IN THE SUPREME COURT OF STATE OF MISSISSIPPI

WILLIE THOMPSON AND JULIA THOMPSON	**APPELLANTS**
VS.	**NO. 2010-CA-00137**
CITY OF CANTON, MISSISSIPPI	**APPELLEE**

[ON APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI]

BRIEF OF THE APPELLEE

> ***ORAL ARGUMENT IS NOT REQUESTED*** <

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the persons listed below may have an interest in the outcome of this case. These representations are made in order that the members of this Court may evaluate possible disqualification or recusal.

1. Willie Thompson, Appellant;
2. Julie Thompson, Appellant;
3. City of Canton, Mississippi, Appellee;
4. E. Michael Marks, Esquire, attorney for Appellants;
5. Julie Ann Epps, Esquire, attorney for Appellants;
6. J. Michael Coleman, Esquire, attorney for Appellee;
7. Kenneth T. O'Cain, Esquire, former attorney for Appellee; and
8. The Honorable Samac S. Richardson, Circuit Court Judge.

THIS, the 5th day of October, 2010.

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STATEMENT OF THE ISSUE

1. Whether summary judgment in favor of the City of Canton was properly awarded by the trial court.

STATEMENT OF THE CASE

In the fall of 2004, with the consent of the Plaintiffs, Willie and Julia Thompson ("the Thompsons"), the City of Canton ("Canton") began the process of applying to the Mississippi Emergency Management Agency ("MEMA") for a grant to provide funds for the City of Canton to purchase a house and lot owned by the Thompsons, which was located in an area prone to flooding. R. 119-122. The subject residence was located at 537 Thornhill Street in Canton, Mississippi. R. 7. The grant program in question was completely voluntary. R. 196-197. In January of 2005, the application to the MEMA Hazard Mitigation Grant Program was completed and submitted to MEMA. R. 208-215. The application process continued until the12th day of October, 2005, when the application was ultimately approved by MEMA. R. 84 and 164.

Following approval of the application, on or about the 18th day of November, 2005, the Thompsons signed a Warranty Deed conveying title of the home and land in question to Canton in consideration for payment in the amount of $55,425.00. R. 168-170. With respect to the MEMA Hazard Mitigation Grant Program, the Thompsons understood that MEMA provided Seventy-Five Percent (75%) of the property's value, leaving Twenty-Five Percent (25%) to come from the Thompsons or other sources. R. 164 and 185. The Thompsons also understood that they were responsible for demolition costs. R. 185. Prior to completion and submission of the application, the property was appraised under the MEMA Hazard Mitigation Grant Program application guidelines in December of 2004 with a value of $68,000.00. R. 171.

At the time the transaction was concluded and upon receipt of the funds from MEMA through the Program, $55,425.00 was provided to the Thompsons, said amount representing Seventy-Five Percent (75%) of the value of the home and lot in accordance with MEMA's then existing guidelines. R. 170. These funds were initially received by Canton from the Hazard Mitigation Program and, on

the date of closing these funds were transferred to the Thompsons. On that same date, the Thompsons signed a Statement of Voluntary Participation, which included an acknowledgment that Canton was not exercising eminent domain to purchase the property, and a separate acknowledgment that the remaining Twenty-Five Percent (25%) local match and *demolition costs* were their responsibility. R. 196-197.

Nevertheless, more than one year following their sale of the house and property to Canton, the Thompsons sent notice in accordance with the Mississippi Tort Claim Act, and, thereafter, suit was filed on April 14, 2008. R. 6. The Complaint sets forth claims of breach of contract, vicarious liability, misrepresentation, negligence, gross negligence, and deprivation of constitutional rights cognizable under 42 U.S.C. §1983. R. 6-13. All of these claims are premised on Thompsons' contention that the City of Canton refused to allow the Thompsons to take possession of and/or move their house after the Thompsons had sold it to Canton on November 18, 2005 and prior to its demolition on April 18, 2007. *Id.* Furthermore, even though they had sold the house and property to Canton, the Thompsons contend that the City of Canton wrongfully took the salvage of the house from the demolition and wrongfully deprived Thompsons of their property. *Id.*

Again, the home *was* demolished by Canton, but this was done approximately one and a half years after the City of Canton acquired title to the property. Thus, the Thompsons essentially claim that Canton was grossly negligent and violated the Thompsons' constitutional rights when Canton destroyed its own property. After all, the Thompsons had voluntarily entered into a federal program through which the sale of their home and property to Canton was subsidized. The Thompsons were paid for their home and property through that program, and then the Thompsons deeded the house and property to Canton on November 18, 2005. The house was not destroyed until April of 2007, and the Thompsons did not file suit until April of 2008.

