SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-SA-01780
1780

MISSISSIPPI TRANSPORTATION COMMISSION — PLAINTIFF - APPELLANT

VS.

ENGINEERING ASSOCIATES, INC. — DEFENDANT- APPELLEE

On Appeal from the Circuit Court of Hinds County, Mississippi
First Judicial District
No. 251-05-232CN

BRIEF OF DEFENDANT-APPELLANT MISSISSIPPI TRANSPORTATION COMMISSION

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APPELLANT REQUESTS ORAL ARGUMENT BEFORE THE COURT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed person have an Interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. The Mississippi Transportation Commission, Appellant and Plaintiff in the trial court proceeding.
2. Larry L. Brown, Executive Director, Mississippi Department of Transportation
3. Honorable Trent Lott
4. Honorable Chip Pickering
5. Jim Hood, Attorney General, State of Mississippi
6. John Robert Smith, Mayor, City of Meridian, Mississippi
7. Engineering Associates, Inc., Appellee and Defendant in the trial court proceeding.
8. James H. Isonhood, Esq., Counsel for Appellant and Plaintiff, Mississippi Transportation
9. Larry A. Schemmel, Esq., Counsel for Appellant and Plaintiff, Mississippi Transportation
10. Andy Hughes, Division Administration, Federal Highway Administration
11. Mark D. Herbert, Esq., Counsel for Appellee, Engineering Associates, Inc.
12. Kevin A. Croft, Esq., Counsel from Appellee, Engineering Associates, Inc.

James H. Isonhood, MS Bar No. 8707
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VS.

ENGINEERING ASSOCIATES, INC. — **DEFENDANT- APPELLEE**

APPELLANT REQUESTS ORAL ARGUMENT BEFORE THE COURT

STATEMENT OF THE ISSUES

1. Did the court err by refusing to dismiss the appeal of Engineering Associates for lack of subject matter jurisdiction?

2. Did the court err when it determined that the decision of the Mississippi Transportation Commission was arbitrary and capricious and lacked substantial evidence?

3. Did the court abuse its discretion by refusing to grant relief from its order which required the Mississippi Transportation Commission to perform a contract to which it was not a party?

STATEMENT OF THE CASE

In early 2002, the City of Meridian ("City") and the Mississippi Transportation Commission ("Commission" or "MTC") entered into a Memorandum of Understanding ("MOU") to develop a new highway interchange on Interstate 20 to service Meridian's industrial park. (RS130, RS137-141, RE020, RE023-027.)[1] The Commission often

[1] R - Reference
RS – Record Supplement
RE – Record Excerpt

enters into similar agreements with cities. The Commission maintains oversight to some degree for each type of project. (RS137-141, RE023-027).

On April 23, 2002, the Commission voted to enter into the MOU with Meridian to work jointly toward designing and building said interchange. (RS130, RE020). Article II, paragraph 2, of the MOU stated in pertinent part:

> This agreement shall be subject to termination at any time upon ninety (90) days written notice written by either party. Such notice shall not however, be effective as to contracts made in reliance upon this agreement and underway at the time of termination. Any contract underway shall be allowed to conclude under its own terms. After the contract for construction has been awarded, this agreement shall not be terminated save for default by the CITY in carrying the project to completion.

(RS139, RE025). The MOU authorized the City, subject to Commission approval, to select an engineering firm to prepare preliminary and final plans, including preparation of the environmental documents (Environmental Impact Statement) within the project. (RS130, RS137, RE020, RE023). The City was required by the MOU to utilize the selection process defined by the Commission in selecting the engineers for the design and construction of the project. (RS139, RE025).

The City conducted the selection process and selected Engineering Associates ("EA") for the environmental and design work on the interchange and entered a contract with EA for that work. (RS131, RE021). During this time, there came to light some improprieties that possibly tainted the selection process. (RS208-209, RE044-045). There was also some question as to the timeliness of the presentation of the contract between the City and Engineering Associates for approval to the Federal Highway Administration ("FHWA") (RS220, RE052). As a result of these issues, on March 8,

2005, the Commission voted to terminate the MOU with Meridian. (RS187, RS225, RE040, RE057).

