governmental authorities to operate said facilities.

(RE 109).

Based on an objective view of these terms the court held the parties intended to tie CMI's operations of the Nursing Home with the opening of the Hospital. (RE 38 CP 722). The Court further concluded that each agreement builds upon the other, and it was the intent of the parties for the Nursing Home and the Hospital Agreements to be treated as one agreement, if the hospital could be reopened. (RE 38 CP 722). The court further concluded the term of the Nursing Home and Hospital Agreement shall continue through and until December 31, 2007. (RE 83 CP 1011).

This finding by the court is clearly substantiated by the testimony of Supervisor Dearman who stated "... the County has a valid and binding contract with CMI." (T 108). Mr. Dearman went further to elucidate the point that the contracts entered were to be companion agreements and to be treated as one if the hospital could be reopened. (T 108-111). In his testimony Supervisor Dearman set forth the reasoning behind signing management agreements for the Nursing Home and Hospital Agreement and that that would allow the GRHC to use the Upper Payment Limit which is given to County owned Nursing and Hospital facilities to help pay for the opening of the Hospital with the operations of the Nursing Home. This understanding is clearly the same as CMI had as evidence by Ted Cain's testimony wherein he set forth the same scenario. (T 292-97).

It must be remembered by all who consider the facts of this matter the two agreements at issue resulted from the Board of Supervisors issuing a request for proposals (RFP) to which CMI was the only respondent. There was no Hospital in operation in Greene County when the Agreements were entered. As the minutes of the Board of Trustees evince there were no issues of any significance raised, mentioned or brought to the attention of CMI from April 1, 2005 to October 17, 2005, the date the Trustees voted to "cancel CMI's contract" , without discussion. (TE P-9 385-427).

Termination of Contract

The first attempt to terminate occurred at the October 17, 2005 Board of Trustees meeting where Marshall Eubanks made a motion to "cancel CMI's contract" and was seconded by Tommy Roberts. At this meeting the Trustees allowed no discussion disregarding the Board's attorney who was present and tried to offer legal advice. (TE 5 pg58). The relevant provision in each contract states the following:

> 3. Term and Termination
>
> a. The term of this Agreement shall begin on 4/1/05 and shall remain in effect for a period of one (1) year(s) unless otherwise terminated pursuant to Section 3 herein and shall automatically renew for successive one (1) year terms beginning 4/1/06 and on each one (1) year anniversary thereafter unless written notice of termination is given by a party 60 days prior to the expiration date. ...

The language of this section sets forth the parties cannot terminate within the initial term and the contract automatically renews for an additional year. During the second year a party is allowed to give sixty (60) days notice prior to the expiration date if they choose to terminate the contract. During the first year the parties could terminate only for specific violations of the contract, of which none has ever been forwarded to CMI. CMI's intent was clearly that that each provision was for a minimum of an initial term of two (2) years as evinced by Ted Cain's, President of CMI, testimony at the Permanent Injunction hearing wherein he stated that during the first year to

be terminated CMI would have to violate terms of the agreement. (T303-04). This is in line with the Court's analysis which set forth the term was for one year with an automatic renewal for successive one year periods. (RE 51 CP 735).

The Court correctly ruled there is a contradiction of the terms in the express provisions of the agreements as it relates to the term of the agreements and time for proper termination which required the Court to interpret and determine the proper period of the agreements and the time for termination. Greene County relies on Miss. Code Ann. §41-13-35(5)(g) as its authority to **breach** the contracts in question. Miss. Code Ann. §41-13-35(5)(g) states:

> (g) To contract by way of lease, lease-purchase or otherwise, with any agency, department or other office of government or any individual, partnership, corporation, owner, other board of trustees, or other health care facility, for the providing of property, equipment or services by or to the community hospital or other entity or regarding any facet of the construction, management, funding or operation of the community hospital or any division or department thereof, or any related activity, including, without limitation, shared management expertise or employee insurance and retirement programs, and to terminate said contracts when deemed in the best interests of the community hospital.

Although the testimony of Roberts, Eubanks, Meadows attempted to show the October 17, 2005 breach of terminating CMI's contract was in the best interest of the community hospital, the GRHC Board of Trustees minutes clearly do not reflect any issues and the testimony of the individual is very contradictory in many instances to this action being in best interest of the community hospital. (T 450-543). During the trial of this matter, the Court specifically asked the Trustees' counsel what evidence there was that the Board had acted in the best interest of the hospital to terminate the contracts. (T 421-22). The Appellants' counsel retorted that the Appellant's would address the Court's concern with some evidence, but at no point did the they produce or come forth with any Board minutes which reflect that the Trustees had ever deemed it in the best interest of the hospital to terminate the management contracts. Instead, the Appellants

elicited *ex post facto* testimony at trial from individual Board members that termination was in the best interest of the hospital.

It must be noted for the Court, the Greene Rural Health Center Board of Trustees did not appeal any decisions set forth in the trial court's Memorandum Opinion or Second Amended Final Judgment. Specifically the GRHC Board of Trustees did not appeal this matter whatsoever.

At the October 31, 2005 meeting the Trustees voted to reinstate the contract of CMI and give them the authority to do what they needed to do to get the hospital open. (TE 6 pg 50). As the Court correctly interpreted, the term of the contracts in question had least until December 31, 2007 as that was the date the Hospital referred to in each contract was required to be offered for sale or lease to CMI.

It is clear from the intent of the contracting parties at the time the contracts were entered the intended termination date had to be at least December 31, 2007 and while the GRHC Board of Trustees have attempted to terminate the contracts, in breach of the terms, which indicate a two (2) year period before a termination by the Trustees or the Supervisors without cause can occur, the notices of termination do not state, much less set forth any allegations, that it is done in the best interest of the community hospital. As the evidence in the record shows the intent of the parties at the time of contracting was to open a hospital in Greene County, Mississippi and to give CMI the time and resources to do just that. The act of termination of a contract is a

To find a termination date prior to December 31, 2007 is illogical and clearly would not have been in the best interest of the hospital. While Miss. Code Ann. §41-13-35(5)(g) gives the Trustees authority to terminate contracts, based on the law cited above the October 17, 2005 breach and the breaches in attempting to terminate the contracts prior to at least December 31, 2007 and/or June 30, 2007 is not proper.

II WHETHER THE CONTRACTS ARE BINDING UPON THE BOARD OF SUPERVISORS.

Relevant Law

Mississippi Code Ann. §25-1-43 (Rev. 1991) provides: An officer shall not enter into any contract on behalf of the state, or of any county, city, town, or village thereof, without being specifically authorized by law or by an order of the board of supervisors or municipal authorities.

The Mississippi Supreme Court has held consistently that "[a] Board of Supervisors can act only as a body, and its act must be evidenced by an entry on its minutes. The minutes of the board of supervisors are the sole and exclusive evidence of what the board did." *Nichols v. Patterson*, 678 So. 2d 673, 677 (Miss 1996) (quoting *Smith v. Board of Supervisors of Tallahatchie County*, 84 So. 707, 709 (1921)). The reasoning behind this requirement is to protect the board from being bound by unauthorized acts of individual members of the board or an agent thereof. *Butler v. Board of Supervisors for Hinds County*, 659 So. 2d 578, 579 (Miss. 1995).