In response to that suit, Canton filed an Answer which raised Sovereign Immunity under MISS. CODE ANN. § 11-46-9 as an affirmative defense. R. 25. Following discovery, the City of Canton filed its Motion for Summary Judgment. The trial court granted the Motion for Summary Judgment on January 14, 2010. R. 255. This appeal followed.

SUMMARY OF THE ARGUMENT

As their primary argument, the Thompsons assert that immunity under the Mississippi Tort Claims Act ("MTCA"), is not applicable to eminent domain actions, contract actions, and ministerial acts. *Appellants' Brief* at pp. 3, 5-10. The Thompsons rely heavily throughout their brief on the argument that the MTCA does not apply in eminent domain actions. However, this suit is not an eminent domain action. Likewise, this case is not a "pure contract" case. The facts do not support the notion that the Thompsons' claims sound in contract, and immunity afforded by the MTCA certainly applies here. In fact, the Thompsons themselves admitted in their Complaint that the MTCA controls this action. *See Complaint* at R. 7.

Additionally, the Thompsons made the eminent domain argument for the first time on appeal. The Thompsons failed entirely to assert this in the trial court in connection with their response to Canton's Motion for Summary Judgment, and this Court has held on many occasions that issues not raised at the lower court will not be considered on appeal. That is the case here.

With regard to the Thompsons' § 1983 claim, there is no proof in the record that a policy of Canton caused the alleged constitutional harm. In fact, the Thompsons' allegation is that Canton's act of demolishing a house on one occasion was violative of the Constitution. Single acts of negligence are not sufficient to support a prima facie case under § 1983.

The simple fact is that the Circuit Court properly awarded summary judgment to Canton. Because of the immunity afforded to Canton under the MTCA, and because the Thompsons could not, as a matter of law, establish their prima facie case on any of their claims, there are no material facts in this case, and summary judgment in favor of Canton was proper.

ARGUMENT

I. STANDARD OF REVIEW.

The Thompsons correctly state the standard of review. However, Canton would also point out that "Immunity is a question of law." *City of Laurel v. Williams*, 21 So.3d 1170, 1174 (¶ 15)(Miss. 2009) (citing *Miss. Dep't of Pub. Safety v. Durn*, 861 So.2d 990, 994 (Miss. 2003) (citing *Mitchell v. City of Greenville*, 846 So.2d 1028, 1029 (Miss. 2003)). And, there are no material issues of fact when the defendants are entitled to immunity under the Mississippi Tort Claims Act ("MTCA"). *See Vo v. Hancock County*, 989 So.2d 414, ¶¶17-18 (Miss. App. 2008). Likewise, "when a party opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law." *Moore ex rel. Moore v. Mississippi Valley Gas Co.*, 863 So.2d 43, (¶15) (Miss. 2003) (citing *Galloway v. Travelers Ins. Co.*, 515 So.2d 678, 684 (Miss. 1987)).

II. THIS IS NOT AN EMINENT DOMAIN ACTION, AND THE MTCA CONTROLS.

The Thompsons each executed a letter memorializing the disputed and undisputed facts of the dispute between themselves and the City of Canton. R.119-122. This was done by Mrs. Thompson on February 1, 2006 and by Mr. Thompson on February 13, 2006. *Id.* Among the items they acknowledged reading and understanding were the following:

1. "In the fall of 2004, the City and the Thompsons began the process of applying to MEMA for a grant to provide funds to the City for [sic] the purchase of the residence and lot owned by the Thompsons, which is located in an area prone to flooding." R.119 at paragraph 1. of "Undisputed Facts."

2. "The transaction was closed on the 18th day of November, 2005, when Mr. And Mrs. Thompson signed a Warranty Deed conveying title to the property to the City of Canton." R.120 at paragraph 6. of "Undisputed Facts."
3. "On that date, a check from the City was delivered to Mr. And Mrs. Thompson in the sum of $55,425.00, a copy of which is attached hereto, as well as a copy of *a disclaimer signed by Mr. And Mrs. Thompson at closing.*" *Id.* at paragraph 7.

