

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

**CHRISTOPHER JAMES STRANGE,
A MINOR, BY AND THROUGH
HIS MOTHER AND NEXT OF KIN
JUDITH LEIGH STRANGE**

APPELLANT

VS.

CASE NO: 2007-CA-01791-COA

ITAWAMBA COUNTY SCHOOL DISTRICT

APPELLEE

**ON APPEAL FROM THE CIRCUIT COURT
OF ITAWAMBA COUNTY, MISSISSIPPI**

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED


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ARGUMENT

I.

Whether the Circuit Court erred in granting Itawamba County School District's Motion for Summary Judgment.

Defendant/Apellee erroneously contends that no genuine issues of material fact exists as to whether the school district is entitled to immunity under the MTCA. Appellant has made the assertions throughout the entire litigation that the Appellee can not survive the tests imposed by the Mississippi Supreme Court to maintain immunity.

If this Court determines that his was a discretionary function, Appellant contends, as stated in Appellant's initial Brief, "in this case, the football coach's acts may have been discretionary, but there remains a factual question as to whether they were directed at social, economic, or political policy. In *Glover v. Donnell*, 878 F.Supp. 898 at 901 (S.D. Miss 1995), the court stated that the Mississippi Supreme Court has "indicated that where the defendant's acts are not related to the development or implementation of public policy or the furtherance of the public welfare, then qualified immunity does not apply."

If this Court determines that this was a ministerial act, then the Court should look to

§ 11-46-9 which requires a minimum standard of ordinary care be exercised by the School District in order to raise the statutory shield of immunity. The statute provides in pertinent part:

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim: . . . (b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid.

The Court can also refer to the statute containing the duty that the School District failed to execute or perform which is Miss. Code Ann. § 37-9-69, which provides in pertinent part that “such superintendents, principals and teachers shall hold the pupils to strict account for disorderly conduct at school, on the way to and from school, on the playgrounds, and during recess.” The conduct of C.J. as well as the conduct of his fellow students riding in the back of the truck and the driver of the truck can be described as disorderly. Riding in the back of a pickup is dangerous, and the students did not have parental consent to transport other students in their vehicles or to ride in the back of the pickup trucks. Furthermore, C.J. was “surfing” while engaging in this dangerous activity. Yet, despite being fully aware of the fact that young students were “piling up” in the beds of pick-up trucks and that two other students had fallen in the same manner, the School District continued to allow this activity without supervision. The Appellee can not survive the test for immunity under the MTCA, thus the trial court erred in granting the summary judgment.

2.

Whether the Circuit Court erred in granting Itawamba County School District’s Motion for Summary Judgment without conducting a hearing or reviewing any evidence provided by Plaintiff.

Defendant/Appellee concedes that the granting of the Motion for Summary Judgment without a hearing was error, however a harmless error. As stated earlier, the trial court erred in granting the summary judgment, and did so without allowing Appellant the opportunity to present its side. The Order granting summary judgment does not provide justification for the granting of the order other than that the Court reviewed the Summary Judgment Motion and finds in favor of the Defendant and that the time has passed for any response to be filed. Plaintiff filed a Motion for Extension of time the same day that the Order was signed. The trial court's own Order states that the Court did not review anything other than the Motion for Summary Judgment. The Court never allowed the Plaintiff an opportunity to present his case, and even denied Plaintiff's Motion for Reconsideration without a hearing. Granting Defendant's Motion for Summary Judgement without a hearing in this case is not a harmless error, just an error.

CONCLUSION

The Circuit Court erred in granting the Defendant's Motion for Summary Judgment. The evidence provided to the Court did not support the finding that the Plaintiff had failed to show that there was a genuine issue of material fact.

The Circuit Court erred also in not reviewing the Plaintiff's Response to Defendant's Motion for Summary Judgment, or conducting a hearing to allow Plaintiff to present his side of the argument.

CERTIFICATE OF SERVICE

I, **SAMUEL C. MARTIN**, do hereby certify that I have this date mailed by facsimile, a true and correct copy of the above and foregoing Appellant's Reply Brief to:

DATED, this the 5th day of August, 2008.

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Honorable Thomas J. Gardner
Itawamba County Circuit Court Judge
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SAMUEL C. MARTIN