Such contracts, like all contracts executed by board(s) of supervisors, must be evidenced by orders duly entered on their minutes, or by papers in such orders referred to and made a part thereof. *Marion County v. Foxworth*, 36 So. 36, 37 (1904). In *Foxworth*, the court found that the contract was maintained by the same chancery clerk and, if the record is created contemporaneously with the minutes, that should be sufficient. What the board had approved immediately viewable by the public and was in no way uncertain or hidden.

In *Community Extended Care Centers, Inc. v. Board of Sup'rs for Humphreys County, Mississippi and Humphreys County, Mississippi* 756 So. 2d 798, 803-04 (Miss. App. 1999) the court held that the entry of a resolution authorizing the Board president "to execute in duplicate the original of the lease," the filing of the lease contract in the land records of the chancery clerk's office, the board's subsequent approval of the lease contract, the filing of an amendment

in the land records of the chancery clerk's office and the entry of the amendments on the minutes were sufficient acts to ensure that no individual of the Board had bound the Board without the benefit of the consent of the Board as a whole by executing the lease contract. In this case the court applied the principle of equitable estoppel to cure a technical omission and barred the Board from denying the validity and enforceablility of the lease. *Id.*.,

Analysis

In the case before the Court many factors are analogous to the holdings set forth in *Community Extended Care Centers, Inc.*

The Nursing Home Contract and the Hospital Contacts are valid and binding contracts which the Trustees entered and executed pursuant to § 41-13-35(5)(g). Neither party has attempted to assert the Trustees were not authorized to enter either contract. The contracts give CMI (or an entity designated by CMI) an unambiguous right of first refusal to buy, lease or manage the respective facilities if the Supervisors ever decide to sell, lease, or discontinue the management of the facilities. The Hospital Contract requires the Supervisors and Trustees to sell or lease the skilled nursing facility and hospital to CMI (or an entity designated by CMI) on or before October 30, 2007, or enter into another management contract with CMI (or an entity designated by CMI) on or before December 31, 2007. (RE 113 TE 1 pg. 32-33). Greene County now claims that neither the contract may be enforced against Greene County. This in an untenable position. The Greene County Board of Supervisors participated in this process from the beginning.

At the Supervisor's December 9, 2004 meeting, the minutes reflect that Supervisor Dearman made a motion "to recommend Board of Trustees to move forward for a period of at least one year contract with a consultant to assist in aiming UPL monies toward building an emergency room/hospital." The motion passed unanimously. (RE 14).

The Board of Supervisors then issued a RFP to receive proposals to buy, sell, lease or lease with an option to purchase Greene Rural Health Center. (TE P-4 357) CMI was the only respondent to the Request for Proposals. The Supervisors attended meetings and discussed the Hospital Agreement and spread the contract on their minutes as required under Mississippi law. The contract is enforceable against the Board of Supervisors and it must be noted, the Board of Supervisors have taken no *official* action to terminate the contracts. The April 1, 2005 "Operations/Consultant Agreement" was also executed by Mr. Morris Hill, President of the Greene County Board of Supervisors. Following Board of Trustee meetings held on June 28, 2005 and June 30, 2005 and a Board of Supervisors meeting on June 29, 2005 all parties executed a contract (the Hospital Agreement) on June 30, 2005. A portion of these meetings are excerpted in Judge Griffis' Memorandum Opinion at (RE 18-25 CP 702-705)

After a detailed discussion on June 28, 2005 between the Board of Trustees and CMI, with Supervisors present, concerning all aspects of opening the Critical Access Hospital including the looming December 31, 2005 deadline, the Supervisors took the Agreement under advisement and met on June 29, 2005. At this Supervisors meeting the minutes reflect the following action was taken:

> Mr. Tommy Roberts addressed the Board on behalf of Greene Rural Health Board. An Operations and Consultant Agreement was proposed to each of the board members.
>
> Some concerns the board expressed regarding the agreement was as follows:
>
> 1. Escape Clause needed to be added.
> 2. Monthly reporting issue.
> 3. Fair Market Value if sold.
> 4. Five year management instead of fifteen year.
>
> Order of the Board

> Motion by Supervisor Dearman: After a lengthy discussion, that when the above corrections are made to the Contract, the Contract be accepted.

(RE 19)

An unsigned copy of the Hospital Agreement was attached to the minutes. The Motion passed by a vote of 3 for and 2 against. Supervisor Dearman then made the motion "to allow the Nursing Home to borrow money for the new construction of a hospital for Greene County." The Motion passed with the same vote. (RE 19). The contract was signed as authorized by Board of Supervisor President Morris Hill at the June 30, 2005 meeting of the Board of Trustees where detailed discussions are set forth in the Minutes of meeting. (TE P-9 pg. 401-04). The Trustees approved the revised contract and signed and Morris Hill signed as authorized by the Supervisors. *Id.* The contract was attached to the minutes and filed with the Chancery Clerk with the official minutes of the Board of Trustees. The purpose of the Hospital Agreement was to reopen Greene County Hospital with after-hours emergency services to be open within six (6) months and the opening of a critical access hospital facility on or before December 31, 2005. (TE P-9 pg. 412).

Uncontroverted testimony of Starann Lamier, Chief Operating Officer of CMI stated a main goal of the Greene County Board of Supervisors was to reopen Greene County Hospital and to have the same entity operate the nursing home and reopen the hospital. (T at 22). At the March 2006 Preliminary Injunction hearing Supervisor Dearman testified that CMI had performed One Hundred Percent within the time frames under the contract. (T at 110). As of December 31, 2005 Greene County Hospital had reopened as a critical access hospital providing hospital and emergency care to the residents of Greene County as was the goal of the Greene County Supervisors. This happened despite the breach of contract by the Trustees two (2) weeks prior to the planned opening on November 1, 2005. Taken together all of these acts are

sufficient to ensure that no individual member of the Board of Supervisors had acted without the benefit of the consent of the Board as a whole and the contract was spread upon the minutes of the Board of Supervisors in compliance with Mississippi law. If the court deems every technicality was not accomplished then alternatively the Board should be equitably estopped from arguing any technical omission by the Board and or CMI in having the contract simultaneously spread on the minutes when the Board of Trustees minutes are filed with the same chancery clerk's office. Most notably the Judge, as finder of fact in this matter, stated discussing the Hospital Agreement stated "The fact there is a contract spread on the minutes and been signed..." (T 165).

Before the doctrine of equitable estoppel shall apply the following factual elements must exist: (1) belief and reliance on some representation; (2) change of position as a result thereof; (3) detriment or prejudice caused by the change of position. *Covington County v. Page*, 456 So. 2d 739, 740 (Miss. 1984). It is clear from the testimony and evidence as set forth in the record, Greene County Board of Supervisors, Greene Rural Health Center Board of Trustees and CMI have had an ongoing relationship since prior to the Request for Proposals published by the Board of Supervisors in October of 2004. It is undisputed CMI was the only respondent and thus the only company interested purchasing or leasing the facility known as Greene Rural Health Center. From the testimony of Supervisor Dearman, and Ted Cain, President of CMI it is clear CMI chose to forgo the opportunity to purchase or lease the facility to allow operations to continue while managing the facility for the GRHC Trustees. (T 108-125, 291-375).