The Thompsons' execution of this letter, especially when coupled with the Statement of Voluntary Participation they signed (R. 196), clearly establishes that the Thompsons were involved in the MEMA Hazard Mitigation Grant Program voluntarily. The execution of this letter also corroborates the fact that the Thompsons transferred title of the property in question to Canton. There is nothing contained within this acknowledgment that indicates that Canton was exercising its eminent domain power. The facts remain undisputed that this was at all times a voluntary transaction entered into by all parties and that title to the property was legally vested in Canton as of November 18, 2005.

The Appellants received their compensation as proved by with the guidelines and agreement between these parties, and they executed a deed at closing, which served to legally transfer title to the property to Canton. R.88-89. And, although the house which formerly belonged to the Thompsons was not demolished until April 18, 2007 (R.108, ¶6), there is nothing in the record to reflect any action by the Thompsons to move the house between November 18, 2005, the date of legal transfer of the property to Canton, and the date of demolition. Most importantly, there is nothing in the record to reflect that Appellants did anything before or after the November 18, 2005 closing to relocate the house. The facts of this case and the ultimate destruction of the house, which was then owned by Canton, in no way constitutes an exercise of eminent domain by Canton.

Eminent domain actions are specific actions governed by specific statutes, and carried out before a specially convening court. *See* MISS. CODE ANN. § 11-27-1 (2010), *et seq.* For example, the Mississippi Code provides, "Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, except as elsewhere specifically provided under the laws of the state of Mississippi." MISS. CODE ANN. § 11-27-1 (2010). Regarding the procedure for eminent domain actions, the Code provides:

> Any person or corporation having the right to condemn private property for public use shall file a complaint to condemn with the circuit clerk of the county in which the affected property, or some part thereof, is situated and shall make all the owners of the affected property involved, and any mortgagee, trustee or other person having any interest therein or lien thereon a defendant thereto. The complaint shall be considered a matter of public interest and shall be a preference case over other cases except other preference causes. The complaint shall describe in detail the property sought to be condemned, shall state with certainty the right to condemn, and shall identify the interest or claim of each defendant.

MISS. CODE ANN. § 11-27-5 (2010).

None of this was done in the present case. Instead, this case involves a voluntary transaction between the parties, and at no time was there ever a threat of condemnation of the property at issue. Canton assisted the Thompsons in selling their home and property through the MEMA Hazard Mitigation Grant Program, and the Thompsons could have walked away from the transaction without ever facing the chance of losing their home or property. R. 196-197. Moreover, the Thompsons signed a "Statement of Voluntary Participation" though which they expressly acknowledged that Canton had agreed *not to use its power of eminent domain* to purchase the property at issue. *Id.*

The Thompsons rely heavily on *McLemore v. Miss. Transp. Comm'n*, 992 So. 2d 1107 (Miss. 2008) for their argument that the MTCA should not apply in the present case.[1] However, *McLemore*

[1] In fact, *McLemore* is the only Mississippi case cited by the Thompsons which does not deal directly with what is acknowledged as an actual eminent domain action. And even

is easily distinguishable from the present case in that the McLemores' suit arose after the McLemores had been compensated initially in and *eminent domain action*. *Id.* at ¶¶2-5.

McLemore was not a case about a voluntary transaction and subsequent alleged negligence or negligent misrepresentations. The McLemores did not voluntarily enter into a transaction for the purchase of their property, as the Thompsons did here. In fact, the entire dispute arose as an extension of the McLemores' *eminent domain* claims, which had already been adjudicated in an eminent domain action. In other words, the McLemores had already been compensated once in an eminent domain action, and although they brought a negligence claim against the contractor, they also sought additional eminent domain relief from the Mississippi Transportation Commission ("MTC").

As the *McLemore* court noted, "While there is an argument that this Court has distinguished cases involving negligence claims, such argument is not applicable here. The negligence claims in the instant case pertain to Talbot [the contractor]. The action against MTC is for taking without just compensation pursuant to the constitution." *Id.* at ¶11. Moreover, when it noted this distinction, the Court had already pointed out that the "constitutional provision [at issue] is only applicable in cases involving property taken for public use." *Id.* at ¶10.

