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**IN THE SUPREME COURT AND  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

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**No. 2007-CA-01797**

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**GREEN REALTY MANAGEMENT CORPORATION**

**APPELLANT**

**vs.**

**MISSISSIPPI TRANSPORTATION COMMISSION**

**APPELLEE**

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**APPEAL FROM THE CIRCUIT COURT OF GRENADA COUNTY, MISSISSIPPI**

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**APPELLANT'S REPLY BRIEF**

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**ORAL ARGUMENT REQUESTED (Miss.R.App.Pro. 34(b))**

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## Table of Contents

|   |    |
|---|----|
| Table of Contents .....   | i  |
| Table of Authorities .....  | ii |
| Introduction.....   | 1  |
| 1. Government agencies can only act through their human agents; if MTC is not responsible for, and did not authorize, its employees' conduct (or misconduct) in negotiating and signing the deeds for purchase of the condemned tracts from Green Realty Management, then the releases in the deeds are, under any analysis, legally ineffective. ....                            | 2  |
| 2. MTC seems to argue that the trial court held that the Green Affidavit did not create any issue of fact which was material; the order entered by the trial court does not support that argument, stating repeatedly, in error, that there were "no facts" in evidence of any representation or misrepresentation by MTC.....  | 4  |
| 3. MTC's brief reveals the basic flaw in its approach in dealing with Mr. Green – the erroneous assumption that its agents and employees can bifurcate a condemnation action with a landowner into a "land transaction" and an "engineering transaction" while remaining within the "one recovery rule" of King v. Miss. Transp. Comm'n and Swett v. Miss. State Hwy. Comm'n..... | 5  |
| 4. The Green Affidavit clearly demonstrates that there are genuine, disputed issues of material fact concerning whether MTC's agents showed a plat to Mr. Green and made misleading statements to him prior to execution of the deeds and releases which materially misrepresented the nature and scope of this MTC project.....  | 7  |
| Conclusion .....  | 8  |
| CERTIFICATE OF SERVICE .....  | 10 |

## Table of Authorities

### Page

#### Cases

|  |      |
|--|------|
| <u>Brown v. Ohman</u> , 42 So.2d 209 (Miss. 1949), suggestion of error overruled, 43 So.2d 727 (1949)..... | 3    |
| <u>J.A. Fay &amp; Egan Co. v. Louis Cohn &amp; Bros.</u> , 158 Miss. 733, 130 So. 290 (1930) .....         | 3    |
| <u>King v. Miss. Transp. Comm'n</u> , 609 So.2d 1251 (Miss. 1992) .....                                    | 6, 7 |
| <u>Swett v. Miss. State Hwy. Comm'n</u> , 193 So.2d 596 (Miss. 1967) .....                                 | 6, 7 |

#### Statutes

|                                    |      |
|------------------------------------|------|
| Miss. Code Ann. § 43-37-3(c) ..... | 2, 7 |
|------------------------------------|------|

## Introduction

The reply brief filed by the Mississippi Transportation Commission (“MTC”) argues around the basic issue in this appeal without ever squarely addressing it – whether the Green Affidavit includes clear testimony, which the trial court must take as true, that MTC’s agents negligently or intentionally misrepresented to Mr. Green the nature and scope of the road-widening project and, as a result, the releases in the deeds obtained by those agents are void.

Rather than address that issue directly, MTC argues that its providing complete “hydraulics” or “specs”<sup>1</sup> to Mr. Green after the deeds and releases were signed somehow cures the problem rather than confirming how materially he was misled by the plat provided to him before the deeds and releases were signed.

The “hydraulics” that MTC claims it made no representations concerning, and that the trial judge referred to as “specs,” are apparently the documents referred to as MTC’s Hydrology Analysis that are provided as RE Tab 9, R292.

A detail of the plat that Mr. Green claims was provided to him by MTC’s agent during the negotiations and that misrepresented the nature and the scope of the project to him are provided as RE Tab 2, R289.

Some of MTC’s arguments actually point out that there are other genuine issues of material fact here that should have precluded summary judgment, for example, the issue of whether this is a situation where it would be “appropriate” (and, therefore, statutorily required) for MTC’s agents to have “separately stated” an estimate of just compensation for

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<sup>1</sup> See references to “specs” and “hydraulics” provided after the deeds with releases were signed and construction had begun in exchanges with the judge at the trial level, MTC’s Brief at 17–19 and 20–21.

foreseeable damages to the remaining property in their fair market value offer under Miss. Code Ann. § 43-37-3(c). MTC argues that it is its position that “there was no damage to the remainder.”<sup>2</sup> The Green Affidavit supplied testimony to the contrary, concerning extensive, foreseeable damage to buildings on other tracts as a result of MTC’s diverting Howard Creek, RE Tab 3, Tr. 294 ¶¶ 13 – 25. On a summary judgment motion, when there is this type of conflict, the testimony in affidavits provided by the non-movant must be taken as true and summary judgment denied.