This was done to allow the Upper Payment Limit program to fund the re-opening of the hospital which was the goal of the RFP and contracting process. This process allowed Greene County to re-open the hospital and build the assets' value prior to sell or lease. The parties knowingly contracted for a sale or lease offer to be made to CMI as consideration for the

willingness of CMI to forebear its ability to purchase or lease Greene Rural Health Center while under the Operations/Consultant Agreements currently in place. The Board of Supervisors were involved in this matter from day one and even instigated this matter by issuing an RFP and making the decision to negotiate with CMI with the Nursing Home Agreement and Hospital Agreements being entered as a result of these negotiations. The Hospital Agreement which has clearly been spread upon the minutes, as the Court held as finder of fact in this matter, clearly included the following sections:

> 5. **Right of First Refusal** CMI shall retain the right of first refusal to buy, lease or manage the Critical Access Hospital Facility in the event Owner and/or Agent desires to sell, lease or discontinue the management of Facility. Owner and/or Agent agree to negotiate solely with CMI should Owner desire to sell, lease, or discontinue management or operation of the Hospital Facility and/or Skilled Nursing Facility at any time in the future prior to or after October 30, 2007.

(RE 117 CP 38)

> 25. **Critical Access Hospital Facility** Second Paragraph
>
> Owner and Agent agree to offer for sale or long term lease both the Greene County Rural Health Center Skilled Nursing Facility and Hospital Facility to CMI, or an entity designated by CMI, on or before October 30, 2007. Owner and Agent agree to complete such sale or long term lease on or before December 31, 2007. If Owner and/or Agent and CMI cannot agree to sale or long term lease terms on both facilities addressed in this agreement, Owner and Agent hereby agree to enter into a management contract with CMI on or before December 31, 2007 for a period of not less than five (5) years. ... Owner and Agent further agree to grant to CMI, or a company designated by CMI, the first right of refusal to purchase both Greene Rural Health Center Skilled Nursing Facility and Hospital Facility should the Owner/Agent. ... Owner/Agent and CMI further agree CMI shall have the option to extend the October 30, 2007 purchase date for a period of one (1) year and extend any management contract of which CMI and Greene County Rural Health Center Skilled Nursing Facility and Hospital Facility are parties to for successive one year increments until such time as CMI or an entity designated by CMI shall purchase the facilities or give written notice to Owner/Agent of the desire not to purchase the Skilled Nursing Facility and Hospital Facility.

(RE 113-14 CP 34-35).

By plain reading the documents produced as a result of the RFP process initiated by the Board of Supervisors it is clear CMI chose to postpone its eventual purchase or lease opportunity while working under the Nursing Home Agreement and Hospital Agreement with the assurance these facilities would be offered to CMI for sale by October 31, 2007 and could then choose to sign a five (5) year management contract if CMI chose not to purchase the facilities. These facts as evidenced by the testimony and documents admitted into evidence, clearly show that CMI (1) believed in, and relied on, representations set forth in the agreements; (2) changed its position as a result of belief that the contracts would be honored and (3) to its detriment now finds the belief in and reliance on these representations has resulted in a detriment to CMI caused by the its change of position.

As the Mississippi Court of Appeals has held in similar circumstances, the Board after reaping the benefits of a contract (lease) for more than thirteen years is not excused from its obligations under the lease contract because of CECC's failure to have the lease contract filed simultaneously in the minute book and in the land records of the chancery clerk, and, applying the doctrine of equitable estoppel, the Board is barred from denying the **validity** and **enforceability** of the lease. *Community Extended Care Centers, Inc. v. Board of Sup'rs for Humphreys County, Mississippi and Humphreys County, Mississippi* 756 So. 2d 798, 804 (Miss. App. 1999). The facts are analogous in this matter before the Court.

As pointed out previously Greene County's goal in the RFP process was to re-open Greene County Hospital for the citizens of Greene County and to have the same company in charge of both facilities. CMI was the only company which responded with an offer. Greene County and the Board of Trustees chose to negotiate with CMI and entered two (2) agreements with CMI for the re-opening of the hospital and management of the facilities until they were to be offered for sale or lease to CMI. CMI has done everything one hundred percent as Supervisor

Dearman stated. (T 110). This was done in the face of Hurricane Katrina and the breach of contract by the Trustees a mere two weeks before the planned opening of the hospital. Now the Board of Supervisors wants the court to deny the validity of the duly signed contracts in an attempt to skirt the contractual responsibilities. Under the doctrine of equitable estoppel this cannot be allowed.

The Greene County Board of Supervisors spread the Hospital Agreement on the minutes, attached a copy to the minutes and authorized the execution of the document. The Nursing Home Agreement and Hospital Agreement are both on file with the same chancery clerk in the Board of Trustees minute book. If the court should find the Hospital Agreement not spread upon the minutes by a technicality the court should bar the Board of Supervisors from denying the validity and enforceability of the Agreement under the doctrine of equitable estoppel.

III. WHETHER THE MATERIAL BREACH AND ATTEMPTED TERMINATION OF THE CONTRACT BY THE BOARD OF TRUSTEES WAS A BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING WHICH IS INCLUDED IN ALL MISSISSIPPI CONTRACTS.

Relevant law

Every contract contains an implied covenant of good faith and fair dealing. *UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc.*, 525 So.2d 746, 757 (Miss. 1987) See, e.g., *Ohashi v. Verit Industries*, 536 F.2d 849, 853 (9th Cir.1976); *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916, 924 (Ala.1981); *Corwin Chrysler-Plymouth v. Westchester Fire*, 279 N.W.2d 638 (N.D.1979); *Christian v. American Home Assurance Co.*, 577 P.2d 899, 904 (Okla.1977); see also Restatement (Second) of Contracts § 205 (1979) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); and Posner, Economic Analysis of Law 81 (3d Ed.1986); cf. Miss.Code Ann. § 75-1-203 (1972) (imposing general duty of good faith).

The Mississippi Tort Claims act simply does not apply to the breach of an express contract. *Estate of Spiegel v. Western Surety Company et al.* 908 So. 2d 859, 863 (Miss. App. 2005).

Analysis

Without notice, reason, or cause on October 17, 2005 the Board of Trustees voted to cancel CMI's contract without discussion or justification and attempted to terminate the contract again during the first year of the contract without justification. The trial court correctly held these acts were a material breach of the Agreements. The attempt to terminate again in the first year lead the Court to hold the actions of Greene County and GRHC Board of Trustees frustrated the purpose of the Agreements and necessitated the commencement of this litigation. (RE 87 CP 1015). Further the court held that Greene County, through its Supervisors, and GRHC breached the implied covenant of good faith and fair dealing that is contained by all Mississippi contracts. As has been pointed out numerous times, the act of canceling CMI's contract and attempting to terminate the contract again prior to the termination as interpreted by the court, clearly constituted a breach of the covenant of good faith and fair dealing for which damages should be awarded.

"Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness, or reasonableness." *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss.1992). Certainly the termination and attempted termination of CMI's agreement by the Board of Trustees violated the standards of fairness and decency or reasonableness as neither was based on the best interest of the community hospital.

Other jurisdictions have provided guidance on how a situation like this may be construed in contract terms and actions. In *Castle v. McKnight*, 116 N.M. 595, 866 P.2d 323 (1993), the

agreement provided that "one party will not change the location of the boundary line fences ... without the express written consent of the other party." *Id.* at 324. The trial court in *Castle* held that the boundary line agreement placed no limitation on the refusal to consent to relocation of the fence. On appeal, the New Mexico Supreme Court reversed and held that "[t]he consent clause contains an implied covenant of reasonableness." Id. at 326.