The present case does not involve the uncompensated taking of private land for public use. This case arises from a voluntary transaction in which the Thompsons sold their property to Canton, and they were compensated for it. The transaction required that all structures on the property be demolished. There was a miscommunication (or as alleged by the Thompsons, a negligent misrepresentation) concerning whether the Thompsons would be able to retain and move the house

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McLemore started as an eminent domain case related to the purchase of land for a highway project. *See McLemore*, 992 So.2d 1107 at ¶¶2-4. The claim ultimately at issue was for additional takings due to run-off and siltation related to that construction project. *Id.*

situated on the transferred property, but when they had not done so over a year and half after title was deeded to Canton, Canton exercised its discretion in light of public policy, and demolished the house. R.119-122. At worst, the facts of this case demonstrate possible negligence on the part of Canton. Canton denies this. However, as is discussed more fully below, Canton is immune from suit related to any such negligence claims, and summary judgment was proper.

In addition to *McLemore*, the Thompsons cite a Texas case for the proposition that an agreement to sell property to a governmental authority is the equivalent of an eminent domain action. However, by the Thompsons' own admission, that case dealt with a contract to *settle an eminent domain action. See Appellants' Brief* at p. 7. In the present case, Canton never asserted its eminent domain power, nor did it ever threaten to do so. In fact, as set out above, the Thompsons expressly acknowledged that they understood that Canton would not exercise eminent domain with regard to purchasing the Thompsons' property. *Again see* R. 196.

The other two "out-of-state" cases cited by the Thompsons also deal with sales of land made *under the threat of condemnation.* There was no threat of condemnation here. As cited above, the transaction at issue was completely voluntary, and Canton had expressly agreed not to exercise its powers of eminent domain.

Simply put, the Thompsons voluntarily entered into this transaction through the Hazard Mitigation Program. Canton facilitated the transaction, with the Thompsons' consent and cooperation, in order to ensure the guidelines were satisfied so that the Thompsons could receive the benefits offered through the Program. Although the eminent domain argument was not raised at any time in response to the Motion for Summary Judgment and should be stricken at this stage in the proceedings, it is clear from the record that this is not an eminent domain action, and that the MTCA controls. As noted above, the Thompsons admitted as much in their Complaint.

III. THE APPELLANTS' ARGUMENT CONCERNING EMINENT DOMAIN IS WAIVED.

This Court has repeatedly held that an issue not raised in the trial court is deemed waived and procedurally barred on appeal. *Davis v. State*, 684 So.2d 643, 658 (Miss. 1987); *Cole v. State*, 525 So.2d 365, 369 (Miss. 1987), *cert. denied, Cole v. Mississippi*, 488 U.S. 934, 109 S.Ct. 330, 102 L.Ed.2d 348 (1988). In fact, this Court very recently said, "One of the most fundamental and long-established rules of law in Mississippi is that the [appellate court] will not review matters on appeal that were not raised at the trial court level." *Jackson v. State*, 2010 Miss. LEXIS 170 (Miss. Apr. 1, 2010) (citing *Shaw v. Shaw*, 603 So. 2d 287, 292 (Miss. 1992)).

The Thompsons' argument that the underlying transaction is somehow an eminent domain action, and that therefore immunity under the MTCA does not attach, was raised for the first time on appeal.[2] It was not raised or argued in response to Canton's Motion for Summary Judgment and the trial court never had an opportunity to make a ruling on that issue. Likewise, Canton had no opportunity to respond at the trial court level. Furthermore, the Thompsons did not raise this argument in the Notice of Appeal filed following the trial court's grant of Summary Judgment, nor was it raised via motion following the summary judgment. Therefore, this argument should be stricken from the Appellants' Brief altogether, and not considered in this appeal.

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[2] The only place in the record in which eminent domain is even mentioned is at R. 7, which is page two of the Thompsons' Complaint. Paragraph 6 of the Thompsons' Complaint, under the heading "Facts," states, "Plaintiffs' home was taken by imminent [sic] domain." Of course, this "fact" is belied by the Thompsons' express acknowledgment that Canton was not exercising eminent domain, but more importantly, none of the causes of action in the Complaint allege eminent domain, and in response to Canton's Motion for Summary Judgment, the Thompsons did not argue eminent domain.

