

**COPY**

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CARL ANDREW FISHER

**FILED**

APPELLANT

VS.

**AUG 24 2008**

NO. 2008-CA-00359-COA

STATE OF MISSISSIPPI

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

APPELLEE

APPEAL FROM THE CIRCUIT COURT OF  
LAUDERDALE COUNTY, MISSISSIPPI

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BRIEF OF THE APPELLANT  
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## STATEMENT OF ISSUE

### **DID THE TRIAL ERR IN SUSTAINING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT?**

## STATEMENT OF CASE

The Appellant, Carl Andrew Fisher, filed suit on May 6, 2004 asserting a claim against the Lauderdale County Board of Supervisors. Mr. Fisher is a resident of Lauderdale County residing in Collinsville, Mississippi, and owns approximately 198, Of which 120 acres of timberland that was flooded on or about April 3, 2003 as a result of heavy rains and flooding. Mr. Fisher alleges in his Complaint the Lauderdale County Board of Supervisors is a governmental agency as defined by **11-46-11 MCA. (CR p2)** The Appellant asserts the Lauderdale County Board of Supervisors is not immune from liability Pursuant to **MCA 11-46-9** which requires a minimum standard of ordinary care be used by the governmental actor to raise the statutory shield. Appellant asserts the Board did not use **ordinary due care** in the maintenance of drainage culverts it had installed on Beaver Pond Road by failing to maintain and keep the culverts free of established beaver dams and associated debris, on the County's right of way, neglect which was the proximate cause of the land's continually retain water from flooding in which resulted in soil fertility depletion and subsequent timber loss. The Appellant asserts that he has notified the District Two Supervisor, of the culvert drainage problem due to established beaver dams and associated debris. **(CR P 60)**. Appellant's Expert would testify that due to improperly installed and inadequately sized culverts, and beaver dams located in the culverts, caused Beaver Pond Road and the surrounding areas to  
1.  
become a Wetland by not allowing flood waters to recede. Further, that such blockage

over the years has caused the water to flow in a different direction across the Appellant's property, resulting in preventable damages to land and timber, nor has there been any official designation in Lauderdale County, Mississippi of a 100 year rain or a 500 year flood by any governmental agency. **CR pgs 87-88**

The Appellees, the Lauderdale County Board of Supervisors, asserts through its Motion for Summary Judgment that it is immune from liability "because no one is liable for any injury proximately caused by an Act of God ..." citing **City of Jackson v. Brummett, 80 So.2d 827 (Miss. 1955)**. The Appellees, the Lauderdale County Board of Supervisors, further assert that it is immune from liability pursuant to the **MCTA, 11-46-9(1)(q), MCA** which states "a governmental entity ... acting within the course and scope of its employment ... shall not be liable for any claim." Arising out of any injury caused solely by the effect of weather conditions on the use of streets and highways. Therefore the damage to Mr. Fisher's property resulted from flooding based on the theory an "Act of God" was the proximate cause to the damage to Appellant's property. The Appellees term the rain as a "100 year rain" and a "500 year flood" although the U.S. Geological Survey has made no such determination. **CR pgs 51-54, CR pgs 93-95**

Finally, Appellees argue immunity from liability because the construction of culverts is governed by **65-21-1, MCA**, which places minimum requirements on the width of culverts which is a ministerial duty on the Board of Supervisors to ensure that the culvert is constructed within the guidelines of the statute, and any decisions made

outside of those minimum requirements are discretionary functions of government, thus immunity applies.

Appellants also contend that the Trial Court gave the “appearance of impropriety” by allowing counsel for the County to enter his chambers immediately after the hearing, causing Appellant to question the fairness of the legal process.

**Rule 56(c) , MRCP**, provides for summary judgment where “there is no issue of material fact... and the moving party is entitled to judgment as a matter of law.”

Appellant contends that is a genuine issue of material as to whether the Lauderdale County Board of Supervisors, failed to exercise ordinary due care in the construction, installation, and maintenance of the culverts.