Other courts have held the same. *See*, e.g., *Bayou Land Co. v. Talley*, 924 P.2d 136, 154 (Colo.1996) ("we have implied the duty of good faith and fair dealing when one party has discretionary authority to determine certain terms of the contract."); *Warner v. Konover*, 210 Conn. 150, 553 A.2d 1138, 1140-41 (1989) ("[a]ccordingly, we hold that a landlord who contractually retains the discretion to withhold its consent to the assignment of a tenant's lease must exercise that discretion in a manner consistent with good faith and fair dealing.").

In this matter the termination and attempted termination of the Agreements by the Board of Trustees are a clear indicator of bad faith as defined by the Mississippi Supreme Court. Bad faith requires a showing of more than bad judgment or negligence; rather, "bad faith" evinces some conscious wrongdoing "because of dishonest purpose or moral obliquity." *Bailey v. Bailey*, 724 So.2d 335, 338 (Miss.1998). In this matter where it is alleged the right to terminate when deemed in the best interest of the community hospital allows the Trustees to willingly breach any agreement at any time demands a reasonableness factor be considered. Most certainly it cannot be a lucid argument that the legislature granted community hospitals the right to breach contracts without regard for the terms thereof. To hold this so will make all contracts with community hospitals without meaning whatsoever.

IV. WHETHER THE TRIAL COURT ERRED IN RESTORING LARRY BROWN IN HIS POSITION ON THE GREENE RURAL HEALTH CENTER BOARD OF TRUSTEES

Relevant Law

The "chancellor's findings will not be disturbed when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong or clearly erroneous or applied an erroneous legal standard." *Williams v. Williams*, 656 So.2d 325, 330 (Miss.1995); *Chamblee v. Chamblee*, 637 So.2d 850, 860

To begin the analysis of this contention, first the Court must look to the statutory law regarding the appointment and removal of Community Hospital Trustees in Miss. Code Stat. Ann. § 41-13-29(6). **Community hospital board of trustees states:**

> 6) The owner which appointed a trustee may likewise remove him from office by majority vote for failure to attend at least fifty percent (50%) of the regularly scheduled meetings of said board during the twelve-month period preceding such vote, or for violation of any statute relating to the responsibilities of his office, based upon the recommendation of a majority of the remaining trustees.

The underlying action was an action for injunction to prevent breach of contract and the Chancellor was well within the authority of the Chancery Court to grant equitable relief as required. The Appellants cannot present any evidence which shows Mr. Pierce's forced resignation was authorized by the Board of Supervisors. In an attorney general's opinions, interestingly enough dealing with the same county Board of Supervisors, the attorney general held:

> The board [Supervisors] may not "reappoint" all the trustees, replacing one trustee with someone else; where that trustee is lawfully appointed to a five-year term and does not **lawfully** resign, that trustee is still member of the board of trustees, and no other person has any authority to act in his place or on behalf of the board. Op.Atty.Gen. No. 2005-0173, Bowman, April 8, 2005

A Brief synopsis of what transpired in regard to Larry Brown and his position on the Board of Trustees is necessary. Larry Brown was legally appointed to the Greene Rural Health Board of Trustees by the Greene County Board of Supervisors. Larry Brown testified he was told to vote

as directed by Pierce and was forced to sign a resignation after being intimidated and threatened by Supervisor Marion Pierce, his employer at the time, when he voted differently than Pierce wished. (T 124-126). On October 31, 2005 Larry Brown changed his vote and voted to reinstate CMI after having voted cancel CMI's contract at the October 14, meeting as instructed upon appointment to the Board. (TE 58-62). Supervisor Marion Pierce forced Larry Brown to follow the actions of Board member Tommy Roberts. At trial Mr. Brown was asked if Marion Pierce told him "if Tommy Roberts votes A, B and C on something, you were to vote A, B and C also?" His response was yes. (T 125).

After reversing his vote to terminate the contracts with Corporate Management, Inc., the next morning Marion Pierce told Mr. Brown he better resign and despite Mr. Brown's refusal, proceeded to take Mr. Brown to the Board of Supervisors office where a lady typed up his resignation. Marion Pierce through intimidation forced Mr. Brown to sign his resignation for not complying with Mr. Pierce's wishes on how he should vote. (T 126-27). That same day Marion Pierce made Larry Brown work at a job making three (3) dollars less an hour than he previously made. (T 127). Subsequent to Larry Brown not voting the way Mr. Pierce instructed, Mr. Brown and his wife were both terminated by Mr. Pierce. (T 128).

When asked if he felt like he was fired because he changed his vote Brown responded "I feel like that's why he got so hard on me and made everything rough on me because I changed my vote. " (T 129). When asked is that what caused you to resign Brown responded "Well, yeah. Because, like I say, I worked for the man. I didn't have much choice *but do what he said* do. (T 129). As shown and held by the Court, Larry Brown offered a resignation forced by Supervisor Marion Pierce. This was done under duress. Supervisor Pierce clearly intended to control the votes on the Board of Trustees which statutorily is supposed to operate independently from the Board of Supervisors. Larry Brown did not lawfully resign as he was forced to resign

under duress and intimidation of Supervisor Marion Pierce, a party Defendant, in this matter and a member of the Board of Supervisors of Greene County, Mississippi, also a party defendant.

The trial court held the Greene County Board of Supervisors' decision to appoint, terminate and restructure the GRHC Board violated the Supervisors' statutory obligation to "appoint trustees for the purpose of operating and governing community hospitals" thereby imposing their will and usurping the independent nature of the GHRC Board. Miss. Code Ann. §41-13-29. The Chancellor corrected an unlawful act of the Board of Supervisors and Marion Pierce which was relief requested by Corporate Management, Inc. on page 9 of the initial Complaint and clearly put all parties on notice of this egregious action. (RE 97 CP 18). The resignation does not comply with Miss. Stat. Ann. §41-13-29 which sets forth the procedure for **Board of Supervisors** removal of a Board of Trustee member. As stated the owner which appointed a Trustee may remove him from office for failing to attend at least fifty percent (50%) of the regularly scheduled meetings of said board during the twelve month period preceding such vote, or for violation of any statute relating to the responsibilities of his office, based upon the recommendation of a majority of the remaining trustees. Miss. Stat. Ann. §41-13-29(6).

The courts of Mississippi have often corrected illegal acts by various Boards. As shown by the Supreme Court's following reasoning that a court can direct an official or commission to perform its official duty or to perform a ministerial act, but it cannot project itself into the discretionary function of the official or the commission. Stated differently, it can direct action to be taken, but it cannot direct the outcome of the mandated function. *In re Wilbourn*, 590 So.2d 1381,1385 (Miss. 1991). The Supreme Court has also said, "[t]hus, a court could, if necessary, compel by mandamus an election commission or executive committee to perform its statutory duty upon its failure to do so, or prohibit it by way of injunction." *Id.*

This is exactly what occurred in this matter and the Chancellor took the proper action by reinstating Larry Brown to a position never relinquished as required by statute and effectively prohibiting the Board of Supervisors from usurping the independent nature of the Board of Trustees and retaining jurisdiction to monitor compliance of his final judgment.

In this matter the owner through Supervisor Marion Pierce coerced, intimidated and, without regard for the law, forced removal of Larry Brown, without cause and in violation of the law for the sole purpose of influencing the votes on the Board of Trustees. As the Attorney General opined in another matter concerning the same Board of Trustees, when a trustee did not legally resign, no other person has any authority to act in his place or on behalf of the board. Op Atty. Gen. No. 2005-0173. The Appellants have failed to show Larry Brown offered a resignation with the intent to give up the office as he attempted to rescind the resignation the same day, shown by his affidavit and appeared at a subsequent meeting of the Board of Trustees to protest his unlawful treatment by Supervisor Marion Pierce.