IV. THE THOMPSONS' CLAIMS DO NOT SOUND IN CONTRACT, AND THIS WAS NOT A "PURE CONTRACT ACTION."

First, the argument that immunity is not afforded to Canton under the facts of this case because this is a "pure contract" case, was also raised for the first time on appeal. In response to Canton's Motion for Summary Judgment, the only argument made by the Thompsons regarding sovereign immunity was that negligent and grossly negligent misrepresentations were made by Canton. R. 231-235. The argument made by the Thompsons was that while immunity is afforded to Canton when it uses ordinary care, the conduct in this case fell beyond that standard. *Id.* The trial court disagreed. Nowhere did the Thompsons argue that the MTCA did not apply because the case is a pure contract action. Therefore, that argument is waived pursuant to the case law cited above.

Secondly, the real underlying claim here is that Canton demolished the Thompsons' house after Canton allegedly said that, despite the fact it was deeded to Canton, the Thompsons could take possession of the house and move it to another location. *Again, see* R. 231-235. Putting aside for a moment the fact that the Thompsons waited a year and a half after they deeded the house and property to Canton to complain about this, the Court should note that the Thompsons have not produced, and the record does not contain, a contract in which Canton agreed to allow Appellants to take possession of or move this house. Any such agreement by Canton, had it existed, would have been gratuitous at best since the Thompsons voluntarily deeded the house and property in question to Canton. The lack of a written contract coupled with over a year of delay on the Thompsons' part proves that Canton had no obligation to allow the Thompsons to take possession of and move the house.

Further, the Thompsons failed to present the trial court with sufficient proof to establish that they could support a prima facie case for breach of contract. In fact, they did not even try. The argument made in response to Canton's Motion for Summary Judgment, related to alleged negligence

and/or gross negligence. No proof was presented with regard to an alleged breach of contract, and no such argument was made. *See Plaintiffs' Response in Opposition to Motion for Summary Judgment* at R. 231-237.

As noted above, "when a party opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law." *Moore ex rel. Moore v. Mississippi Valley Gas Co.*, 863 So.2d 43, (¶15)(Miss. 2003) (citing *Galloway v. Travelers Ins. Co.*, 515 So.2d 678, 684 (Miss.1987)). Because there is no evidence of a contract in the record, and because the argument is being made for the first time on appeal, the Thompsons' argument that the summary judgment was not proper because the MTCA does not apply in pure contract actions must fail.

However, the substance of the Thompsons' argument on this point is misguided as well. The Thompsons' point to *Lamb v. Booneville School Dist.*, a district court case, and quote that case for the proposition that the MTCA does not apply to a "pure contract action." *Appellants' Brief* at p. 9. At issue in *Lamb* was a motion to dismiss for failure to follow the MTCA's notice provisions in a federal employment action, which also asserted state law claims. The defendant in *Lamb* filed a motion to dismiss the state law claim, asserting that the plaintiff's state law claim should be dismissed and sanctions imposed, because the plaintiff did not give pre-suit notice of the claim as required by the MTCA. *Lamb v. Booneville Sch. Dist.*, 2009 U.S. Dist. LEXIS 25847, *2 (N.D. Miss. Mar. 26, 2009). The plaintiff, in turn, filed a motion to voluntarily dismiss the state law claim without prejudice because she conceded that she did not give the defendant pre-suit notice of her state law claim under the MTCA. *Id.* However, the plaintiff did not concede such notice was required. To the contrary, the plaintiff specifically argued "there is controlling authority that her wrongful discharge claim, under *McArn v.*

Allied Bruce Terminix Co., 626 So. 2d 603, 607 (Miss. 1993), is a claim sounding in contract rather than tort, such that the MTCA is inapplicable." *Id.*

Contrary to what the Thompsons would have this Court believe, the *Lamb* court actually held, "After reviewing the case law provided by both parties, the Court finds that Plaintiff's claim for wrongful termination indeed is covered by the MTCA and thus, notice is required." *Id.* at *2-3. The Court went on to explain:

> Although the MTCA does not apply to "pure contract actions," it does apply to claims for tortious breach of contract: The clear intent of the legislature in enacting [the Tort Claims Act] was to immunize the State and its political subdivisions from any tortious conduct, including tortious breach of . . . contract.

Lamb, at. *3 (citing *City of Grenada v. Whitten Aviation, Inc.*, 755 So. 2d 1208, 1213 (Miss. Ct. App. 1999)).