### **ARGUMENT**

#### **I. DID THE TRIAL COURT ERR IN SUSTAINING THE DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT?**

The Mississippi Rules of Civil Procedure **11-46-9(1)(q)** states a “governmental entity... acting within the course and scope of their employment... shall not be liable for any claim: “Arising out of any injury caused solely by the effect of weather conditions on the use of streets and highways.” The case of **City of Jackson v. Brummett, 80 So.2d 827 (Miss. 1955)** states “No one is liable for an injury proximately caused by an act of God, which is an injury due directly and exclusively to natural causes without human intervention, and which could have been prevented by the exercise of reasonable care and

foresight. However, in the case of **Hattiesburg v. Hillman**, 76 So.2d 368, 370 (Miss. 1954) states “But an act which may be prevented by the exercise of ordinary care is not an act [\*\*\* 11] of God which would immunize a tort-feasor from liability. In the case of

Brummett, the court found the City of Jackson liable for using rotten ropes to tie down an airplane which flipped over when the ropes snapped in high winds. In the case at bar, the flooding that ruined the 120 acres of Mr. Fisher’s property was the result of gross negligence of the Lauderdale County in the placement, installation, and maintenance of the culverts on Beaver Pond Road. Mr. Randy Warren, the designated expert in the area of forestry, biology and environmental science, having expertise pertaining to timber loss and damage to personal property due to inundation - flooding states “Mr. Fisher has sustained long-term, irreversible damage to his property , not from an Act of God, but from the direct result of Lauderdale County’s improperly installing culverts that are inadequately sized. Mr. Warren further asserts that Lauderdale County also totally avoided and abandoned its responsibility for periodically removing the beaver dams along the county right of way easement across Beaver Pond Road and across Mr. Fisher’s property. Mr. Warren states the beaver dams were built against the culverts on the west side of Beaver Pond Road, which is a public road. Mr. Fisher notified the county of the beaver problem on several occasions but no action was ever taken by the County. See **Affidavit and C Vitae of Randy Warren. CR p 30-32; Deposition of C. Fisher, CR p 60.** Mr. Warren states due to the County failing to remove the dams on the right of way in the culverts, after repeated calls and visits from Mr. Fisher, caused the normally

eastward flowing gravitational water to flow northward across Mr. Fisher's property, creating a wetland over a period of years after the none receding waters were retained. Mr. Warren further states that even though for many years Lauderdale County was included in the USDA's APHIS ( Animal, Plant, Hail, Inspection Services) Wildlife Service's Beaver Control Program, not a single call for assistance for removing beaver dams along the right-of-way of Beaver Pond Road was made by any personnel from the Lauderdale County Board of Supervisors. This agency, which maintains a daily log of requests from any county personnel, has no record of any such or said request from any Lauderdale County employee. Lauderdale County admitted in its Motion for Summary Judgment that Mr. Fisher's property would flood in the winter and becomes dry in the summer. Now it is a wetland.

The Appellees' argue that they are immune from liability because the maintenance of culverts is a "discretionary function" of an governmental entity. Generally, supervisors have been found to be immune from liability for injuries resulting form the negligent maintenance of public roads. **Mohundro v. Alcorn County, 675 So.2d 848 (Miss. 1996); Coplin v. Francil, 631 So.2d 752, 753 (Miss. 1994); Webb v. County of Lincoln, 535 So.2d 1356, 1358-1360 (Miss. 1988).** However, this qualified immunity only affords protection against suits arising out of the performance of discretionary duties. **Mohundro v. Alcorn County, 675 So.2d 848 (Miss. 1996); Davis v. Little, 362 So.2d 642, 644 (Miss. 1978).** A supervisor or other public official has no immunity to a civil action for damages if his breach of a legal duty cause[d] injury and (1) that duty is ministerial in



nature, or (2) that duty involves the use of discretion and the governmental actor greatly or substantially exceeds his authority and in the course thereof causes harm, or (3) the governmental actor commits an intentional tort. In **Mohunro** citing **Grantham v. Mississippi Dept. of Corrections, 522 So.2d 219, 225 (Miss. 1988)**. A duty is ministerial in nature when “the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer’s judgment or discretion...” **Coplin, 631 So.2d at 754, citing Poyner v. Gilmore, 171 Miss. 859, 865.**

Miss. Code Ann. **65-21-1** sets out the following requirements for the placement of culverts: “All culverts hereafter built, rebuilt, or placed on any public road in this state shall be not less than the full width of the crown of the roadway, and shall have guide or warning posts on either side.”

Miss. Code Ann. **19-13-41**, gives Boards of Supervisors the full jurisdiction over the roads, bridges and ferries in their respective counties.