Engineering Associates is not now nor has it ever been a party to the MOU that is the subject matter of this appeal (RS137-141, RS144-155, RE023-027, RE028-039). In addition, there is not now nor has there ever been a contractual relationship between Engineering Associates and the Commission regarding the subject interchange (RS137-141, RS144-155, RE023-027, RE028-039). Moreover, on January 10, 2006, the Commission voted to pay Meridian $297,559.08 as reimbursement for monies paid to Engineering Associates for developing the environmental documents for said interchange. (R205, RE042). At the time that Engineering Associates filed its Notice of Appeal to the Circuit Court, the City had not terminated its contract with Engineering Associates. (RVol. 3 P.4, RE019).

At the meeting that the Commission decided to terminate the MOU, Commissioner Dick Hall questioned staff regarding the reasons for terminating the MOU (RS204, RE041). David Foster, Assistant Chief Engineer for PreConstruction Division, Mississippi Department of Transportation ("MDOT"), stated that "[it was] my understanding that MDOT is fixing to assume the design and construction part of it to expedite the process of getting the project finished." (RS204, RE041). Commissioner Wayne Brown asked about the status of the contract with Meridian and the MDOT Chief Engineer, Harry Lee James, replied that "we do have a [sic] MOU with Meridian for the work. However, it was – all of the actions by the Commission up to date had been predicated on the fact using those earmark funds, which, you know, came as a result of some error on our part for not getting Federal Highway approval. We don't have access

to those funds...and then we're also going to show the responsibility of taking the project on and moving forward with it and expediting it." (RS205-206, RE042-043).

MDOT Executive Director Larry Brown next addressed the status of the contract by discussing a letter from the Mayor of Meridian and stated that "[h]e [the Mayor] convinced the council to continue on with the environmental document, and that is the meeting – the same meeting that he said a dozen times, or more, very openly in his meeting that as soon as they had an environmental document that MDOT would then proceed to make a selection for the design. That's one very important thing that he said, he reiterated yesterday. He also told me yesterday by phone that all he wants to do is to expedite this process." (RS213, RE046). While being questioned about the viability of the MOU, the Chief Engineer responded to Commissioner Brown by stating, "I've been told that it's proceeded without that approval, all of it will be either at our expense or the City of Meridian's expense. There will not be any access to federal aid funds." (RS215, RE047).

The Executive Director next asked Tom Bryant, principal for Engineering Associates who attended the meeting, "Have you had any comments, Tom, with your attorney and/or anyone else, that answers the questions satisfying the rules and regulations promulgated under the Brooks Act? You have not been reviewed by a selection process?" (RS215-216, RE047-048). Mr. Bryant responded, "No, sir, we haven't been reviewed by a selection process." (RS216, RE048).

Responding to questioning by the Executive Director as to the selection process through which Engineering Associates was selected, Mark Herbert, EA's counsel, responded, "Well, this one is the final and binding one, and that contract recites in its

opening recitals that the selection of Engineering Associates was done pursuant to MDOT's standard operating procedures, ADM 2401, and the Federal Aid Policy Guide part 172. So the process was fulfilled, and that's been done now with regard to Engineering Associates." (RS217, RE049). In response, the Executive Director stated, "Well, I think that you've done an adequate job of stating your client's case, and certainly that would be subject to other legal interpretation by somebody other than you or me." (RS218, RE050). The Executive Director further stated, "But I can also refresh your memory, and I think we've got staff here that can do that, in that this project as originally approved was what you call an L-LPA project, and it was approved in error. And those terms that you give and those terminologies used in that acceptance was [sic] based on an LPA agreement, which does not apply." (RS218, RE250).

After further discussion with Mr. Herbert, the Executive Director stated, "Okay. Then, you know, this tactic here is indeed going to delay this project; is that correct?" (RS219, RE051). Mr. Herbert responded, "No, sir" and the Executive Director continued, "Is that what we're about here is to delay it such that you think we're going to just automatically violate the federal laws?" (RS219, RE051).

