IN THE SUPREME COURT 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**

ITAWAMBA COUNTY SCHOOL DISTRICT **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT
OF ITAWAMBA COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons 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 disqualifications or recusal.

1. Christopher James Strange, a minor, by and through his mother and next of kin, Judy Leigh Strange.- Appellant
2. Samuel C. Martin, Esquire–Counsel for Appellant.
3. Marc E. Brand, Esquire–Counsel for Appellant.
4. Mark R. Smith, Esquire –Counsel for Appellee.
5. Itawamba County School District–Appellee.
6. Michelle Floyd, Esquire- Attorney for the Itawamba County School Board.
7. Honorable Thomas Gardner- Circuit Court Judge

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TABLE OF AUTHORITIES

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STATEMENT OF THE ISSUES

COMES NOW, Christopher James Strange, a minor, by and through his mother and next of kin, Judy Leigh Strange, pursuant to Rule 28 (e) of M.R.A.P. and makes the following statements of the issue:

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

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ITAWAMBA COUNTY SCHOOL DISTRICT **APPELLEE**

STATEMENT OF THE CASE

COMES NOW, Christopher James Strange, a minor, by and through his mother and next of kin, Judy Leigh Strange, pursuant to Rule 28 (4) of M.R.A.P. and files this his Statement of the Case:

On February 15, 2006 filed his Complaint against the Itawamba County School District for personal injuries his suffered as a result of an accident while on school grounds and during school hours on February 17, 2005. Defendant, by and through counsel, filed its Answer and Affirmative Defenses on April 3, 2005. The parties in this case completed substantial discovery, including depositions of both Christopher James Strange, and his mother, Judy Leigh Strange.

The parties entered into numerous Agreed Orders setting discovery deadlines, as well as extending those deadlines. Plaintiff filed two separate Motions to refer the case to mediation, to which Defendant filed two separate answers. An Agreed Order Setting Trial was entered in this case setting a trial date of October 1, 2007. The record will reflect that both parties prosecuted and defended this matter continuously, and without delay, until such time as the case was dismissed.

On May 31, 2007, Defendant filed its Motion for Summary Judgment, along with its Itemization of Undisputed Facts. Defendant mailed a letter to the trial Court, dated June 19, 2007, stating that the time allotted by the MRCP for Plaintiff to file his response has expired, and asked that the Court enter its attached Order. Counsel for Plaintiff received this letter on June 21, 2007, and immediately filed a Motion for Extension to Time to File a Response, and sent a copy to the Court by facsimile, and also by mail. Plaintiff filed his Response to Defendant's Motion For Summary Judgment on June 22, 2007. Plaintiff filed his Response to Defendant's Itemization of Undisputed Facts on June 24, 2007. Plaintiff mailed his Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment on June 28, 2007. The same day of that mailing, Plaintiff received a copy of the Order granting Plaintiff's Motion for Summary Judgment dated June 21, 2007, but filed June 27, 2007, and Plaintiff immediately mailed his Motion to Set Aside Judgment and for Reconsideration on June 28, 2007. Plaintiff set his Motion for hearing on August 31, 2007 and mailed his Notice of Hearing to be filed on June 29, 2007. Plaintiff received copies of his filed Memorandum, Motion to Set Aside Judgment and for Reconsideration, and Notice of Hearing filed on July 2, 2007.

Defendant filed its Response to Plaintiff's Motion to Set Aside Judgment and for Reconsideration on July 5, 2007. On August 20, 2007, the Circuit Court entered an Order denying Plaintiff's Motion to Set Aside Judgment and for Reconsideration. Plaintiff filed his Notice of Appeal on September28, 2007.

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SUMMARY OF THE ARGUMENT

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

2. That 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.

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ITAWAMBA COUNTY SCHOOL DISTRICT **APPELLEE**

ARGUMENT

1.

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

FACTS

The Plaintiff filed this action against Itawamba County School District ("School District") on October 21, 2005, claiming personal injuries that the School District is liable for these injuries based upon claims of negligence, negligent supervision and breach of fiduciary duty. The Plaintiff's Complaint arises out of an incident that occurred on February 17, 2005, in which C.J. was seriously injured when he was thrown from the bed of a truck driven by another student of the school, while on school grounds, and during school hours, and while under the care and supervision of the School District. Itawamba County High School's football coach requires his players to arrive at practice immediately after they are dismissed from school. This means he wants the students to use any means possible to get to practice in a timely manner. He would rather students use automotive transportation rather than walking to practice. The school board allowed the football coach to transport students in the back of pickup trucks and in other students' vehicles without parental consent. This failure to notify parents and obtain their

consent subjects these parents to liability for any harm done to students other than their own children riding in their vehicles.