When the facts and arguments made by the Thompsons are reviewed, it is clear that they are making a tortious breach of contract claim, if they have made a contract claim at all. That is, they claim that Canton demolished a house after allegedly telling the Thompsons that they could have it. That is a claim that Canton engaged in a tortious act which was contrary what the Thompsons expected. It is not a "pure contract" claim where the trial court was asked to interpret the language of a contract that Canton had entered. Other than self-serving statements by Mrs. Thompson that parrot her pleadings, no proof of any such contract was produced by the Thompsons in response to the Motion for Summary Judgment. Thus, *Lamb* is of no benefit to the Thompsons.

The Thompsons also rely on *City of Grenada v. Whitten Aviation, Inc.* for the rule of law that when a governmental entity enters into a contract "it waives sovereign immunity from suit." *Appellants' Brief* at. P. 9. However, this is not exactly the rule annunciated in *Whitten Aviation*. The Court actually held, "The clear intent of the legislature in enacting MTCA was to immunize the state

and its political subdivisions from any tortious conduct, including tortious breach of implied term or condition [sic] of any warranty or contract. The provisions of MTCA have no application to a pure breach of contract action as is the subject of the case at bar." 755 So. 2d 1208, 1213 (¶12)(Miss. App. 1999).

Whitten Aviation involved a claim for breach of an extensive written lease, and the case went to trial "on the sole issue of breach of contract." *Whitten Aviation*, 755 So.2d 1208 at ¶ 2. The lease at issue contained "approximately twenty-five paragraphs, the interpretation of three of which were at issue in the trial court." *Id.* at ¶4. The plaintiff claimed that the lease was breached when the city terminated the lease early, and the city felt that no breach had occurred based on the "immediate termination" provisions of the lease. *Id.* at ¶4-8. Again, no tortious conduct was at issue at trial. To the contrary, *Whitten Aviation* was a pure contract action, and for that reason it has no applicability here.

The present case is easily distinguished from those cases, such as *Whitten Aviation*, which hold that the MTCA is not applicable in pure contract actions because the case at bar is not a pure contract action. In such "pure contract cases," there is a contract, and the issue is either interpretation of the language of the contract, or whether the state has breached the material terms of its agreement by violating the clear terms of the contract (e.g., not paying the agreed upon price, etc.). In the present case, the Thompsons offered no proof other than the bald allegations in their pleadings (stated again in a self-serving affidavit by Mrs. Thompson) that any contract existed. And, the conduct they complain about is the alleged tortious act of demolishing the house in question, and/or alleged tortious

misrepresentations about whether the house could be kept and moved after it was deeded to Canton. Thus, this action is not a "pure contract action," and the MTCA applies here.[3]

V. CANTON IS IMMUNE FROM SUIT.

The trial court found that Canton was entitled to summary judgment, in part, because it was entitled to sovereign immunity under the MTCA. If this Court agrees, then the issue here is whether, under the MTCA, liability should still attach. On appeal, the Thompsons have made only two arguments which are relevant to that issue. In other words, if the Thompsons' "eminent domain" and "pure contract" arguments are momentarily set aside because this is not an eminent domain or pure contract case, then the MTCA does apply, and this Court must focus on whether Canton is liable under the MTCA based on the operative facts. The Appellants have made two arguments on this issue: (1) Canton failed to exercise ordinary care, and (2) the acts in question were ministerial. *Appellants' Brief* at pp. 8-10.

In reality, this is one argument with two prongs because if the acts in question are found to be discretionary functions, then it does not matter whether ordinary care was used by Canton. In *Collins v. Tallahatchie County*, this Court clarified the *misconception* in the bar that ordinary care must be used in carrying out discretionary functions in order for immunity to attach. In that case, this Court explained, "Miss. Code Ann. § 11-46-9(1)(d) exempts governmental entities from liability of a discretionary function or duty 'whether or not the discretion be abused'. Therefore, the ordinary care standard is not applicable to MISS. CODE ANN. § 11-46-9(1)(d)." 876 So. 2d 284, 289 (Miss. 2004) (quoting MISS. CODE ANN. § 11-46-9(1)(d)).