Andy Hughes, Division Administrator for the Mississippi FHWA, responded by stating, "And that original solicitation was advertised (inaudible) for a firm to design and do environmental study (inaudible). (Inaudible – cannot hear.) That agreement was never really approved by the Mississippi DOT officials, which is required, and was not approved by the Federal Highway Administration. So therefore, federal aid funds are not (inaudible)." (RS220, RE052). Mr. Hughes raised an additional concern by stating, "Its [sic] the contract, a negotiated contract. What happens is this Commission agreed

to allow the city to advertise for a consultant (inaudible). This is an interstate interchange, and that basically requires us – required MDOT to exercise full oversight of the project. That MOU is not (inaudible)." (RS221, RE053).

To complete the discussion regarding the status of the contract between Meridian and Engineering Associates, the Executive Director stated, "Mr. Chairman, one last thing that shouldn't be overlooked, it should be a part of this record, these proceedings today is that MDOT has stepped forward and has agreed to reimburse the City of Meridian for the cost of the environmental document. There is in no way [sic] any danger that this firm will be harmed by the work that it's done." (RS221-222, RE053-054).

Commissioner Bill Minor stated, "I want to make a statement. I guess somebody won't like this, but last week I along with some more people were set up in a meeting in Washington with a congressman and United States senator. At the end, there was [sic] three of us left there – us three Commissioners was [sic] left there. That congressman and that senator told us that they wanted this road built under any circumstances, they didn't care how it got built. And that's what we're trying to do right now. And if somebody thinks they're going to set me up and going to get by with it is wrong, because that's the message that you left me set up with, and that's what that congressman and senator sat there and told us three to get it done." (RS223-224, RE055-056). The Executive Director added more comment regarding the discussions with Senator Trent Lott and Congressman Chip Pickering and their desire to expedite this project. (RS224-225, RE056-057).

To summarize the relevant events of this Commission meeting, the Commission was fully aware, as was the staff, of problems with the selection process under which EA was chosen by Meridian and were fully aware of issues concerning the timing of the presentation of the contract between Meridian and EA to FHWA for approval. Andy Hughes of FHWA presented his concern that this was not an appropriate project for oversight by a city. He specifically stated that this project should be managed by the Commission directly. (RS221, RE053). The Executive Director stated that the Commission would pay the City for the work billed by EA after the environmental document was completed. (RS221-222, RE053-054). Finally, it was the recommendation of the MDOT staff that this action be taken. (RS 222, RE 54).

EA appealed the decision of the Commission on to the Circuit Court for the First Judicial District of Hinds County, Mississippi on March 17, 2005. (R4) In its Notice of Appeal, EA raised its objection to termination of the MOU between the Commission and the City and authorization to advertise for Requests for Proposals for an engineering company to complete the design of the project. (R4, RE004).

The Commission responded by filing a Motion to Dismiss, citing the failure by EA to request a writ of certiorari from the Circuit Court to proceed with the appeal. (R6-7, RE006-007). The Commission argued: "That there is no statutory process for an appeal from a decision of the Mississippi Transportation Commission; that an appeal from the Mississippi Transportation Commission may only be made by obtaining a writ of certiorari...". (R6, RE006).

The court denied the Commission's motion to dismiss by "Opinion/Order" dated January 11, 2006. (R73-74, RE009-010). Among the findings, the court found " 1)

There is no statutory procedure for an appeal from a decision of the Mississippi Transportation Commission." (R73-74, RE009-010).

After determining a final version of the bill of exceptions (Amended Bill of Exceptions) to be presented to the court, the parties provided briefs to the court as to whether the decision of the Commission was arbitrary and capricious and was supported by substantial evidence. (RS130-133, RE020-033).

The court entered its final judgment on May 22, 2007, voiding the action of the Commission as arbitrary and capricious and lacking substantial evidence. (R261-262, RE011-012). The court ordered "that the March 8, 2005 Resolution of the MTC to Rescind the Memorandum of Understanding and Authorizing the advertising, selection and negotiation of a new engineering service contract to replace the EAI contract is hereby set aside and held void and of no legal effect." (R261, RE011). The court further ordered the Commission to "proceed with its duties and contractual responsibilities with regard to the EAI contract." (R261-262, RE011-012). MTC filed a "Motion for Relief from Judgment Under Rule 60(b)" on May 29, 2007. (R263-265, RE013-015). In its motion, the Commission requested a modification of the language set out above, stating "That it is clear from all of the proceedings and evidence presented to the Court that the Mississippi Transportation Commission is not nor ever has been a party to the EAI Contract. The only contract to which the Mississippi Transportation Commission is a party in this matter is the Memorandum of Understanding with the City of Meridian." (R263, RE013).