There was never a vote by the Board of Trustees to remove Larry Brown for any reason listed in §41-13-29 (6). As the Chancellor states in paragraphs 120 and 121 of his Memorandum Opinion the Board of Supervisors usurped the independent judgment of Trustee members and forced Larry Brown to offer a resignation under duress which he attempted to withdraw the same day. The Chancellor has held this was not an effective resignation.

The Appellant consistently attempts to misdirect this Court by alleging the issue of the illegal removal of Larry Brown was not before the Court and could not be ascertained by reading the pleadings filed in this matter. As the original complaint clearly states in paragraph 23 and trial testimony of Larry Brown proves that Supervisor Pierce illegally removed Larry Brown from office because he did not like the way Larry Brown voted. The act of removing Larry Brown was done so for the purpose of controlling votes concerning the contracts in the future. CMI also

requested this relief to correct the illegal actions of Supervisor Marion Pierce. Corporate Management and did not attack I.D. Brown's right to office as he was never legally placed on the Board of Trustees.

In this matter Larry Brown never resigned as he was forced to sign a piece of paper drafted by someone other than himself and form the transcript of the trial did not get to read the alleged resignation. Mr. Brown's resignation was not given to the Board of Trustee's and not entered on its minutes. As this matter was tried in the Chancery Court of Greene County, Mississippi certain other considerations must be given credence.

> Mississippi's chancery courts are courts of equity, and under the clean hands doctrine, anyone that comes before "a court of equity ... must do equity as a **condition of recovery.**" *Galloway v. Inglis*, 138 Miss. 350, 359, 103 So. 147, 149 (1925); see also Billy G. Bridges & James W. Shelson, Griffith Mississippi Chancery Practice §§ 42-43 (2000 ed.). This doctrine, in effect, prevents a complainant from petitioning the court to modify an original decree absent proof that said complainant has fully performed under the terms of the original decree or, in the alternative, that full performance thereunder has been wholly impossible. *Kincaid v. Kincaid*, 57 So.2d 263, 265 (1952).

Dill v. Dill, 908 So.2d 198, 201-02 (Miss. App. 2005).

A mere perusal of Larry Brown's testimony will clearly show he acted under duress and even after being forcibly removed and suffered retribution from Supervisor Pierce. As pointed out Larry Brown's actions were forced by exactly what duress is defined to be by both elements of law and historical definitions. "... duress, in its more extended sense, ...is meant that degree of severity, either threatened and impending, or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness." *Davis v. Mississippi Cent. R. Co.*, 46 Miss. 552, (1872). Later the same day Mr. Brown attempted to rescind his ill gotten letter of resignation. (TE 12 pg 95). The holding of the trial court must be deemed proper or the independent authority granted the Board of Trustees by Miss. Code Ann. §41-13-35 *et. seq.* is a

mere fallacy as the Trustees will become no more than puppets for overzealous Boards of Supervisors throughout the State of Mississippi. It must again be stated, the Greene Rural Health Center Board of Trustees did not appeal any aspect of the Trial Court's Judgment. The Appellant's are requesting relief be granted a party that did not appeal the underlying court decision.

IV. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANTS GREENE COUNTY, TOMMY ROBERTS, JOHN MARSHALL EUBANKS AND MARION PIERCE'S MOTION FOR A NEW TRIAL.

RELEVANT LAW

The Mississippi Supreme Court has held the scope of review is limited on the denial of a motion for new trial, and the Court will reverse the grant or denial of a motion for new trial only upon the showing of an abuse of discretion by the trial judge. *Maxwell v. Illinois Central Gulf R.R.*, 513 So.2d 901, 908 (Miss.1987).

A motion based upon newly discovered evidence may not be granted unless it can be shown that (1) the evidence was discovered following the trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is material and not cumulative or impeaching; (4) the evidence is such that a new trial would probably produce a new result. *Moore v. Jacobs*, 752 So.2d 1013, 1017(18) (Miss.1999). "A party asking for a new trial on the ground of newly discovered evidence must satisfy the [trial] court that the evidence has come to his knowledge since the trial and that it was not owing to a want of diligence on his part that it was not discovered sooner." *Sullivan v. Heal*, 571 So.2d 278, 281 (Miss.1990). "Facts implying reasonable diligence must be provided by the movant." *N.L.R.B. v. Jacob E. Decker & Sons*, 569 F.2d 357, 363-64 (5th Cir.1978).

The Appellants simply restate the arguments presented at trial on the matters presented to the court in their Motion for a New Trial. While some theoretically new evidence is set forth with James Aldridge and Larry Brown no evidence whatsoever was offered only a self serving affidavit and testimony of a person who was known to all parties and attorneys throughout the litigation. Mr. Brown testified and was clearly available at any time to be deposed or subpoenaed to trial, this did not occur. Mr. Aldridge was the Hospital administrator and was known by all involved and the Appellants chose not to depose or subpoena him to trial in the underlying matter. While not binding law, as this is an appeal of the Court's decision, an excerpt of the Judge's reasoning is very important in defeating any claim of an abuse of discretion which must be shown to grant a new trial on appeal. The trial judge, also the finder of fact, in this proceeding, stated at the hearing conducted on March 14, 2007:

> Let me interrupt you Mr. Mills, ... This is something I'm concerned with. My Final Judgment, I didn't order any relief against I.D. Brown. I ordered that the Greene Rural Health Board immediately remove I.D. Brown. So the order was made to a party in this case as to the structure of the Board and the body. The issue that is concerning to this Court after listening to all the **testimony** making a detailed decision is that in essence the future of this hospital and nursing home is going to rest on the vote of one person in on e seat on this Board. And the Court already found that the Greene County Board of Supervisors in essence is trying to impose their will in not allowing this Board to maintain independent judgment so that it can do what's right and purposeful. And I've sat and listened to a lot of testimony by a lot of people that talked about in essence how this was – the control over this board depended on this one seat.
>
> Now I've got before me as part of this, certainly there was evidence about how Larry Brown – how he was terminated or how he resigned under duress. And now I've got **information** before me that you've provided where Larry Brown now works for CMI.

(T 564-65)

There was no new evidence presented by Appellants at the hearing held on the Motion for New Trial. The only "information" presented was a transcript of an interview of James Aldridge. It should be noted that any reference made by counsel opposite that James Aldridge or Larry Brown ever worked for CMI is patently false and unsupported by any "evidence".

Mr. Aldridge was known to be the hospital administrator as he had appeared at meetings of the Board of Trustees to discuss purchasing policies and declared in the January 16, 2006 meeting of the Board of Trustees that as a result of various vendors refusing to issue the Hospital credit he was forced to go to us an CMI affiliated company (Quest) "because no vendor would give us credit." (TE pg 465). As the minutes reflect "Mr. Aldredge stated he believed everything was done on the up and up." *Id.* This occurred at a meeting which was attended by Edwin L. Pittman, Jr. one of the Appellants attorney's of record from day one in this litigation.

