IN THE COURT OF APPEALS 06/18/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00268 COA

JAMES G. PENNINGTON, MARCUS K. SAVAGE, WALTER GUY BURKHALTER, UNITED STATES FIDELITY & GUARANTY COMPANY AND PROVIDENCE WASHINGTON INSURANCE COMPANY, SUCCESSOR TO NATIONAL GENERAL FIRE AND CASUALTY COMPANY

APPELLANTS

v.

THE STATE OF MISSISSIPPI EX REL. MIKE MOORE, ATTORNEY GENERAL AND STEVEN A. PATTERSON, AUDITOR OF PUBLIC ACCOUNTS FOR THE USE AND BENEFIT OF TALLAHATCHIE COUNTY, MISSISSIPPI

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JON M. BARNWELL

COURT FROM WHICH APPEALED: TALLAHATCHIE COUNTY CHANCERY COURT, FIRST JUDICIAL DISTRICT

ATTORNEY FOR APPELLANTS:

JOHN W. WHITTEN, JR.

ATTORNEY FOR APPELLEES:

OFFICE OF THE ATTORNEY GENERAL

BY: LARRY E. CLARK

NATURE OF THE CASE: SUIT TO COLLECT ON COUNTY OFFICIALS' BONDS

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT IN FAVOR OF THE APPELLEES

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

The State of Mississippi filed this cause to collect on the bonds of the Tallahatchie County Board of Supervisors (the Board) for certain monies "appropriated [for] Christmas bonuses to county employees." The State filed a motion for summary judgment. After conducting a hearing on the matter, Chancellor Jon M. Barnwell granted the State's motion for summary judgment. Feeling aggrieved, the Appellants have appealed from the chancellor's order. The primary issue before this Court is whether the chancellor erred when he determined that there were no genuine issues of material fact and that the State was entitled to summary judgment. This means that the Court must also address whether the monies expended by the Board were monies for "objects not authorized by law."

THE FACTS

In 1989, Burt Haney, an investigator with the Mississippi State Auditor's Office, went to Tallahatchie County to investigate a complaint that had been filed in an unrelated matter. While reviewing payroll records of the sheriff's office, he discovered checks paid to the sheriff's employees for extra sums of money issued in December of that year. The amounts ranged from $25.00 to $100.00, with the bulk of the payments being for $100.00. Haney asked the Tallahatchie County Chancery Clerk, Nick Denley, if these payments were "Christmas bonuses" paid to all county employees. According to the testimony of Haney, Denley replied, "Yes, they were." Haney reported this information to the deputy director of investigation for the auditor's office who authorized Haney to investigate the county's payrolls for the years 1986, 1987, and 1988.

The records revealed that in December 1986, fifty-six county employees were paid $100.00, seven county employees were paid $50.00, and two employees were paid $25.00. These payments were in addition to the employees' regular salaries. The December 1987 records showed that fifty county employees were paid $100.00, four were paid $75.00, and three were paid $50.00. According to the testimony of several witnesses at the hearing on the motion for summary judgment, the varying amounts depended upon the length of time that the employee had been employed by the county. In December of 1988, all fifty-eight county employees were paid bonuses in the amount of $100.00 each. The chancery clerk testified that all of the county employees were paid bonuses at the end of each of these years.

On March 26, 1990, Pete Johnson, then the Mississippi State Auditor, formally demanded repayment of these monies. He claimed that these payments violated section 31-7-57 of the Mississippi Code and sections sixty-six and ninety-six of the Mississippi Constitution. According to the complaint, the amount of county funds expended for these extra payments, *excluding* audit costs, taxes, and interest, totaled $20,055.58. When the money was not forthcoming from the Board, the State filed a

complaint in the Tallahatchie County Chancery Court. Defendants named in the complaint were Supervisors James K. Pennington, Marcus K. Savage, J.W. Tartt, and Walter Guy Burkhalter, and sureties United States Fidelity and Guaranty Company and Providence Washington Insurance Company (the Defendants/Appellants). The Defendants answered and denied that the payments were bonuses of any kind. They alleged that the payments were promised to the employees at the time they were employed and "were made pursuant to a practice of long-standing through at least 60 counties within the State."

In their answers to the State's interrogatories, the Defendants admitted that there were no written contracts in the Board's minutes that authorized these payments nor made the county "obligated to pay bonuses in the said three years." The Defendants also admitted that by agreement of the Board, county employees received "a Christmas bonus, or year-end bonus, which had the effect of payment of salary or wages greater than for the other months of those years." Furthermore, the following admission was made by the Board:

7. Do you admit that these payments were made as Christmas or year-end bonuses?

ANSWER: Defendants admit that the bonus payments were usually made just prior to

Christmas and were considered to be Christmas bonuses.