The court denied the motion by order dated July 27, 2007, stating "The final judgment dated May 21, 2007 correctly reflects the findings and rulings of this Court by Memorandum dated April 25, 2007." (R283, RE016).

MTC filed its notice of appeal on August 20, 2007. (R284-285, RE017-018).

STATEMENT OF THE ARGUMENT

I. Did the trial court err by refusing to dismiss the appeal of Engineering Associates for lack of subject matter jurisdiction? The Mississippi Supreme Court held that, where there is no statutory appeal process set up for an agency or subdivision of the state, the appeal should be by writ of certiorari from the circuit court. *Gill v. Miss. Dept. of Wildlife Cons.*, 574 So. 2d 586, 590-91 (Miss. 1991). Engineering Associates filed its appeal in the instant case by merely sending a notice of appeal and bill of exceptions to the circuit clerk. The *Gill* decision provides the necessary step to protect state agencies from frivolous appeals. By requiring the appellant to apply for a writ of certiorari, the circuit court can "weed out" those appellants that lack standing or have issues more suitable to a civil lawsuit. Engineering Associates, in order to avoid suing the City of Meridian for breach of contract and having the City bring in the Mississippi Transportation Commission on a third-party basis, filed an appeal that effectively resulted in an order from the circuit court requiring the Commission to specifically perform a contract to which it is not and never was a party. A significant question exists as to whether Engineering Associates' appeal is appropriate where it is not a party to the contract that the Commission rescinded. All relevant issues should have been addressed under an application for writ of certiorari. Due to the absence of the writ, the

Commission filed a Motion to Dismiss citing these questions and the circuit court dismissed the motion.

II. Did the trial court err when it determined that the decision of the Mississippi Transportation Commission to terminate the MOU with the City of Meridian was arbitrary and capricious and lacked substantial evidence? The decision of the Commission from which Engineering Associates appealed terminated a Memorandum of Understanding between the Commission and the City of Meridian. Ancillary to the MOU termination was a Commission order allowing MDOT to advertise for a contractor to perform the design work on the interstate interchange that was the subject of the MOU. The MOU was terminable by either party on proper notice – effectively "terminable at will" so that no reason was required by either party to terminate the contract. Despite the "at will" nature of the decision, the Commission provided numerous valid reasons in its brief to the circuit court which satisfied the need to terminate the MOU, including questions about the method used by the City to select the contractor, the need to expedite the project that had been floundering, and evidence that the MOU was simply not working.

Engineering Associates used language in the MOU to weave its contract with the City into a web with the MOU in an attempt to show the circuit court the dire consequences to EA of the Commission's termination. The fact remains, however, that the MOU was a separate contract to which Engineering Associates was never a party. Moreover, nothing prevented Engineering Associates from entering the bid process initiated by the Commission and being considered to complete the remainder of the work to be performed under its contract with the City. If not chosen, Engineering

Associates could have filed a breach of contract action against the City which may have brought the Commission in under the terms of the MOU as a third party defendant.

Engineering Associates instead bypassed these options and appealed the action of the Commission claiming that the decision was arbitrary and capricious and lacking in substantial evidence. A significant question exists concerning what amount of evidence is required by an administrative body to terminate an "at will" contract. The Commission provided the circuit court with numerous valid reasons and record evidence before the Commission to support its decision.

III. Did the trial court abuse its discretion by denying the Mississippi Transportation Commission relief from the court's judgment and order which required the Commission to perform a contract to which it was not a party? The circuit court's judgment and order required the Commission to specifically perform its duties under the contract between Engineering Associates and the City. The Commission filed a motion for relief from judgment because it had no duties under the contract between Engineering Associates and the City. The Commission was not a party to that contract. The circuit court effectively ordered the Commission to specifically perform the contract between the City and Engineering Associates. As there was no privity between the Commission and Engineering Associates in any contract involved, the Commission had no duties to perform. The circuit court abused its discretion by denying the Commission's attempt (motion for relief) to correct this error.