Several students, including Plaintiff C.J. Strange, rode to football practice in the back of trucks in order to comply with the coach's wishes and get to practice as fast as possible. On February 17, 2005, C.J. fell from the bed of another student's truck while traveling on school property from the school parking lot to the football facility for football practice. The School District was fully aware of the fact that the act of traveling to and from practice was commonly done by young students by "piling up" in the back beds of pick-up trucks, however, despite prior falls in the same manner by two other students during the same activity, the School District continued to allow students who participated in sporting activities to drive to and from practice on school grounds.

SUMMARY JUDGMENT

A party moving for summary judgment has the responsibility to demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The summary judgment standard requires that all legitimate factual inferences be made in favor of the Plaintiff. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

While the Defendants argue that Plaintiff's claims must fail as the school district's conduct was discretionary in nature rendering the school district immune from liability pursuant to the Mississippi Tort Claims Act, the analysis is not that simple. Material fact questions remain as to whether or not the coach's actions involved social, economic, or political policy and whether or not

the coach used ordinary care to minimize the risk of personal injury to the players. Furthermore, even if the Defendant School's conduct is best described as discretionary, "there is a ministerial aspect, because both state and federal law place a duty of ordinary care on school personnel to minimize risks of personal injury to provide a safe school environment." *L.W. v. McComb Separate Municipal School Dist.*, 754 So.2d 1136 at 1145 (Miss. 1999).

DISCRETIONARY ACT ANALYSIS

Even if it is conceded that the actions of Itawamba County High School's football coach were discretionary, the inquiry does not end there. The Mississippi Supreme Court in *Jones v. Mississippi Department of Transportation*, 744 So.2d 256 (Miss. 1999), expressly adopted the two-prong "public policy function test" set forth in *United States v. Gaubert*, 499 U.S. 315, 322 (1991). If the act is deemed to be a discretionary duty, the second step in determining whether the Defendants should be granted immunity calls for a factual determination "of whether the choice involved social, economic, or political policy." *Jones*, 744 So.2d 256 at 260.

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."

Finally, an issue of fact exists as to whether or not the discretionary act in question was conducted using ordinary care. Justice McRae's dissenting opinion in *Harris ex rel. Harris v. McCray*, 867 So.2d 188 (Miss. 2003), provides an analysis of this final step.

Miss. Code Ann. § 11-46-9 requires a minimum standard of ordinary care. Public

> schools have a responsibility to provide a safe environment for students; therefore, ordinary care and reasonable steps must be taken to minimize risk to students . . . In other words, ordinary care must have been used before a school can use the statutory shield of immunity.

Id. at 196. (citations omitted). The football coach directed the students to sit in the back of the truck and had knowledge that they were sitting in the back of the truck. Whether or not this action constitutes ordinary care in minimizing the risk of personal injury to the students is a genuine issue of material fact that must be decided, before the Court can determine that the School District is immune from liability.

In *L.W.*, the Mississippi Supreme Court found that a school board's providing supervision, monitoring, and a safe environment involved discretionary conduct rather than ministerial, but noted that "public schools have the responsibility to use ordinary care and to take reasonable steps to minimize foreseeable risks to students thereby providing a safe school environment." *L.W.*, 754 So.2d 1136 at 1143. However, the Court said that "merely finding that the conduct at issue in the instant case was discretionary does not fully resolve the matter." *Id.* at 1141. The Court went on to say that within the broad discretion of the discretionary function exemption, "reasonable steps of a type determined by management to minimize risks of personal injury are necessary," and "failure to take any such steps where feasible is negligent and not within the discretionary function exemption, even though the particular nature of the appropriate steps is discretionary." *Id.* at 1143. (citing *Andrulonis v. United States*, 952 F.2d 652 (2d. Cir. 1991).

