

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CARL ANDREW FISHER

APPELLANT

VS.

NO. 2008-CA-00359-COA

LAUDERDALE COUNTY BOARD
OF SUPERVISORS

APPELLEE

ON APPEAL FROM THE CIRCUIT COURT
OF LAUDERDALE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

J. Richard Barry (MSB # [REDACTED])
Robert T. Bailey (MSB # [REDACTED])
BOURDEAUX & JONES
Post Office Box 2009
Meridian, MS 39302-2009
Telephone: (601) 693-2393

Attorneys for the Lauderdale County
Board of Supervisors

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 Judge of the Circuit Court of Lauderdale County may evaluate possible disqualification or recusal.

1. Carl Andrew Fisher, Appellant
2. Lauderdale County Board of Supervisors, Appellee
3. J. Richard Barry (MSB [REDACTED])
Robert T. Bailey (MSB# [REDACTED])
Bourdeaux & Jones, LLP
P. O. Box 2009
505 Constitution Avenue
Meridian, MS 39301
Telephone: (601) 693-2393

Attorneys for Appellee

4. Thomas Powell (MSB [REDACTED])
P. O. Box 621
Ridgeland, MS 39158
Telephone: (601) 922-2824

Attorney for Appellant

5. Attorneys of the Law Firm of Bourdeaux & Jones, LLP:

William C. Hammack
J. Richard Barry
Lee Thaggard
William T. May
Kacey G. Bailey
Robert T. Bailey

The above disclosures and 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.

DATE: September 24th, 2008.

A handwritten signature in black ink, appearing to read 'R. T. Bailey', written over a horizontal line.

Robert T. Bailey

Attorney of Record for Appellee,
Lauderdale County Board of Supervisors

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iv
TABLE OF CASES AND AUTHORITIES	v
STATEMENT OF ISSUES	-1-
STATEMENT OF THE CASE	-2-
ARGUMENT	-4-
CONCLUSION	-9-
CERTIFICATE OF SERVICE	-10-

TABLE OF CASES AND AUTHORITIES

Cases:

<i>Barr v. Hancock County</i> , 950 So.2d 254, 258 (Miss. Ct. App. 2007)	-8
<i>Davis v. Hoss</i> , 869 So.2d 397 (¶10) (Miss. 2004)	-4-
<i>McFarland v. Entergy Mississippi, Inc.</i> , 919 So.2d 894, 903 (Miss. 2006)..	-5-, -6-
<i>McFarland v. Leake</i> , 864 So.2d 959 (¶7) (Miss. 2003)	-4-
<i>Mohundro v. Alcorn County</i> , 675 So.2d 848, 853 (Miss. 1996)	-8-
<i>Moore ex rel. Moore v. Mem'l Hosp. of Gulfport</i> , 825 So.2d 658, 663 (¶15) (Miss.2002)	-4-
<i>Owens Corning v. R.J. Reynolds Tobacco Co.</i> , 868 So.2d 331 (¶7)(Miss. 2004)	-4-
<i>Palmer v. Anderson Infirmary Benev. Ass'n</i> , 656 So.2d 790, 794 (Miss. 1995)	-5-
<i>Reid v. American Premier Ins. Co.</i> , 814 So.2d 141 (¶11) (Miss. 2002)	-4-
<i>Schepens v. City of Long Beach</i> , 924 So.2d 620 (Miss. Ct. App. 2006).	-7-
<i>Soil Survey of Lauderdale County Mississippi</i> , by the United States Department of Agriculture, issued July 1983	-7-, -8-
<i>Stephens v. Carlisle Corp.</i> 853 So.2d 871 (¶11) (Miss. 2003).	-5-
Miss. R. Civ. P. 56(c)	-4-
§ 11-46-9(1)(d), MCA	-2-, -7-, -8-, -9-
§ 11-46-9(1)(q), MCA.	-6-, -7-
§ 11-46-11, MCA	-8-
§ 65-21-1, MCA	-8-, -9-

STATEMENT OF THE ISSUE

The only issue before this Court on appeal is as follows: Did the Trial Court err in sustaining the Defendant's (Lauderdale County Board of Supervisors) Motion for Summary Judgment?