ARGUMENT

STANDARD OF REVIEW

This Court's standard of review from a court's grant or denial of a motion to dismiss or a motion for summary judgment is *de novo*. *McLendon v. State,* 945 So. 2d 372, 382 (Miss. 2006); *Park on Lakeland Drive, Inc. v. Spence,* 941 So. 2d 203, 206 (Miss. 2006); *Scaggs v. GPCH-GP, Inc.,* 931 So. 2d 1274, 1275 (Miss. 2006); *Monsanto Co. v. Hall,* 912 So. 2d 134, 136 (Miss. 2005). Also, [w]hen considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim. *Scaggs,* 931 So. 2d at 1275 (citing *Lang v. Bay St. Louis/Waveland Sch. Dist.,* 764 So. 2d 1234, 1236 (Miss. 1999)).

Regarding a decision from a board or commission, the standard of review is as follows:

> With respect to decisions by a circuit or chancery court concerning the actions of an administrative agency or board, we apply 'the same standard of review that the lower courts are bound to follow. We will entertain the appeal to determine whether the order of the administrative agency (1) was unsupported by substantial evidence; (2) was arbitrary or capricious; (3) was beyond the power of the administrative agency to make; or (4) violated some statutory or constitutional right of the complaining party.'

Miss. Sierra Club, Inc. v. Miss. Dep't of Envtl. Quality, 819 So. 2d 515, 519 (Miss. 2002) (citing *Miss. Comm'n on Envtl. Quality v. Chickasaw County Bd. of Supervisors,* 621 So. 2d 1211, 1215-16 (Miss. 1993)).

The standard of review for a decision of a trial court to deny relief from a judgment is abuse of discretion. *Montgomery v. Montgomery,* 759 So. 2d 1238, 1240 (Miss. 2000).

I. THE TRIAL COURT ERRED BY REFUSING TO DISMISS THE APPEAL OF ENGINEERING ASSOCIATES FOR LACK OF SUBJECT MATTER JURISDICTION.

As the court correctly stated, no statutory process exists for an appeal from a decision of the MTC. (RS009, RE73,). The Supreme Court spoke to the issue of appeals from state agencies where no appeal process appears in the statutes most recently in the case of *Casino Magic Corp. v. Ladner*, 666 So. 2d 452 (Miss. 1995). The Court in *Casino Magic* addressed the right to appeal as follows:

> 'A right of appeal is statutory.' *Bickham v. Department of Mental Health,* 592 So.2d 96, 97 (Miss. 1991); *See also, Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312-13, 77 L.Ed.2d 987, 993 (1983). Furthermore, 'a circuit court has not authority to judicially create a right of appeal from an administrative agency in the absence of clear statutory authority therefor.' *Bickham v. Department of Mental Health,* 592 So.2d 96, 98 (Miss. 1991).'

Casino Magic, 666 So. 2d at 456.

The compelling basis for this proposition is set out in *Gill v. Miss. Dept. of Wildlife Cons.*, 574 So. 2d 586 (Miss. 1991). *Gill* involved an attempt by the Department of Wildlife Conservation to appeal a decision of the Employee Appeals Board. *Id.* The Mississippi Supreme Court reasoned that, although a statutory right to appeal existed for the employee from the board, none existed for the Department. *Id.* The Court said: "This court has repeatedly held that a party has no right to appeal, except insofar as it has been given by law." *Id.* at 590. The Supreme Court set out the only avenue for an appeal in its opinion by saying "On the other hand, limited judicial review via writ of certiorari is available to DWC." *Id.* at 590. The Supreme Court cited Miss. Code Ann. Sections 11-51-95 and 11-51-93 as providing review under certiorari for decisions of

tribunals inferior. *Id.* The Court then held that the Employee Appeals Board was a tribunal inferior as contemplated in the statute. *Id.*

It is clear from *Gill* that where no statutory right to appeal exists, one must apply for a writ of certiorari to appeal. This Court's decision in *Gill* makes sense. An appeal of right from any decision made by a governmental entity such as the Commission would expose the entity to frivolous appeals with no means of filtering out appeals where standing or mootness would make the appeal a waste of time and money. The application for a writ of certiorari is a small price to request of the appellant from a state agency's decision. The Plaintiff in the instant case failed to obtain a writ of certiorari, the trial court lacked subject matter jurisdiction over this matter, and the action should have been dismissed.