MINISTERIAL ASPECT

As noted supra, Miss. Code Ann. § 11-46-9 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 statute containing the duty that the School District failed to execute or perform 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 issue of ordinary care is a fact question, and there remains a genuine issue of material fact in this case as to whether or not the School District exercised ordinary care in carrying out this statutorily imposed duty. see *L.W.* and *Henderson ex rel. Henderson v. Simpson County Public School District*, 847 So.2d 856 (Miss. 2003).

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 School District's administrators, teachers and coaches have a statutorily imposed duty

to hold students to strict account for disorderly conduct at school. The School District's duty to control and discipline students is ministerial not discretionary, and therefore the discretionary exception does not apply. *Lang v. Bay St. Louis/Waveland School District*, 764 So.2d 1234 (Miss. 1999).

While Defendant Itawamba County School District submitted a Motion for Summary Judgment and Brief which shows why they contend their side of the case should be believed, they have simply not shown that there is no genuine issue of material fact. If the evidence is construed in the light most favorable to C.J., it is clear that the School District owed him a statutorily imposed duty to provide a safe environment and to hold him accountable for disorderly conduct and in doing so exercise reasonable steps and ordinary care to minimize the risk of personal injury to him. This statutorily imposed duty "trumps the discretionary exception, regardless of the amount of discretion school personnel may exercise in carrying out this statutory obligation." *L.W.*, 754 So.2d 1136 at 1142. However, even if the court should find that the act of the School District was discretionary in nature, the second prong of the discretionary function test must be analyzed before determining immunity exists.

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.

Summary judgments are not favored and the proper procedure for obtaining a Summary Judgment must be followed. It is undisputed that a hearing for this Summary Judgment was not held, or even scheduled, to the severe detriment of the Plaintiff. In the case of *Partin vs. North*

Mississippi Medical Center, 929 So.2d 924 (Miss. App.,2005), the trial Court granted a Summary Judgment without a hearing. The party's motion that was granted argued that MRCP 78 gives the Court permission to grant a Summary Judgment without conducting a hearing on the Summary Judgment. The Mississippi Court of Appeals in the Partin case held that "Thus, M.R.C.P. 78 declares that courts may establish local rules allowing for certain motions to be decided on written briefs without a hearing, but M.R.C.P. 78 does not, by its terms, fundamentally change the requirements of M.R.C.P. 56 regarding summary judgment. Moreover, our case law on this subject clearly says that the notice and hearing requirements of Rule 56 are to be strictly enforced. For instance, the case of Hurst v. Southwest Miss. Legal Serv. Corp., 610 So.2d 374, 385 (Miss.1992) (overruled as to one particular aspect of its holding not related to Rule 56), declares that the ten day notice requirement for a summary judgment hearing is to be strictly enforced; thus granting a summary judgment motion on less than ten days notice can be reversible error. However, the cases of Croke v. Southgate Sewer Dist., 857 So.2d 774, 778 (Miss.2003), and Adams v. Cinemark USA, Inc., 831 So.2d 1156, 1163 (Miss.2002), declare that the error in granting a summary judgment motion without a hearing may be harmless error if there are, indeed, no triable issues of fact. Adams, specifically, declared that a summary judgment motion may be decided upon written briefs, if it appears that there are no genuine issues of material fact. Id. at 778. Thus, while our law in general requires adherence to the notice and hearing requirements of M.R.C.P. 56 and while our case law declares that granting a summary judgment motion without a hearing is error, we have made some allowance for harmless error in cases in which there are clearly no genuine issues of material fact."

The Plaintiff provided a Motion for Extension of Time to File a Response to Defendant's Motion for Summary on June 21, 2007 as well a letter to the Court advising that Plaintiff was

going to file a Response, and was doing so immediately. While the Order granting the Summary Judgment was signed on June 21, 2007, it was not filed until 6 days later. By the time the Order was filed, Plaintiff's Response to Defendant's Motion for Summary Judgment was filed and on record. A review of the Order granting Summary Judgment will show that the Court in making its decision did not review anything other the Defendant's Motion.

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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 Brief to:

DATED, this the 10th day of April, 2008.

Mark R. Smith, Esq.
Holcomb Dunbar P.A.
PO Drawer 707
Oxford, MS 38655

SAMUEL C. MARTIN

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 Brief to:

DATED, this the 11th day of April, 2008.

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