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[3] At the very least, summary judgment was proper on any and all claims which are not "pure contract" claims. Again though, Canton contends that the Thompsons failed to meet their summary judgment burden by producing at least a scintilla of evidence that there was a contract at all.

Since *Collins*, this Court and the Mississippi Court of Appeals has consistently held that if the act in question is a discretionary function, the governmental entity is immune regardless of whether ordinary care was used.[4]

Thus, the question becomes whether the governmental action in this case constitutes a discretionary function. The Thompsons argue that it does not. However, "A duty is discretionary if it requires the official to use her own judgment and discretion in the performance thereof." *Stewart ex rel. Womack v. City of Jackson*, 804 So. 2d 1041, 1048 (¶14) (Miss. 2002) (citations omitted). On the other hand, an act is ministerial if the duty is one which has been positively imposed by law and its performance required at a time and in a manner or under conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.'" *Id.* (quoting *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So. 2d 1136, 1141 (Miss. 1999)).

This Court has also adopted the public policy function test under which, "in determining whether governmental conduct is discretionary the Court must answer two questions: (1) whether the activity involved an element of choice or judgment; and if so, (2) whether the choice or judgment in supervision involves social, economic or political policy alternatives.'" *Dancy v. East Miss. State*

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[4] *See for example, Dancy v. East Miss. State Hosp.*, 944 So. 2d 10, 16 fn.11 (¶18) (Miss. 2006) ("The ordinary care standard is not a consideration under this test as "Miss. Code Ann. § 11-46-9(1)(d) exempts governmental entities from liability of a discretionary function or duty 'whether or not the discretion be abused.'") (citing *Collins* supra). Or, *see Barrentine v. Miss. DOT*, 913 So. 2d 391, 393-394 (Miss. Ct. App. 2005) ("In *Collins v. Tallahatchie County*, 876 So. 2d 284, 289 (¶16) (Miss. 2004), the Mississippi Supreme Court held that the principle that one must use ordinary care in performing a discretionary function to retain immunity was an erroneous proposition.").

Hosp., 944 So. 2d 10, 16 (¶18) (Miss. 2006) (quoting *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So.2d 584, 588 (Miss. 2001) (citation omitted).

While the initial transaction between Canton and the Thompsons was governed largely by the MEMA Hazard Mitigation Grant Program, Canton's decision to demolish the house in question after the transaction had concluded, was purely discretionary. A choice had to be made, and that choice involved social, economic or political policy alternatives. Factors such as public policy for dealing with abandoned buildings, the costs of moving or selling the structure, and the social and political implications of demolishing the house had to be considered, and a judgment call had to be made. This is precisely the kind of situation for which the Legislature meant to protect municipalities through the operation of the MTCA.

Further, Canton acted fully within its rights as legal title holder of the subject property when it demolished the house previously owned by the Thompsons. Again, Canton became legal title owners by virtue of the Appellants' transfer of title through the warranty deed executed in favor Canton in November, 2005. It was approximately one and a half years later, on April 18, 2007, that the structure was demolished. Canton had to make a policy decision about whether to demolish this house or not, because it had been deeded to Canton for over a year and a half.

There has never been a claim that Canton did not own the property following the closing in November, 2005, and simply put, Canton exercised its legal rights in demolishing a structure on its property after making the public policy decision that this was the best course of action to take under the circumstances. Whether to destroy that house or not, involved a decision, and because that decision related to public policy with regard to managing a flood prone area, public policy for dealing with abandoned buildings, the economic costs of moving or selling the structure, etc., the decision to destroy the house and the act of doing so were discretionary functions. Since that is the case, summary

judgment was properly awarded to Canton, because Canton is immune from suit regardless of whether it exercised ordinary care.

VI. CLAIMS UNDER 42 U.S.C. § 1983.

Finally, the Thompsons claim that they were denied due process and equal protection, and they sought relief under 42 U.S.C. § 1983. R. 11-12. Section 1983 provides that a "person who under color of any statute, ordinance, regulation custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or or the person within the jurisdiction thereof to the deprivation of any right, privilege, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law" or other proper suit. *Brown v. City of Hazlehurst,* 741 So.2d 975, 981 (Miss. App. 1999) (quoting 42 U.S.C. § 1983).