II. THE DECISION OF THE COMMISSION WAS NEITHER ARBITRARY NOR CAPRICIOUS AND WAS BASED ON SUBSTANTIAL EVIDENCE.

As set out hereinabove, the standard of review for public action by administrative boards is well-established. The particular act of the MTC in the instant case has been challenged by the Plaintiff as being arbitrary and capricious and lacking in substantial evidence. In addition to the basic premise, this Court has said:

> We have also held that we will not substitute our judgment for the judgment of an administrative agency when the action of the agency is not arbitrary or unreasonable, and when it is supported by substantial evidence. The only grounds for overturning administrative agency action by the appellate process is that the state agency has acted capriciously, unreasonably, arbitrarily; has abused its discretion or has violated a vested constitutional right of a party.

Electronic Data Systems Corp. v. Mississippi Div. of Medicaid, 853 So. 2d 1192 (Miss. 2003).

In addition, a rebuttable presumption exists in favor of the action of an administrative agency and the burden of proof is on the party challenging an agency's action. *Hill Bros. Constr. & Eng'g Co., Inc. v. Mississippi Transp. Comm'n*, 909 So. 2d 58, 64 (Miss. 2005) (citation omitted). Further, "[t]he existence within government of discrete areas of quasi-legislative, quasi-executive, quasi-judicial regulatory activity in need of expertise is the *raison d'etre* of the administrative agency. 'Because of their expertise and the faith we vest in them, we limit our scope of judicial review.'" *Id.* at 64 (citations omitted).

A. The Decision Of The Commission Was Based On Substantial Evidence.

Substantial evidence has been described as something less than a preponderance and more than a scintilla of evidence. *Miss. Dept. of Envtl. Quality v. Weems*, 653 So. 2d 266, 280 (Miss. 1995). In its hearing to determine whether to terminate the MOU and advertise for a new design firm, the Commission received input from David Foster, MDOT Assistant Chief Engineer for PreConstruction; Harry Lee James, MDOT Chief Engineer; Andy Hughes, head of the Federal Highway Administration in Mississippi; Larry Brown, MDOT Executive Director; and Bill Minor, Northern District Commissioner. Presentations were also provided by Tom Bryant, principal for EA, and Mark Herbert, counsel for EA. Statements set out in the facts herein indicate that there were questions concerning the manner in which EA was selected by Meridian and questions concerning why, how, when, and if the contract between EA and Meridian was ever presented to FHWA. There were also discussions that the project was not being moved along with a pace satisfactory to the City or to part of the federal congressional delegation that participated in approval of federal funds for

the project. In addition, the FHWA representative, Andy Hughes, specifically stated that this was a project requiring complete MDOT oversight.

Except for Larry Brown, all testimony presented to the Commission was provided by registered professional engineers who were experts in planning, designing, building, and managing highways in this state. These individuals and their staff, along with the MDOT Executive Director and the Commissioners, have worked with the law and regulations that control these types of construction projects for many years. *Id.* at 64. The input of these professional individuals and the admission by EA's counsel that there were significant problems in the relationship between the City and the Commission constitute more than substantial evidence for the Commission's decision to terminate the MOU.

B. The Decision Of The Commission Was Neither Arbitrary Nor Capricious.

1. The MOU was Terminable at Will and Required No Reason to Terminate.

An administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone. *Gillis v. City of McComb*, 860 So. 2d 833, 836 (Miss. Ct. App. 2003). An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles. *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 977 (Miss. 1999) (citation omitted).

By its own language, the Commission's MOU with the City was a contract terminable at will. It specifically stated that either party could terminate the contract upon 90 days' notice. It is well-established that a contract at will does not require a

reason for termination and that it may be terminated by either party at its discretion. 17A Am. Jur. 2d *Contracts* § 559 (1991).

The Commission made a decision in *Hill Brothers* similar to the issue here. In *Hill Brothers*, the Commission made a discretionary decision to waive an irregularity in a bid proposal - a decision that was determined to meet the arbitrary and capricious standard by the Mississippi Supreme Court. *Hill Brothers*, 909 So. 2d at 70-71. In the instant case, the Commission made a decision to terminate a contract (MOU) with Meridian that was terminable at will. Since the MOU was terminable at will, the Commission's decision was an exercise of discretion requiring a minimal reason.