As pointed out by the Court when hearing this matter, concerning the purchasing indiscretions Mr. Aldridge attempts to accuse CMI of in the affidavit supporting the Motion for a New Trial, "My recollection is that those matters were not tried in this litigation." (T 582). The trial judge is correct on this point, the Appellants never produced a specific claim for money recovery or a specific claim evidencing an infraction of any purchasing laws. (T at 583), There is no "evidence" to support any a claim of a violation of bid laws and this relief was not requested nor tried in the underlying action. In the counterclaim, which was not amended, the Appellants requested the following relief:

1. Declare that the agreements attached to the Complaint as Exhibits A and B are void an of not effect.

2. Require CMI to account to the Board of Trustees for all funds received and expended by it related to Greene Rural Health Center and to deliver all property of whatsoever kind and nature in its possession which the property of Greene Rural Health Center to the Trustees.

The Appellants knew of the existence of Mr. Aldridge as the administrator of Greene County Hospital, at the latest, in January of 2006 and had more than two months to depose or subpoena the individual prior to the first hearing and more than six (6) months prior to the final

hearing, As the Appellants made no demand at trial for violations of the purchasing statutes and they simply chose not to question Mr. Aldridge. This is clearly not a showing of due diligence which must be shown by the Appellants. The issues brought forward in the Appellant's Motion for New Trial do not set forth an abuse of discretion by the Trial Court or that a an issue was decided under a clearly erroneous legal standard. The Appellants have not set forth any facts which indicate the underlying action would have been decided differently as many of the Appellants arguments were not litigated in the underlying action.

VI. WHETHER THE CONTRACT IS ILLEGAL

Appellants assert the contracts are illegal because the trial court found some of the language ambiguous and/or contradictory. These contracts are clearly not illegal and are valid and enforceable.

Appellants have never challenged that an offer, acceptance and consideration have been exchanged. The lone argument is that the Trial Court found some language ambiguous and inserted some language to clear up a contradiction in terms. How this is illegal is beyond comprehension. The contracts have a partial invalidity clause which states:

Partial Invalidity. The invalidity of unenforceability of any particular provision of this Agreement shall not affect the other provisions thereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

The Trustees and Supervisors are granted the authority to enter into contracts and the trustees have the authority to enter in to contracts under Miss. Stat. Ann. §41-13-35(5)(g)

> g) To contract by way of lease, lease-purchase or otherwise, with any agency, department or other office of government or any individual, partnership, corporation, owner, other board of trustees, or other health care facility, **for the providing of property, equipment or services by or to the community hospital or other entity or regarding *any facet of the construction, management,* funding or operation of the community hospital or any division or**

department thereof, or any related activity, including, *without limitation*, shared management expertise or employee insurance and retirement programs, and to terminate said contracts when deemed in the best interests of the community hospital;

Also the Mississippi Attorney General has opined:

Section 41-13-35 clearly allows the community hospital to fulfill its mission independently or jointly with other health care providers, whether or not such other providers are private, a partnership, or public entities. Op.Atty.Gen. Cowart, Aug. 5, 1992.

Clearly the Trustees have the authority to allow another entity to manage the facility. Also, in this matter the Trustees have continued to exert control over various aspects such as acquiring land, seeking approval from the Board of Supervisors to acquire loans, approving all checks written on the facilities accounts. It must be noted the trustees have approved every penny ever spent during CMI's tenure. CMI was brought in to manage a nursing home and open a critical access hospital and has complied in a timely manner with every provision of the contracts. Under Mississippi law courts are allowed to reform a contract which is ambiguous and/or contradictory. The Appellant's illegality argument is not plausible.

CROSS APPEAL ISSUES

I. WHETHER THE TRIAL COURT ERRED IN FINDING THE CONTRACT DID NOT GRANT CORPORATE MANAGEMENT, INC. THE EXCLUSIVE RIGHT TO RECEIVE AN OFFER TO PURCHASE OR LEASE THE FACILITIES

Relevant Law

The relevant Miss. Code Ann. provision that mandates how a sale, lease or sale with option to lease shall be completed is §41-13-15. Establishing, leasing and conveying assets of community hospitals. The trial court only required that Greene County and GRHC be required to offer the Nursing Home and Hospital for sale or long term lease in compliance with §41-13-

15. The court deviated from reason when it then held the offer to sell or lease shall not be an exclusive right of CMI, but shall be open to the public and sold or leased to the highest and best bidder, consistent with the statutory requirements. (RE 83 CP 1011).

This statutory process of §41-13-15 is what the parties have been working under and CMI's reply to the Request for Proposal is what started this whole process. In August 2004 the Greene County Board of Supervisors published a Request for Proposals to which CMI was the only respondent. (TE P-3 pg 356, TE P-4 pg 357-58 and TE 2 pg. 35-54). The RFP was property published. (TE P-2 pg 354). The Supervisors received advice of counsel on what paths they could take and the chose to move forward with CMI. (TE 3 pg. 55). It is at this point CMI and the Board of Supervisors and Trustees decided on the path taken. This path was to hold the sale or lease in abeyance while, under the Nursing Home and Hospital Agreements, CMI managed the facilities and utilized the Upper Payment Limit (UPL) to assist in defraying the cost of opening the Critical Access Hospital.

It is clear the parties all agreed and there was an obvious meeting of the minds as to what path to pursue and the parties entered the Nursing Home and Hospital Agreements that contained the following language:

Paragraph 25 of the Nursing Home Agreement signed on April 1, 2005, the parties agreed:

> Critical Access Hospital CMI agrees to work in good faith with the Board of Trustees and Board of Supervisors to obtain the goal of opening a critical access hospital on the premises of Greene Rural Health Center.
>
> Upon the execution and during the term of this Agreement CMI, the Board of Trustees and Board of Supervisors agree to utilize all resources of Greene Rural Health Center to accomplish the goal of opening Greene County Hospital with after hours emergency services to be open within six (6) months of the effective date of this contract. Opening and provision of said services is contingent upon Greene County obtaining all permits, licenses and certifications required by city, county, state and federal governmental authorities to operate said facilities.

(RE 109).

The Hospital Agreement includes the following sections:

> 5. **Right of First Refusal** CMI shall retain the right of first refusal to buy, lease or manage the Critical Access Hospital Facility in the event Owner and/or Agent desires to sell, lease or discontinue the management of Facility. Owner and/or Agent agree to negotiate solely with CMI should Owner desire to sell, lease, or discontinue management or operation of the Hospital Facility and/or Skilled Nursing Facility at any time in the future prior to or after October 30, 2007.

(RE 117 CP 38)

> 25. **Critical Access Hospital Facility** Second Paragraph
>
> Owner and Agent agree to offer for sale or long term lease both the Greene County Rural Health Center Skilled Nursing Facility and Hospital Facility ***to CMI, or an entity designated by CMI, on or before October 30, 2007. Owner and Agent agree to complete such sale or long term lease on or before December 31, 2007. If Owner and/or Agent and CMI cannot agree to sale or long term lease terms on both facilities addressed in this agreement, Owner and Agent hereby agree to enter into a management contract with CMI on or before December 31, 2007 for a period of not less than five (5) years.*** ... Owner and Agent further agree to grant to CMI, or a company designated by CMI, the first right of refusal to purchase both Greene Rural Health Center Skilled Nursing Facility and Hospital Facility should the Owner/Agent. ... Owner/Agent and CMI further agree CMI shall have the option to extend the October 30, 2007 purchase date for a period of one (1) year and extend any management contract of which CMI and Greene County Rural Health Center Skilled Nursing Facility and Hospital Facility are parties to for successive one year increments until such time as CMI or an entity designated by CMI shall purchase the facilities or give written notice to Owner/Agent of the desire not to purchase the Skilled Nursing Facility and Hospital Facility.