STATEMENT OF THE CASE

Nature of the Case

This is a Mississippi Torts Claim case which was filed by Carl A. Fisher ("Fisher") on May 6, 2004, against the Lauderdale County Board of Supervisors ("the Board"). Mr. Fisher alleges, among other things, that his land flooded due to the fact that the Board did not use ordinary care in the maintenance of the drainage culverts it had installed on Beaver Pond Road.

Course of the Proceedings

Mr. Fisher filed his complaint on May 6, 2004. The Board filed its Answer and Defenses on May 18, 2004. On September 24, 2007, the Board filed its Motion for Summary Judgment. On October 15, 2007, Fisher filed his response to the Board's Motion for Summary Judgment and on October 29, 2007, the Board filed its Rebuttal.

The Summary Judgment hearing was held on December 19, 2007. On December 28, 2007, a motion for a rehearing was filed by Fisher, which was responded to by the Board on January 3, 2008. On January 25, 2008, the Honorable Lester Williamson issued a Memorandum Opinion and Judgment in which he held that "the Lauderdale County Board of Supervisors is entitled to immunity pursuant to § 11-46-9(1)(d), MCA." **R. at 129.**

Statement of the Facts

In April of 2003, the area surrounding Beaver Pond Road received about 10 inches of rain on two separate occasions that washed out ditches, culverts, and roads. **R. at 56.** Beaver Pond Road is a Lauderdale County road maintained by Appellee, Lauderdale County.

In 1984, Carl Fisher, purchased real property consisting of 82 acres of timberland in the area adjacent to Beaver Pond Road. **R. at 70.** This 82 acre tract of land is near Ponta Creek. **R.**

at 71. Mr. Fisher believes that the two big rains that fell in April of 2003 could be considered a 500 year flood. **R. at 72-73.** Mr. Fisher also stated that his tract of land will get wet in the wintertime but will dry out in the summer. **R. at 74.** Mr. Fisher also stated that because of this substantial amount of rainfall the lakes on the Navy Base overflowed sending water rushing down Ponta Creek and causing Ponta Creek to flood out as well. **R. at 73.** Mr. Fisher stated that nothing could have been done to prevent the flood of April 2003. **R. at 76.** After the flood of April 2003, Mr. Fisher did not have any conversations with anyone from Lauderdale County regarding his flooded timberland. **R. at 76.**

ARGUMENT

Standard of Review

The Mississippi Supreme Court has clearly held that “summary judgment is appropriate ‘if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Reid v. American Premier Ins. Co.*, 814 So.2d 141 (¶11) (Miss. 2002)(quoting in part Miss. R. Civ. P. 56(c)).

The burden of demonstrating the absence of any material issue rests with the moving party. *Davis v. Hoss*, 869 So.2d 397 (¶10) (Miss. 2004)(citing *Moore ex rel. Moore v. Mem'l Hosp. of Gulfport*, 825 So.2d 658, 663 (¶15) (Miss.2002)). In other words, the courts will give a non-movant the benefit of the doubt as to whether such a material issue actually exists. *Owens Corning v. R.J. Reynolds Tobacco Co.*, 868 So.2d 331 (¶7)(Miss. 2004). However, “If, in this view, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment should be entered in that party's favor.” *Id.* It is not enough that a party simply rely on its allegations or denials. Rather, a plaintiff must put forward “specific facts” that would indicate there is a material issue to be tried. *Id.* Indeed, regarding allegations of negligence, the state supreme court has held that:

In a negligence action, the plaintiff bears the burden of producing evidence sufficient to establish the existence of the conventional tort elements of duty, breach of duty, proximate causation, and injury. Therefore, in a summary judgment proceeding, the plaintiff must rebut the defendant's claim (i.e., that no genuine issue of material fact exists) by producing supportive evidence of significant and probative value; this evidence must show that the defendant breached the established standard of care and that such breach was the proximate cause of her injury.