EA's counsel cited cases before the circuit court that involve individuals before an administrative body with significant fundamental rights at issue, i.e. the loss of a license, medical benefits, retirement benefits or unemployment benefits. EA has no fundamental right at issue in this matter and was not even a party to the MOU that the Commission terminated. EA argues a connection between the two agreements by contending that the language in the MOU states that cancellation of the MOU will not affect any existing contracts. However, that is irrelevant to EA's appeal. EA has been paid for the environmental work it performed and its contract with the City has not been terminated. If EA had been ordered to stop work, it had an adequate remedy at law in a civil suit against the City for breach of contract. The decision to terminate the contract between the City and EA lies with either the City or EA. Nothing precluded EA from submitting a proposal when the Commission advertised for a design contract.

The Commission's decision to terminate the MOU with the City was a discretionary act of the Commission. As such, any reason or no reason would be

sufficient for termination. However, the reasons set forth in the Commission meeting included expediting the process, questions of funding, questions regarding the selection process, and questions of proper oversight. In addition, the MDOT staff recommended the action. Although not necessary, these justifications provide sufficient reasons for termination of the MOU.

2. Sufficient Reasons Existed to Terminate the MOU.

Although not necessary, several reasons were cited in the Commission meeting for terminating the MOU. The Commission heard statements from its staff that provided multiple, legitimate reasons for terminating the MOU with the City. It is irrelevant whether EA or the trial court agreed with the decision of the Commission. In discussing the Court's role, the Mississippi Supreme Court has said: "[A] reviewing court may not reweigh the facts in an agency case, nor may it replace the agency's judgment with its own. *Trading Post, Inc. v. Nunnery,* 731 *So. 2d 1198, 1200 (Miss.1999).* "We will not reweigh the facts in a given case or attempt to substitute our judgment for the agency's judgment." *Id.* at 1200. It makes no difference in this case whether the trial judge agrees with the Commission's reasons.

Expediting the construction project to completion was the first and most compelling reason given for the termination. The Commissioners heard from both the City and Mississippi's congressional representation that the project needed to be expedited. The MDOT Executive Director specifically stated that the Mayor of Meridian told him that the Commission needed to take over the process to expedite the completion of the interchange. In order to avoid appearing arbitrary and/or capricious, some reason for such a decision must exist but is not required to be universally agreed

upon or even popular. In this case, the Commission terminated the MOU for reasons not only set forth by MDOT staff but also by the other party to the MOU, the Mayor of Meridian, and Senator Lott and Congressman Pickering. These facts more than satisfy the arbitrary and capricious requirements and far exceed those requirements as compelling reasons for terminating the MOU.

In addition to the acceleration of the contract, there was also a question as to the appropriateness of the selection process. EA's counsel cites as EA's basis for the appropriateness of the selection process a mere recitation in the contract between the City and EA. When questioned about the appropriateness of the selection process, EA's counsel could provide no personal knowledge beyond the conclusory statements made in EA's contract. (RS144, RE028). When questioned about whether EA had undergone a necessary portion of the review, the principal for EA responded "no". (RS216, RE048). Counsel for EA also failed to mention that the contract clause cited also stated that MDOT and FHWA had approved the contract. (RS144, RE028). However, it is undeniable that the contract was never presented to MDOT or FHWA before execution as required. In addition, Andy Hughes of FHWA stated there were questions about the appropriateness of the selection of EA. These reasons provided more than compelling justification to terminate the MOU.

EA also questions the lack of evidence regarding the allegations of improper selection. Since the Commission saw no reason to drag "through the mud" a contractor that the Commission itself has used and still uses on a regular basis, particularly where other compelling reasons for its actions existed, that basis clearly does not obviate the

fact that there were questions raised by FHWA and MDOT concerning the selection process through which EA was chosen.