(RE 113-14 CP 34-35).

The Greene County Board of Supervisors has failed to complete the process. The trial court erred in determining the process began under §41-13-15(10) ended with the Nursing Home and Hospital Agreements. These were simply a step in the process not completed by the Board of Supervisors to the detriment of CMI. The Supervisors were in compliance with the RFP process as statutorily outlined in this section which is set forth below:

§41-13-15(10) If an owner wishes to sell such community hospital or lease the hospital with an option to sell it, the owner first shall conduct a public hearing on the issue of the proposed sale or lease with an option to sell the hospital. Notice of the date, time, location and purpose of the public hearing shall be published once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in the county or city, as the case may be, or if none be so published, in a newspaper having a general circulation therein. The first publication of the notice shall be made not less than twenty-one (21) days before the date of the public hearing and the last publication shall be made not more than seven (7) days before that date. If, after the public hearing, the owner chooses to sell or lease with an option to sell the hospital, the owner shall adopt a resolution describing its intention to sell or lease with an option to sell the hospital, which shall include the owner's reasons why such a sale or lease is in the best interests of the persons living in the area served by the facility to be sold or leased. The owner then shall publish a copy of the resolution; the requirements for proposals for the sale or lease with an option to sell the hospital, which shall state clearly the minimum required terms of all respondents and the evaluation process that will be used when the owner reviews the proposals; and the date proposed by the owner for the sale or lease with an option to sell the hospital. Such publication shall be made once a week for at least three (3) consecutive weeks in at least one (1) newspaper published in the county or city, as the case may be, or if none be so published, in a newspaper having a general circulation therein. The first publication of the notice shall be made not less than twenty-one (21) days before the date proposed for the sale or lease with an option to sell the hospital and the last publication shall be made not more than seven (7) days before that date. If, on or before the date proposed for the sale or lease of the hospital, there is filed with the clerk of the owner a petition signed by twenty percent (20%) or fifteen hundred (1500), whichever is less, of the qualified voters of the owner, requesting that an election be called and held on the question of the sale or lease with an option to sell the hospital, then it shall be the duty of the owner to call and provide for the holding of an election as petitioned for. In that case, no such sale or lease shall be entered into unless authorized by the affirmative vote of the majority of the qualified voters of the owner who vote on the proposition at such election. Notice of the election shall be given by publication in the same manner as provided for the publication of the initial resolution. The election shall be conducted and the return thereof made, canvassed and declared in the same manner as provided by law in the case of general elections in the owner. If, on or before the date proposed for the sale or lease of the hospital, no such petition is filed with the clerk of the owner, then the owner may sell or lease with an option to sell the hospital. Such sale or lease shall be made to the respondent submitting the highest and best proposal. In no case may the owner deviate from the process provided for in the request for proposals.

(Miss. Stat. Ann. §41-13-15(10)).

The Supervisors published the Public Notice as required by law. (TE P-2 pg 354 P-3 pg.355).

The issued the Request for Proposals and received one response, that being from CMI. The trial

court correctly found some ambiguity and contradictory terms in the terms of the contracts and the duties and authorities and as such under the contract laws of this state proceeded to interpret the intentions of the parties. CMI does not disagree with the trial court's holding in those regards.

That the Owner and Agent (Supervisors and Trustees) agreed to complete the process outlined in the statute excerpted above is not in the least ambiguous or contradictory. CMI negotiated the right to receive the offer of a sale or lease from the owner and agent, to the exclusion of all others, as CMI was the only entity to respond to the request for proposals. CMI and the Owner and Agent all agreed to forgo the immediate offer while the UPL payment was received to defray the costs of opening a hospital. This was done. Now to the detriment of CMI the Trustees have breached and continue to attempt to breach the contract and the Supervisors (Marion Pierce), while still under contract, pressured the Board of Trustees (Larry Brown) to oust CMI and deny CMI the negotiated offer of a sale or lease on or before October 30, 2007 and to complete sale by December 31, 2007.

The trial court then correctly enforced the provision which mandates if the sale or lease is not completed by December 31, 2007, then Greene County and GRHC shall be required to enter into a management contract with CMI for both facilities for a term of not less than (5) years. (RE 83 CP 1011). CMI requests this Court reverse the trial court and order a sale or lease offer be made to CMI in compliance with the agreed terms of the contract and in compliance with the applicable statute cited above.

II. WHETHER THE TRIAL COURT ERRED IN DENYING CORPORATE MANAGEMENT, INC LOST PROFITS DUE TO THE BREACH OF CONTRACT.

Mississippi law allows one to recover for loss of future profits in a breach of contract case as long as the lost profits are proven to a degree of reasonable certainty and not based on

speculation or conjecture. *Lovett v. E.L. Garner, Inc.*, 511 So. 2d 1346, 1353 (Miss.1987). *See McCain v. Cox*, 531 F.Supp. 771, 783 (N.D. Miss. 1982) *aff'd* 692 F.2d 755 (5th Cir. 1982); *United States Finance Co. v. Barber*, 157 So. 2d 394, 398 (Miss. 1963); *Mississippi Power Co. v. Cochran*, 147 So. 473, 475 (Miss. 1933); *Yazoo & MVR Co. v. Consumer Ice and Power Co.*, 67 So. 657, 658 (Miss. 1915); *Crystal Ice Company v. Holliday*, 64 So. 658, 660 (Miss. 1914); *Railroad Co. v. Ragsdale*, 46 Miss. 458, 483 (1872). The unique nature of each individual contract mandates claims for lost profits must be determined on a case by case basis, as there are no concrete elements to such a claim other than establishment to a reasonable certainty. *Ishee v. Peoples Bank*, 737 So. 2d 1011, 1013 (Miss. Ct. App. 1998) *citing Lovett*, 511 So. 2d at 1353.

Further, Mississippi law states that: "...damages are speculative only when the cause is uncertain, not when the amount is uncertain." *Parker Tractor & Implement Co. v. Johnson,* 819 So.2d 1234, 1239 (Miss. 2002) (citing *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 740 (Miss.1999) (*citing Shell Petroleum Corp. v. Yandell,* 172 Miss. 55, 67, 158 So. 787, 790 (1935)). *A commonly recognized method of establishing lost profits is to rely on past earnings. Ishee v. Peoples Bank*, 737 So. 2d 1011, 1013 (Miss. Ct. App. 1998). The right of an injured party to recover is not precluded by an uncertainty regarding the exact amount of damages. *Harrison v. Prather*, 435 F.2d 1168, 1174-75 (5th Cir.1970) (*citing Koehring Co. v. Hyde Constr. Co.*, 178 So.2d 838, 853 (Miss.1965)), *cert. denied*, 404 U.S. 829, (1971). The evidence is required to only lay a foundation upon which the trier of fact can form a fair and reasonable assessment of the amount of damage sustained. *Mutual Life Ins. Co. v. Estate of Wesson*, 517 So.2d 521, 536 (Miss.1987) *cert. denied*, 486 U.S. 1043, (1988) (*citing, Cain v. Mid-South Pump Co.*, 458 So.2d 1048, 1050 (Miss.1984)).