- 1. Government agencies can only act through their human agents; if MTC is not responsible for, and did not authorize, its employees’ conduct (or misconduct) in negotiating and signing the deeds for purchase of the condemned tracts from Green Realty Management, then the releases in the deeds are, under any analysis, legally ineffective.**

As admitted in MTC’s brief, Green Realty Management’s amended complaint clearly alleges “violations of Article 3, Section 17 of the Mississippi Constitution of 1890 by diversion of surface waters on to the property of Green Realty.”<sup>3</sup>

It is undisputed that the trial court granted summary judgment on Green Realty’s constitutional takings claim based on the release provisions in the deeds negotiated and executed following interaction between MTC’s agents and Green Realty’s agent, Mr. Green.

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<sup>2</sup> MTC’s Brief at 24. MTC’s Brief also includes the following statement: “The answer is obvious, MTC did not and does not acknowledge any damage to any remainder.” MTC’s Brief at 13. When statements to this effect are compared to clear statements to the contrary in the Green Affidavit, it is clear that there is an additional genuine issue of material fact – concerning potential damage to structures on property that was not condemned by MTC – which precludes summary judgment in this case.

<sup>3</sup> MTC’s Brief at 4.

It is black letter law that negligent or intentional misrepresentation by one party that induces the other party to sign a contract renders the contract void. See, e.g., Brown v. Ohman, 42 So.2d 209 (Miss. 1949), suggestion of error overruled, 43 So.2d 727.

As pointed out in the Brown decision, “[I]f the writing is procured by false representations, or fraud, committed by one of the parties to the writing on the other, on which he might reasonably rely, the court will permit the facts to be shown, and if fraud was committed in the procurement of the contract, it will be avoided, in other words, no contract exists in legal contemplation if it was procured by fraud.” Brown v. Ohman, 42 So.2d at 212.

A classic statement of the well-settled principle that a party making a misrepresentation in procuring a contract cannot use any part of the contract as a defense is found in J.A. Fay & Egan Co. v. Louis Cohn & Bros., 158 Miss. 733, 130 So. 290 (1930). In Fay, the court noted that where a contracting party made material representations that were not true, the entire contract is avoided “regardless of whether the seller had an actual fraudulent intent or not,” and none of the provisions of the contract were enforceable.

MTC cites no authority in its brief for the proposition that it is exempt from this basic principle of contract formation law and that it can claim the benefits of a contract while disclaiming responsibility for, or authorization of, its agents’ conduct or “misconduct” in obtaining the other party’s signature on that contract.

MTC’s brief confirms that there is a genuine issue of material fact affecting whether the releases were effective, since the Green Affidavit presents evidence that the releases were obtained as a result of misrepresentation, mutual mistake, or fraud. RE 3, ¶¶ 6-12.

2. MTC seems to argue that the trial court held that the Green Affidavit did not create any issue of fact which was material; the order entered by the trial court does not support that argument, stating repeatedly, in error, that there were “no facts” in evidence of any representation or misrepresentation by MTC.

MTC’s brief seems to argue that the trial court did not hold that there were no facts in evidence concerning misrepresentation, fraudulent inducement, and failure to disclose material facts, despite the fact that such evidence was put squarely in the record by the Green Affidavit. See MTC Brief at 29. Instead, MTC argues that the trial court held that there was no evidence in the record that related to any material facts. Id.

This argument is unsupported by the order entered by the trial court, RE 12. The order includes the following clear statements to the contrary:

“There are absolutely no facts in the record to support these theories [of fraudulent or negligent misrepresentation].” Order at 4.

“MTC represented that it would purchase the land at a specific price which it did . . . . Green offers no proof of any other representation made by MTC.” Id.

“MTC made a written representation of what it wanted to purchase and what it would pay . . . . MTC did what it said it would do so there was no misrepresentation by MTC.” Id.

“Green in its brief alludes to actual fraud and mutual mistake. There are no facts to support either.” Order at 5.

-- A straightforward reading of the Order confirms that the trial judge ruled as he did because he believed there was “no evidence” in the record concerning misrepresentation or fraud, not because he believed that any misrepresentation by MTC was not material.

Despite statements to the contrary in MTC's Brief,<sup>4</sup> the Green Affidavit clearly states that the plat shown to him in the negotiations before execution of the deeds with the release provisions misleadingly communicated to him, a lawyer, a contractor familiar with roadwork of this type, and a businessman, that MTC did not intend to change the existing culvert, materially misrepresenting the nature and scope of this MTC project.

MTC's repeated assertion in its brief that MTC made no representations concerning the hydraulics<sup>5</sup> or "specs" that were provided to Mr. Green after the fact – after the deeds with releases were signed, after the construction of the much larger culvert to divert Howard Creek was begun, and after it was too late – only confirm the extent to which the plat provided to him previously misrepresented the nature and scope of this project.

3. **MTC's brief reveals the basic flaw in its approach in dealing with Mr. Green – the erroneous assumption that its agents and employees can bifurcate a condemnation action with a landowner into a "land transaction" and an "engineering transaction" while remaining within the "one recovery rule" of King v. Miss. Transp. Comm'n and Swett v. Miss. State Hwy. Comm'n.**

MTC's brief, at times, refers to Mr. Green being presented only with a "land transaction" rather than an "engineering transaction" at the time he signed the deeds with release provisions. MTC Brief at 22.