As this Court pointed out in *Elkins v. McKenzie*:

> The United States Supreme Court in *Monell* stated that "Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies." In *Monell*, the Court held that a municipality could only be held liable where an action pursuant to an official municipal policy caused a constitutional tort, determining that there is no § 1983 liability on a respondeat superior theory. The court held that:
>
> > The language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor, or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory.

865 So. 2d 1065, 1071 (Miss. 2003) (quoting *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 691 (1978).

Thus, Canton can only be liable under § 1983 where an official municipal policy caused a constitutional tort. The allegation made in the present case by the Thompsons is *not* that Canton had

an unconstitutional policy. Rather, the Thompsons argue that the single act of destroying the house they once owned was unconstitutional. The Thompsons argue that their house was demolished, they were treated differently from some other persons who participated in the MEMA grant program. Importantly, the Thompsons have never argued that Canton has an unconstitutional policy which mandates the destruction of houses in this manner. Rather, the Thompsons argue that the single act of destroying this one home violated their constitutional rights.

As the Mississippi Court of Appeals held in *Brown v. City of Hazlehurst*, "A single incident of unconstitutional activity is insufficient. In addition to proving the act in question, the plaintiff must demonstrate 'the existence of the unconstitutional policy, and its origin,' which are 'separately proved' from the act." 741 So. 2d 975, 981 (Miss. App. 1999) (quoting *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985)).

The Thompsons have not even attempted to meet this burden of proof. Instead, they argue that they were treated differently from similarly situated persons because while some of those participating in the MEMA grant program were allowed to keep/move their houses, Canton demolished the house formerly owned by the Thompsons. *See Appellants' Brief* at p. 11. The Thompsons cite *City of Cleburne v. Cleburne Living Ctr.*, as support for their § 1983 argument, but that case had nothing to do with § 1983. Instead, in *City of Cleburne*, a corporation which proposed to lease a building for the operation of a group home for the mentally retarded filed suit in a Federal District Court, alleging that a city zoning ordinance requiring a special use permit for the operation of a group home for the mentally retarded was invalid on its face, and as applied, because it discriminated against the mentally retarded in violation of the equal protection clause. 473 U.S. 432 (U.S. 1985). Not only was this case *not* a § 1983 case, it also dealt with a city policy in the form of an ordinance, and not a single act like demolishing a single house.

The Thompsons also cite a Connecticut state court case, *New Eng. Estates, LLC v. Town of Branford*, but that case arose from a town's exercise of eminent domain with respect to an approximately seventy-seven acre parcel of land. 294 Conn. 817, 820 (Conn. 2010). Again, the present case is not an eminent domain action. Canton did not exercise its powers of eminent domain, and the Thompsons expressly acknowledged this. Also, Canton did not "take" the Thompsons property without due process. In fact, Canton did not take the Thompsons' property at all. The Thompsons took advantage of a MEMA program to sell their property, which sat in an area extremely prone to flooding, and after going through that MEMA grant process, the Thompsons were paid for their house and property. At that point, the Thompsons deeded the property to Canton.

None of the cases cited by the Thompsons are on point. Instead, they offer this Court a hodgepodge of disjointed and inapplicable constitutional catch phrases from a variety of inapplicable cases. In short, the Thompsons did not meet their production burden in response to Canton's Motion for Summary Judgment with regard to any § 1983 claim, and they have not given this Court any reason to overrule the sound judgment of the trial court.

CONCLUSION

This case is not an eminent domain case. This case is not a "pure contract" case. The Thompsons allege that Canton was negligent or grossly negligent in demolishing a house formerly owned by the Thompsons, and/or that Canton negligently misrepresented to the Thompsons that they could keep and move their house. The demolition of the house occurred over a year and half after the house and the property on which it sat were deeded to Canton. Canton is immune under the MTCA for any such actions, and the Thompsons failed to establish the elements of their prima facie case on any claim based on 42 U.S.C. § 1983. Therefore, the trial court did not err in rendering summary judgment in favor of Canton.

Respectfully submitted, this the 5th day of October, 2010.

CITY OF CANTON, MISSISSIPPI, *Appellee*

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CERTIFICATE OF SERVICE

I, J. MICHAEL COLEMAN, attorney for the Appellee, do hereby certify that I have this day mailed, via U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLEE** to:

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[MADISON CO. CIRCUIT COURT NO. CI 2008 0124-R]

THIS, the 5th day of October, 2010.

J. MICHAEL COLEMAN