Analysis

It is an undisputed fact on October 17, 2005 the Board of Trustees cancelled the contract of CMI and removed CMI and any person they "believed" was associated with CMI from the facilities. It is also undisputed on October 31, 2005 GRHC Board of Trustees voted to reinstate CMI. This of course led to Supervisor Marion Pierce attempting to stack the Trustees the way he deemed necessary by exerting pressure on Larry Brown and forcing him to offer a resignation under duress. The testimony and Board minutes clearly show the Trustees breached the contract and CMI was not allowed to exercise its rights and fulfill its duties for fourteen days during which time, not only was no progress made toward the goal of reopening the hospital, steps were taken by Tommy Roberts and Marion Pierce to derail the goal of the Agreements which had been duly executed.

While not directly germane to the actual lost profits the actions that took place the two weeks CMI was not allowed to continue its work to opening the hospital does lend credence to the figure asserted by CMI as being proven to a reasonable certainty.

On October 18, 2005, City of Leakesville police officer Bobby Fick and Board of Trustee member Tommy Roberts escorted the administrator of the Nursing Facility off the premises under the guise that she had been terminated. (T 140). No minutes of the Trustee meetings reflect authority to remove the administrator from the facility as she was employed by the facility, not CMI. Also during the two week time period Tommy Roberts and Marshall Eubanks took actions in an attempt to further frustrate the goal of the Agreements. Ms. Martina Miller, an employee of the facility testified that Trustees Tommy Roberts and Marshall Eubanks, personally instructed her to write "void" on **hospital** administrator James Aldridge's payroll check dated October 20, 2005. (T 146 -47). There was no documentation of any type authorizing this action. *Id.* These actions were done although Mr. Eubanks testified he knew

that December 31, 2005 was the absolute deadline to get the critical access hospital designated. (T 449-50)

After terminating CMI the Trustees cancelled purchase orders on equipment that had been sent and sent equipment back that has already arrived that was necessary for opening the hospital. (T 451). During the two week period not only was no progress made toward opening the hospital, actions were taken that detrimentally effected the progress already made by CMI and Greene Rural Health Center. It is necessary to understand the situation confronted by CMI upon return to the facility on November 1, 2005, the originally planned opening date of the hospital. CMI appeals the trial court's holding denying the claim for damages for the delay in the opening of the Hospital. (RE 80)/

CMI's Chief Financial Officer Thomas Kuluz testified on the issue of lost profits sustained by CMI due to the breach of contract for the two week period CMI was not allowed access to the premises. Mr. Kuluz testified he took historical data from the first five months of the now existing hospital and turned it into a daily projected lost profit figure sustained by CMI. (T 379, 382). This is historical data from the existing hospital that had opened on December 29, 2005. *Id.* Mr. Kuluz prepared the Lost Profit calculation which showed a lost profits sustained by the two week breach of contract to be $56,069.19. (TE P9 pg. 366-67). The two week breach and detrimental actions taken by Board Members delayed the opening by fifty eight (58) days. As shown by his detailed calculation Mr. Kuluz took into account all items required under Mississippi law regarding lost profits. (TE P9 pg. 366-67). As the testimony and calculations based on actual historical data clearly show a conservative estimate of a daily lost profit of $966.71. *Id.* This is a conservative number as pointed out on cross examination by Mr. Mills.

On cross examination Mr. Mills' questions and Mr. Kuluz's testimony clearly indicate this was a conservative estimate and lend credence to these damages being proven to a reasonable

certainty. Mr. Kuluz testified he equitably distributed CMI's expenses over the seven (7) management agreements currently maintained by CMI arriving at a figure of 14.29% of CMI's total expenses allocated to Greene County Hospital. (T 388-390). The equitable distribution of these expenses is set forth on pages 396-400 of Mr. Kuluz's testimony. Mr. Kuluz stated:

> because CMI expenses allocated at 14.29 percent to Stone County Hospital, which you did mention is a bigger facility and I did as well, but 14.29 percent of CMI's expenses are being allocated to Stone County Hospital. And it being a bigger facility it could in turn take more of the expenses and that would be less expenses to be allocated to Greene County Hospital account, which would make greater lost profits on this calculation. So it's fair to this Greene County calculation that it's a fair allocation between Stone and Greene County Hospital.

(T 398).

Based on the testimony and calculations admitted into evidence, CMI has without question proven to a reasonable certainty, $56,069.19 in lost profits due to the breach of contract and two week absence and resulting 58 delay in opening the hospital. CMI can never regain the 58 days lost due to the breach of contract and resulting lost profits. CMI respectfully requests this court reverse the lower court and award CMI $56,069.19 in lost profits or reverse and render with instructions for the trial court to render same.

CONCLUSION

Almost three (3) years ago the parties in the underlying litigation freely and voluntarily entered into valid and binding contracts for the management of Greene Rural Health Center and the re-opening and management of Greene County Hospital. Despite many obstacles thrown at CMI through many nefarious actions of individual Supervisors and Trustees, breach of the contracts and continued attempted termination in breach of good faith, CMI has successfully performed under the contracts. A Critical Access Hospital has been in operation for more than two (2) years serving the citizens of Greene County. The parties clearly contracted for both the Skilled Nursing Facility and Hospital Facility to by offered to CMI for sale or long term lease by October 31, 2007. The parties mutually agreed to this to allow the facility to utilize UPL money to assist in defraying the costs of opening the Hospital.

Despite action taken to thwart the hospital opening, it was accomplished. The Trustees breached the agreement in an attempt to stop the obvious intent of the parties and the Trial Court held, despite the plain terms regarding the offer of sale or lease to CMI, that this is not a right of CMI. CMI respectfully requests this Court affirm the lower court's finding that the contracts are valid and binding upon the Trustees and Supervisors, that the contracts are not illegal, and that the breaches and attempted terminations of the contracts were a clear breach of the covenant of good faith and fair dealing. CMI respectfully requests this honorable Court affirm the chancellors holding to restore Larry Brown to the Board of Trustees as he was not legally removed and did not offer a lawful resignation due to the duress which the deleterious actions of Supervisor Marion Pierce placed on Trustee Larry Brown. .

CMI respectfully requests this Court affirm the Chancellor's finding that the Appellants did not present evidence of violations of purchasing laws and did not seek such in the underlying litigation. CMI respectfully requests this honorable Court affirm the Chancellors denial of a new

trial as the Appellant's did not present any new evidence and all persons or information presented as a basis for the new trial request were readily available for the Appellants to bring forward in the underlying litigation, had they practiced due diligence on behalf of their clients.

CMI respectfully requests this honorable Court reverse the Chancellor's finding that CMI was not entitled to lost profits resulting from the breach of the contract on October 17, 2005 and the resulting 58 day delay in opening the critical access hospital. CMI respectfully requests this honorable Court reverse the Chancellor's finding that CMI did not have the exclusive right to receive an offer to purchase or long term lease the facility as set forth in the contract entered on June 30, 2005.

RESPECFULLY SUBMITTED, this the 7th day of March, 2008.

CORPORATE MANAGEMENT, INC.
Appellee/Cross Appellant

BY: _____
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CERTIFICATE OF SERVICE

I, Darren E. Gray, do hereby certify that I have this date mailed, postage prepaid, by First Class United States mail an original and three (3) copies to the Clerk of the Mississippi Supreme Court and Court of Appeals and additional copies of the foregoing Brief of Appellee/Cross Appellant to the following:

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SO CERTIFIED, this the 7th day of March, 2008.

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