If MTC's agents presented its offer to purchase tracts from Green Realty Management in lieu of filing an eminent domain or condemnation action as only a "land transaction" (i.e., a purchase of small, undeveloped tracts for a road-widening project) rather

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<sup>4</sup> See, e.g., MTC Brief at 21.

<sup>5</sup> MTC's Brief includes the following statement: "Further, there was no misrepresentation of hydraulics, since clearly there was no representation either way as to the hydraulics." MTC Brief at 19.



than an “engineering transaction” (a diversion of Howard Creek that had been considered for years and would increase the drainage toward GRM’s other property and industrial buildings from 7% to 44%, increasing water flow by 733%),<sup>6</sup> MTC moved, in this instance, outside the “one-recovery” rule discussed in King v. Miss. Transp. Comm’n, 609 So.2d 1251 (Miss. 1992) and Swett v. Miss. State Hwy. Comm’n, 193 So.2d 596 (Miss. 1967).

As explained in more detail in Green Realty’s initial brief,<sup>7</sup> King involves a special variant of res judicata that holds that in an eminent domain action there is a “conclusive presumption” that evidence of all potential damage, no matter how speculative, to the condemned property and any adjoining property owned by the condemnee has been considered and awarded. In King, MTC condemned 1/3 of a 3.35 acre tract in order to construct a “massive” overpass at the conjunction of two highways within a few hundred feet of the Kings’ home on the remaining portion of their property. The issue was whether a second lawsuit could be filed by the Kings to recover for vibration damage to their home due to the change in grade and use of a pile-driver during the construction of the overpass.

King dealt with the preclusive effect of eminent domain litigation; it did not involve any allegation of negligence by MTC in constructing the “massive” interchange or any negligent or fraudulent misrepresentations by MTC representatives to the Kings concerning the nature and scope of the project and the foreseeable damage to their remaining property.

Swett was cited in the King decision for the proposition that the “one-recovery” rule would also apply in a situation where MTC negotiated a purchase in lieu of filing a condemnation action. The release used in Swett, however, in sharp contrast to the releases

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<sup>6</sup> See Green Affidavit RE Tab 3, R 294, 298-299, ¶¶ 13-17.

<sup>7</sup> See Green Realty Management’s Brief at 21-24.

in the deeds involved in this case, (a) specifically provided that they would have “the same effect as if the Highway Commission had condemned the right-of-way and easement in condemnation proceedings”; and (b) the deed used by the highway department specifically disclosed that the property was being purchased “for the purpose of constructing channel changes.” Swett, 193 So.2d at 598. In Swett, unlike the situation here, the parties agreed that the one-recovery rule would apply.

MTC’s agents and employees cannot split an offer in lieu of condemnation into a (a) “land transaction” (i.e., an offer to purchase small tracts, while misleading the condemnee concerning the purpose of the project); and (b) an “engineering transaction” (hydrology studies and recommendations to divert a creek in a project that could have massive, undisclosed effects on the condemnee’s remaining property), without taking MTC out of the application of the King and Swett cases and out of compliance with the requirement in Miss. Code Ann. § 43-37-3(c) that MTC separately state a “just compensation” figure for damage to the remaining property.

4. **The Green Affidavit clearly demonstrates that there are genuine, disputed issues of material fact concerning whether MTC’s agents showed a plat to Mr. Green and made misleading statements to him prior to execution of the deeds and releases which materially misrepresented the nature and scope of this MTC project.**

MTC’s brief tries to finesse whether the plat shown to Mr. Green, a lawyer, contractor, and businessman, familiar with how water drainage control features are shown on such plats or plans communicated to him that the existing culvert would remain. MTC argues in a circular fashion around this issue – for example, stating that it made no representations about the hydraulics or “specs” provided after the fact – rather than addressing it directly.

The Green Affidavit is clear on this issue. Despite the trial court's conclusion in its Order that there was "no evidence" in the record concerning misrepresentation or fraud in the inducement by MTC's agents, there clearly was such evidence that, under the well-recognized standard for summary judgment, must be taken as true.

### Conclusion

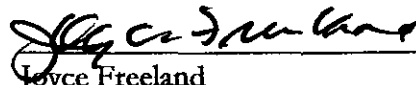
There are genuine issues of material fact here as to whether MTC obtained the releases by misrepresentations to Mr. Green and imposed on GRM acts of fraud, whether intentionally or negligently committed. As confirmed by MTC's brief, there is also a genuine issue of material fact whether the potential damage from MTC's hydrology project makes this a situation where it was "appropriate" and statutorily required that MTC separately state compensation for that potential damage to the tracts that were not condemned. These genuine issues of material fact preclude the granting of summary judgment to MTC in this case.

GRM, accordingly, respectfully requests that this Court reverse the lower court's grant of summary judgment to MTC and remand this matter to the trial court.

Respectfully submitted, this the 18<sup>th</sup> day of June, 2008.



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## CERTIFICATE OF SERVICE

I, T.H. Freeland, IV, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to:

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This 18<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
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