Miss. Code Ann. **19-13-51**, gives Boards of Supervisors the discretion to pay certain claims for injuries to property sustained as the result of defective bridges, causeways and culverts. However, in case of the **Benefit of Brazeale v. Lewis, 498 So.2d 321, 323(Miss. 1986)**, the court noted the statute does in fact , reinforce the discretionary -ministerial distinction by allowing the board as a whole the authority to make discretionary decisions with regard to the general condition and state of maintenance of county roads and bridges, thus leaving intact the board’s qualified

immunity for such decisions. *id.* at 323. In finding that road and maintenance and repair are discretionary rather than ministerial functions, the court relied on Lewis.

The minimum requirements of the construction of culverts are specified in Miss. Code Ann. **65-21-1** leaving no room for discretion in meeting the minimum standards set out there.

Miss. Code Ann. **11-46-9** requires a minimum standard of ordinary care be exercised by the government actor in order to raise the statutory shield but when a government actor fails to use ordinary care in executing or performing or failing to execute or perform an act mandated by statute, there is no shield of immunity. Still and Jones, 744 So.2d 256, (Miss. 1999). The court citing **Bailey Drainage Dist. v. Stark**, 526 So.2d 678, 681, n.2 (Fal.1988), states that “once the road is built and the responsible entity becomes aware of a dangerous condition in connection with the road, the duty becomes one of maintenance. *Id.* Therefore, MDOT and Tunica must use due care in the exercise of discretion.

In the case at bar, once District Two Supervisor Jimmy Smith and the Lauderdale County Board of Supervisors became aware of the culverts’ conditions on Beaver Pond Road and failed to use ordinary due care in the maintenance of the culverts. In Mohundro, the court stated “The law is not clear as to whether an individual supervisor has a ministerial duty or function to see to the repair and maintenance of the roads and bridges within his district or whether that duty is only one of the Board of supervisors as a whole. In Coplin, we found that the supervisor in that case did have such a duty and we reversed summary judgment. The decision to replace the existing bridge on Mathis road

with a culvert was a discretionary function, but there may be a genuine issue of material fact regarding whether Dixon substantially exceeded his authority in making that decision. He made the decision on his own without consulting the rest of the board or professional engineer to see if a culvert would be sufficient. See *Coplin*, 631 So.2d 755. In *Mohundro*, the court found though the board of supervisors had sovereign immunity, but there was a genuine issue of material fact as to whether a supervisor exceeded his authority or was so grossly negligent that his action may be described as constrictively intentional. If so, there is no immunity. **MRCP 56**

Appellant contends that Supervisor Jimmy Smith was so grossly negligent by failing to use ordinary due care in the placement, installation and maintenance of said culverts on Beaver Pond Road to make his actions intentional, thus allowing Mr. Fisher to pierce the veil of immunity. **Still and Jones v. MDOT and Tunica County**, 744 So.2d 256, (Miss. 1999).

Rule 56 of the MRCP, provides for “summary judgment is appropriate ‘if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” **Brown v. Credit Center, Inc.**, 444 So.2d 358, 362 (Miss. 1983); **MRCP 56**; **Reid v. American Premier Ins. Co.**, 814 So.2d 141 (Miss. 2002). In this case, there is a genuine issue of material fact as to whether Lauderdale County Supervisor Jimmy Smith exceeded his authority in this case or was so grossly negligent that his actions may be described as constructively intentional. Further, there is a genuine issue of material fact as to whether the Lauderdale

County Board of Supervisors failed to exercise ordinary due care in the placement, installation and maintenance of the culverts. **Still and Jones v. MDOT and Tunica County, 744 So.2d 256 (Miss. 1999).**

### **CONCLUSION**

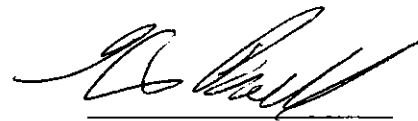
The Trial Court erred in granting Appellee Lauderdale County Board of Supervisors Motion for Summary Judgment because there is a genuine issue of material fact regarding whether Jimmy Smith exceeded his authority or was grossly negligent as to make his acts intentional, and whether the Lauderdale County Board of Supervisors used ordinary care in the placement, installation and maintenance of the culverts on Beaver Pond Road.

CERTIFICATE OF SERVICE

I, Thomas Powell, Attorney do hereby certify that I have this day mailed, by U.S. mail, postage pre-paid, a true and correct copy of the above and foregoing instrument to:

J. Richard Barry, Esq.  
BORDEAUX & JONES  
P.O. Box 2009  
Meridian, MS 39302

This the 24<sup>th</sup> day of August, 2008.

  
Thomas Powell, Esq.