McFarland v. Leake, 864 So.2d 959 (¶7) (Miss. 2003) citing *Palmer v. Anderson*

Infirmity Benev. Ass'n, 656 So.2d 790, 794 (Miss. 1995); see also *Stephens v. Carlisle Corp.* 853 So.2d 871 (¶11) (Miss. 2003).

Thus, where the defendant has put forward evidence adequate to shift the burden of persuasion back to the plaintiff as to the existence of a genuine issue of material fact, the plaintiff is not sufficiently served to simply deny the defendants allegations, but must put forward “evidence of significant and probative value” that there is a material issue to be decided. *Id.*

Act of God

The floods of April 2003 can be categorized as an act of God for which the Lauderdale County Board of Supervisors had no control. Nothing could have been done to prevent the floods from occurring. Fisher stated that he believes his land received about 10-15 inches of rain on April 22, 2003 and that another 10 inches fell soon after. **R. at 56.** No amount of preparation by the Lauderdale County Board of Supervisors could have prevented the damage done to the land that received some 25 inches of rain in such a short period of time.

An act of God has been defined by the Supreme Court of Mississippi as the following:

“A loss happening in spite of all human effort and sagacity.”

“Any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected could have been prevented.”

“Applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.”

“An Act of God is not only one which causes damage, but one as to which reasonable precautions and/or the exercise of reasonable care by the defendant, could not have prevented the damage from the natural event.”

McFarland v. Entergy Mississippi, Inc., 919 So.2d 894, 903 (Miss. 2006).

In *McFarland*, a severe ice storm struck the Mississippi Delta causing trees to fall as well as downing power lines throughout the area. *McFarland* at 897. A driver ran into one of these downed power lines and sued Entergy for negligence. *Id.* The Court ruled in favor of Entergy stating that “all Entergy could hope to accomplish under these circumstances was a quick mobilization of all its available workers, equipment and resources; to call for extra support from surrounding companies in sister states; to seek volunteers to assist; and to use reasonable ordinary due care in restoring power lines, poles, and electricity as soon as possible.” *Id.* at 903.

Fisher has sued the Lauderdale County Board of Supervisors for negligence on the theory that liability can be found in the alleged failure to properly maintain and keep the drainage culverts free of debris. **R. at 78.** Fisher bought this tract of land in 1984 and stated that this piece of land had never flooded like this before April of 2003. **R. at 72, 75.** In April of 2003 when the area around Beaver Pond Road received the heavy rainfall and subsequent flooding, the water blew out the culverts and drains, and washed out some of the road on Beaver Pond Road. **R. at 75.** Even though Mr. Fisher claimed that he spoke with someone at the county barn prior to the floods of April 2003, he did not have any conversations with anybody with the county to alert them that he may have a problem on his land. **R. at 76.** The County did replace three culverts that were blown out during the floods of April 2003 in the land adjacent to Mr. Fisher’s land. **R. at 76.**

The flood of April 2003 in the Beaver Pond Road area was clearly an Act of God. No amount of preparation by the Lauderdale County Board of Supervisors could have prevented the floods.

MTCA Section 11-46-9(q)

Furthermore, immunity is appropriate under Section (q) of the MTCA which states that there shall be no liability, "Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways. . . ." Miss. Code Ann. 11-46-9(q) Code of 1972 as Amended. Clearly, the washout at issue was the result of weather conditions on Beaver Pond Road. This fact is not in dispute. There is no allegation that the Lauderdale County contributed to or caused the washout conditions.

In *Schepens v. City of Long Beach*, 924 So.2d 620 (Miss. Ct. App. 2006), the Plaintiffs claimed that a dirt road had not been properly maintained. The Plaintiff testified that "naturally a dirt road, when it goes to raining, you're going to start getting potholes it. That is when it needs to be graded." *Id.* at 623. The Court held that the Plaintiff's claim "arose from an injury which resulted solely from the effect rain" had on the road making the City of Long Beach immune from Schepens claim under § 11-46-9(1)(q). *Id.* at 623.