After discovery was completed by the parties, the State moved for summary judgment. The chancellor conducted a hearing in which several parties and witnesses testified. Haney testified concerning what he had uncovered during his investigation, namely that the extra payments were made but that nothing in the minutes evidenced extra work for which the employees were being paid. Ray Hardy, a former supervisor who had paid the State the money which it had requested and was not a party to the case, testified that these payments were for extra labor or for overtime that was paid in one check at the end of the year. However, Hardy testified on cross-examination that the Board had stopped calling the payments "Christmas bonuses" and instead called them "extra labor" after a letter from the auditor's office advised the Board that it could not give Christmas bonuses. Hardy also stated that the Board had not entered into any contracts with the employees for this extra money; he stated, "No, It was just, that's what we did." Burkhalter also testified at the hearing. The substance of his testimony was that this money was for "extra labor" but that there was never any promise, contract, or obligation on the part of the county to pay this extra money for extra labor when the employee was hired.

At the end of the hearing, the chancellor rendered his decision in favor of the State. The chancellor found that the money was a donation, and that the Board could not use county funds to pay employees extra compensation for work that had previously been contracted at a specific rate. The chancellor stated, "I find no evidence whatsoever that the county through its minutes, in any form or fashion, obligated itself to pay any sort of overtime, which this was alleged to have been." The chancellor concluded that no facts were in dispute; rather, the chancellor noted that the Board's interpretation of the facts were in dispute from the State's interpretation of the same facts. He granted summary judgment to the State and ordered the Defendants to pay $27,206.50 plus interest and court costs. The Defendants' motion for a JNOV was overruled by the court. From this, the

Defendants have appealed.

DISCUSSION

In analyzing the issue before the Court, the standard of review is as follows:

> We employ a de novo standard of review in reviewing a lower court's grant of summary judgment. . . . We must review all evidentiary matters before us in the record: affidavits, depositions, admissions, interrogatories, etc. The evidence must be viewed in the light most favorable to the nonmoving party who is to be given the benefit of every reasonable doubt. . . . A motion for summary judgment lies only when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. This Court does not try issues on a [R]ule 56 motion; it only determines whether there are issues to be tried. In reaching this determination, this Court examines affidavits and other evidence to determine whether a triable issue exists, rather than for the purpose of resolving that issue.

Seymour v. Brunswick Corp., 655 So. 2d 892, 894-95 (Miss. 1995) (citations omitted); *see Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1171 (Miss. 1992). As stated above and in Rule 56 of the Mississippi Rules of Civil Procedure, summary judgment is proper only where there are no genuine issues of material fact. M.R.C.P. 56. Furthermore, the nonmoving party may not rest merely on the allegations and denials in his or her pleadings, but "must set forth facts showing that there is a genuine issue for trial." *Id.* In essence, to prevail on a motion for summary judgment, the moving party must show that the opponent has no valid defense to the action. *Id.* cmt.

On appeal, while admitting that the payments were made, the Appellants argue that the monies paid to the county employees were actually part of their salaries, and as such, the payments were "object[s] authorized by law." They allege that the payments were not "bonuses" which are unauthorized by law, and therefore, they cannot be held personally liable. It is really the characterization of these payments with which the Appellants take issue.

For support of their argument that they are not personally liable, the Appellants rely on the case of *Paxton v. Baum*, 59 Miss. 531 (1882). In *Paxton*, county taxpayers sued the board of supervisors and alleged that the board had made illegal appropriations of monies for pay for "extra days," attendance at meetings, and allowances on contracts for work performed on roads and bridges. *Id.* at 532. The board members filed three demurrers, alleging that the taxpayers had no right to file suit on the

bonds, that nearly all of the objects to which monies were appropriated were authorized by law, and that the board had exclusive jurisdiction over these matters. *Id.* The trial court granted the demurrer on the first ground, and the taxpayers appealed. The Mississippi Supreme Court reversed the judgment and held that, by statute, when "money [is] appropriated to something for which the law does not permit it to be appropriated at all, . . . [then the] members [of the board] are personally liable." *Id.* at 536. In addition, the converse is also true. When a board of supervisors spends money on an object which is authorized by law, even though in an improper amount or manner, then the board members cannot be held personally liable. *Id.* at 536-37; *see Barnett v. Woods*, 196 Miss. 678, 18 So. 2d 443, 445 (1944) (the board of supervisors could not be held personally liable for a contract to pay the county auditor $500.00 in excess of the statutory limit since the auditor's salary was an object authorized by law); *Causey v. Gilbert*, 10 So. 2d 451, 452 (Miss. 1942) (the board of supervisors could not be held personally liable for monies paid to an attorney who handled the issuance of bonds for the board at a rate of one and one-fourth percent of the bonds rather than the statutorily allowed one percent since the issuance of the bonds was authorized by law).

As stated earlier, the Appellants argue that the county employees' salaries are objects, authorized by law, to which money may be appropriated, and as such, these extra payments are objects for which they cannot be held personally liable. Because the rule expressed in *Paxton v. Baum* is still valid today, if this were the case, then the Appellants could not have been held personally liable. This contention may have been true if when the employees were hired, the supervisors had informed them that a larger fraction of their agreed salaries would be paid in the December payroll check or if there had been an express system of overtime pay. However, this Court finds that this is not the case.