There is likewise the issue of presentation of EA's contract with the City to FHWA. The selection improprieties were one basis for not presenting that contract to FHWA. Information was likewise presented to the Commission that the appropriate time to present the contract to FHWA had passed and it was, therefore, too late. (RS215, RE047). In speaking to conflicting evidence, the Mississippi Supreme Court has said:

> The Commission had before it the whole ball of wax. It was clearly the Commission's prerogative on [a] disputed issue to adopt whichever ... view it chose to give credence to. The Commission, with its expertise, is the trier of facts and within this province it has the right to determine the weight of the evidence, the reliability of estimates and the credibility of the witnesses.

State ex rel. Pittman v. Mississippi Public Service Comm'n, 481 So. 2d 302, 305 (Miss.1985).

The trial court is not in a position to determine whether improprieties occurred in the selection process and it is required to defer to the findings of the Commission. If the majority of the Commissioners believed the alleged improprieties were sufficient reasons, they were acting within their authority.

Finally, when viewed *in toto*, serious problems existed in the relationship between the Commission and the City in accomplishing the goals set out in the MOU. EA alleges problem after problem that occurred during the prosecution of this construction project and would have this Court believe that all such problems were the fault of the Commission. This entire line of argument appears to rest on the statement of Commissioner Hall, who voted against terminating the MOU. There was significantly

more evidence presented to the Commission to indicate that there were problems with the prosecution of this project. Where a contract is terminable at will and a relationship is not working smoothly, the best solution is sometimes to simply terminate the relationship, which is exactly what the MDOT staff recommended and the Commission did in this case. One can not imagine a more reasonable act on the part of a party to such a troubled contract.

III. THE COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT THE COMMISSION RELIEF FROM ITS FINAL JUDGMENT AND ORDER.

The final judgment of the court specifically ordered the Commission to perform its duties under the contract between EA and the City of Meridian. In effect, the trial court turned an appeal from an administrative agency into an order for specific performance under a contract to which the MTC was not a party. The Commission filed a motion for relief asking the court to revise the order and require the Commission to perform its duties under the MOU with Meridian. This relief was flatly denied. There is no case law specifically on point for this situation. The Supreme Court has reversed a judgment of contempt by saying "where it appears that it is or was impossible to comply with the order without fault on the part of the one charged, there is no contempt." *Keppner v. Gulf Shores, Inc.*, 462 So. 2d 719, 726 (Miss. 1985). In *Keppner*, a hotel manager was not in contempt of court where it was impossible for him to have brought the hotel within the terms of an injunction permanently enjoining him from discharging sewage from the inn into a sewage lift station because he had no authority to restrict the flow. *Id.* at 725. In the instant case, there is no question that the Commission was not a party to the

contract between EA and the City of Meridian. Absolutely no duties exist that the Commission can perform.

The trial court could have remanded the matter to the MTC for further findings and action or, simply, ordered the Commission to perform its duty under the MOU with the city.

CONCLUSION

The trial court erred by not requiring EA to obtain a writ of certiorari before proceeding with its appeal. This is an issue that affects many state agencies. Where the legislature has failed to act, the Supreme Court of Mississippi has provided a procedure for appeal. The trial court should have followed the process. Beyond the procedural decision, the Commission's decision in this case was not only supported by substantial evidence and made by an informed, capable, and reasonable administrative body based on the recommendation of its staff, but it was an exemplary decision to make an undesirable situation better for both parties to the MOU. Substantial and compelling evidence was presented to the Commission resulting in more than 21 transcribed pages of informed discussion and debate over the decision. Despite the significant debate before the Commission, the trial court ordered the Commission to specifically perform a contract to which it was not a party. The trial court would have been within its discretion to simply void the action of the Commission or remand the matter to the Commission for further development.

The Commission prays that this court will reverse and render the decision of the trial court refusing to dismiss this case for lack of subject matter jurisdiction giving such guidance as necessary for appeals of this type. In addition, this Court should reverse

and render the decision to overturn the action of the Commission as arbitrary and capricious, and lacking in substantial evidence or, in the alternative, remand the decision to the Commission for further deliberation.

Respectfully submitted,

MISSISSIPPI TRANSPORTATION COMMISSION

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CERTIFICATE OF SERVICE

I, James H. Isonhood, Attorney for the Defendant, Mississippi Transportation Commission, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of *Brief of Appellant* to the following:

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This the 7th day of April, 2008.

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