MTCA Section 11-46-9(d)

Fisher claims that his land was flooded due to "inadequately sized and improperly installed culverts." **R. at 87.** Fisher also states that he has "sustained long-term irreversible damage to his property, in particular his soils, timber, etc." **R. at 87.** Furthermore, Fisher states that he has suffered "mental anguish and anxiety for the last Twenty-five (25) years." **R. at 87.**

From 1972-1979, the United States Department of Agriculture conducted a soil survey of Lauderdale County. *Soil Survey of Lauderdale County Mississippi*, by the United States Department of Agriculture, issued July 1983. The aerial photograph, which was taken on November 12, 1979, shows that the land at issue had a beaver pond located within its boundaries.

R. at 96. This aerial photo also shows that in 1979, the beaver pond and the approximately 50 acres surrounding the beaver pond consisted of wetlands and/or grasslands. *Id.* The type of soil was listed as DJ which the Soil Survey book defines as Daleville-Jena association, frequently flooded. *Soil Survey of Lauderdale County Mississippi*, page 17. This type of soil is defined as the following:

This unit consists of deep, nearly level, poorly drained Daleville soils and well drained Jena soils on flood plains along major streams. These soils are flooded more often than once in 2 years. Depressional areas and sloughs often remain under water for several months, but mostly they are flooded for periods of shorter duration. *Soil Survey of Lauderdale County Mississippi*, page 17-18.

In 1979, the land that Fisher now owns was already considered flooded land and already had considerable flood damage. Fisher is not entitled to damages when his land was damaged prior to him purchasing the property in 1984. Fisher is also not entitled to damages over the past 25 years because the Torts Claim Act states that all actions shall be “commenced within one year after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after.” Miss. Code Ann. 11-46-11(3) Code of 1972.

The construction of a culvert is dictated by § 65-21-1 of the Mississippi Code which places minimum requirements on the width of culverts. While this statute does place a ministerial duty on the Board of Supervisors to ensure that the culvert is constructed within the guidelines of the statute, any decisions made outside of those minimum requirements are discretionary functions of government. *Barr v. Hancock County*, 950 So.2d 254, 258 (Miss. Ct. App. 2007). Maintenance of roads has long been held to be a discretionary duty. *Mohundro v. Alcorn County*, 675 So.2d 848, 853 (Miss. 1996). Being that there is not any evidence to suggest

that the culverts were not designed or constructed within the guidelines as dictated by § 65-21-1, and that the maintenance or repair of roads is a discretionary act, the Board is immune under § 11-46-9(d), and the claim should be dismissed as a matter of law.

CONCLUSION

Based on the foregoing, the Lauderdale County Board of Supervisors respectfully submits that there is no genuine issue of material fact and that the Lauderdale County Board of Supervisors is entitled to judgment as a matter of law as to the entirety of the Appellant's issues. The Lauderdale County Board of Supervisors should be immune from the claims of the Appellant, Carl A. Fisher. Accordingly, the order by the Trial Court granting summary judgment to the Lauderdale County Board of Supervisors should be affirmed.

Respectfully submitted, this the 24th day of September, 2008.

Lauderdale County Board of Supervisors

BY: _____



J. Richard Barry (MSB # [REDACTED])
Robert T. Bailey (MSB # [REDACTED])
of BOURDEAUX & JONES, LLP
P.O. Box 2009
Meridian, MS 39302
(601) 693-2393
(601) 693-0226 (Facsimile)

Attorneys for Appellee

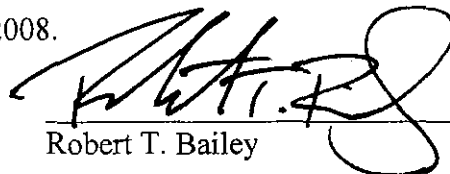
CERTIFICATE OF SERVICE

I certify that I have this day served the above document, by United States Mail, postage prepaid, on the following persons at these addresses:

Thomas Powell
P. O. Box 621
Ridgeland, MS 39158

The Honorable Lester Williamson
Circuit Judge
P. O. Box 86
Meridian, MS 39302

THIS the 24th day of September, 2008.


Robert T. Bailey

F:\MyFiles\WPDOCS\20374\Appeal\Brief.Appellee.wpd