As the chancellor correctly noted, there is no evidence in the minutes of the Board which authorizes overtime pay nor does anything reflect that when the employees were hired that the "bonuses" were actually calculated into their salaries. The law on how a board of supervisors must evidence its actions is clear. The supreme court has stated:

[W]e [have] held that a board of supervisors can only act as a body through its

minutes; that its minutes are the exclusive evidence of what the board did; and that

parol evidence is not admissible to show what action the board took.

Myers v. Blair, 611 So. 2d 969, 972 (Miss. 1992) (quoting *Noxubee County v. Long*, 141 Miss. 72, 106 So. 2d 83, 86 (1925)); *see also Richardson v. Canton Farm Equip. Inc.*, 608 So. 2d 1240, 1246 (Miss. 1992) (board can act only by orders formally adopted and entered on the minutes).

In addition to the fact that the minutes of the Board do not support its contentions, the testimony of Supervisors Hardy and Burkhalter established that this money was not promised to the employees when they were hired. The chancellor concluded that the bonuses were not part of the employees' salaries but were donations since they were "money for work that ha[d] already been contracted for at a given rate." Indeed, according to the Appellants' answer filed with the court, the bonuses "were expected by each employee of the county by reason of a long-standing custom."

In an effort to prove that summary judgment was improper, the Appellants specifically argue that there are still some material facts in dispute, *inter alia*: (1) whether the supervisors had promised the employees at the time they were hired bonuses to be paid at the end of the year; (2) whether the bonuses were for services actually received by the county; (3) whether there were contracts with the employees for extra pay for extra services performed; and (4) whether the supervisors have the authority to pay a salary plus a year-end bonus. In contrast though, the admissions, hearing testimony, interrogatories, and the minutes of the Board support the conclusion that no material facts are in dispute. There were affidavits submitted by the Appellants in their motion against summary judgment which stated in effect that the county employees would receive "additional money" at the end of the year if their services were valuable and satisfactory. However, mere allegations alone cannot preclude summary judgment. As the chancellor correctly stated:

> There simply were not facts which were in dispute. There were facts that are disputed as to their interpretation. But the facts themselves, basically, are not in dispute. . . . The defendants themselves have testified. And I'm actually finding that there is no evidence of overtime payments, through the defendant's [sic] own testimony. They, themselves, verified that the county was not obligated to pay this amount. They, themselves, verified that the county took a look at the funds before they decided what the bonuses were. And then later on, after calling them Christmas bonuses for years, changed the name to overtime or extra time -- extra labor. And that is the only evidence that this Court has that it was anything other than a Christmas bonus.

Finally in addressing whether these payments were objects authorized by law, there has been only one case in which the Mississippi Supreme Court has had the opportunity to address the issue of county funds being used to pay Christmas bonuses. In *Golding v. Salter*, the state auditor brought suit against the Board of Trustees of the Neshoba County Hospital, who were appointed by the board of supervisors, the hospital administrator, and a surety in which the auditor sought to recover county funds which were allegedly misappropriated by the board. *Golding v. Salter*, 234 Miss. 567, 107 So. 2d 348, 349 (1958). The auditor alleged, *inter alia*, that the trustees had paid hospital employees Christmas bonuses in violation of the Mississippi Constitution. *Golding*, 107 So. 2d at 350. The trustees admitted that the Christmas bonuses were paid, claiming that they were a reward for faithful services. *Id.* Similar to the instant case, in *Golding*, the hospital administrator testified that the Christmas bonuses were actually "for extra work performed during the Christmas Holidays." *Id.* at 352.

The trial judge in *Golding* instructed the jury that if it found that the bonuses were payments for services rendered and the hospital got the value, then the jury should return a verdict for the

defendants on that claim. *Golding*, 107 So. 2d at 353. The jury did return a verdict in favor of the defendants on this claim. *Id.* On appeal, the supreme court reversed and held that it was error for the trial court to instruct the jury that if it found that the payments were for services, it could return a verdict for the defendants. *Id.* at 356. The court noted that the order adopted by the trustees called the payments "Christmas gift[s]" and stated:

The Legislature has never authorized, or attempted to authorize, any subordinate state agency to make donations of public funds to employees as Christmas presents. And payments of that kind are so clearly and distinctly payments which the board of trustees in this case could not lawfully make as to bar the members of the board from claiming justification or immunity from liability therefor on the ground that the payments were made "in good faith and honest error."

Id. at 356-57 (emphasis added). This Court concludes that the December extra payments made to the Tallahatchie County employees were Christmas bonuses, and according to *Golding*, were not objects authorized by law. Therefore, the Court finds that the Appellants are personally liable for these monies.

CONCLUSION

The chancellor did not err when he granted summary judgment in favor of the State based on the evidentiary matters before the court. Based on the record, there are no material facts in dispute. As a matter of law, the bonuses were objects not authorized by law, and as such, the Appellants are personally liable for these unauthorized payments.

THE JUDGMENT OF THE TALLAHATCHIE COUNTY CHANCERY COURT IN FAVOR OF THE APPELLEES IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS ARE TAXED TO THE APPELLANTS.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.