

2008-TS-00897

**IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI**

**JOE KNIGHT AND JOYCE KNIGHT,
WRONGFUL DEATH BENEFICIARIES
OF CHARLES PRATHER, DECEASED AND
BRANDI HOLLAND, WRONGFUL DEATH
BENEFICIARY OF CAROLYN PRATHER,
DECEASED**

PLAINTIFFS/APPELLANTS

V.

CAUSE NO. 2008-TS-00897

**MISSISSIPPI TRANSPORTATION
COMMISSION (MTC)**

DEFENDANT/APPELLEE

**APPELLEE BRIEF OF DEFENDANT/APPELLEE
MISSISSIPPI TRANSPORTATION COMMISSION (MTC)**

On Appeal from the Circuit Court of Calhoun County, Mississippi

ORAL ARGUMENT REQUESTED

Submitted by:

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COMMISSION (MTC)**

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**MISSISSIPPI TRANSPORTATION
COMMISSION (MTC)**

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Defendant/Appellee certifies that the following persons have interest in the outcome of this case. These representations are made in order that the Justices of the Mississippi Supreme Court and the Judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal:

1. Joe Knight, Appellant;
2. Joyce Knight, former Plaintiff;
3. Brandi Holland, Appellant;
4. Mississippi Transportation Commission; Appellee;
5. Upshaw, Williams, Biggers, Beckham & Riddick, LLP, Attorneys of Record for Appellee;
6. Harlow Law Firm, Attorneys of Record for Appellants; and
7. Judge Henry L. Lackey, Trial Judge.

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STATEMENT OF ISSUES

Whether the trial court's grant of summary judgment in favor of Defendant should be affirmed based upon the discretionary function exemption under the Mississippi Tort Claims Act found in §11-46-9(1)(d), Mississippi Code Annotated (1972), as amended.

STATEMENT OF THE CASE

The instant appeal involves two cases filed under the Mississippi Tort Claims Act seeking recovery from the Mississippi Transportation Commission for the alleged wrongful deaths of Charles and Carolyn Prather. (R. E. 1-6; R. 4-9, Amended Complaint of Joe and Joyce Knight for Wrongful Death of Charles Prather filed January 17, 2002 and R. E. 25-29; R. 10-14, Brandi Holland Complaint seeking recovery for the wrongful death of Carolyn Prather, filed January 30, 2002).

Although the Order is not reflected in the record, by agreement of the parties these cases were consolidated for discovery and trial. The Complaints charge the Defendant with failure to properly maintain the public highway and the failure to warn of an allegedly known dangerous condition.

Defendant's Answers and Defenses asserted, *inter alia*, that the Defendant was exempt from liability by virtue of §11-46-9(1)(d), which provides for exemption from liability of governmental entities for the performance or non-performance of discretionary functions, even in cases where the discretion is abused. (R. E. 17-24; R. 20-27, Answer in Knight case; R. E. 35-41; R. 28-34, Answer in Holland case; R. E. 21-22; R. 24-25, Defense of discretionary exemption in Knight and R. E. 39; R. 32, discretionary exemption from liability defense in Holland case).

Defendant filed a Motion for Summary Judgement on January 23, 2008, asserting, *inter alia*, that it was exempt from liability based upon §11-46-9(1)(d). (R.E. 44-46; R. 35-37).

The Motion was supported by a deposition given by Defendant's District Engineer for District Two, which encompasses Calhoun County where the accident occurred, Jimmy Dickerson

(R. E. 47-66; R. 38-57), with the chief reliance of Defendant for support of its Motion being an affidavit of Mr. Dickerson given in another case which was made an exhibit to this deposition. (R. E. 71-77; R. 62-68).

Plaintiffs responded to the Motion for Summary Judgment on April 25, 2008, asserting that there were genuine issues of material facts and that Defendant was not entitled to Summary Judgment. (R. E. 84-85; R. 261-262).

The Court ordered that a hearing be held on the Defendant's Motion for Summary Judgment on Tuesday, May 6, 2008. (R. 263).

Following the oral argument, on May 13, 2008, the Court entered its order sustaining the Motion for Summary Judgment, finding, *inter alia*, that the acts complained of constituted a discretionary function. (R. E. 255-257; R. 264-266). The Complaint was dismissed with prejudice and on May 22, 2008, Plaintiffs' filed their Notice of Appeal. (R. E. 259-260; R. 267-268).

STATEMENT OF FACTS

As previously stated, the present appeal involves two separate lawsuits filed seeking recovery for the alleged wrongful deaths of Charles and Carolyn Prather. The wrongful death beneficiaries of Mr. Prather were his siblings, Joe and Joyce Knight and the sole wrongful death beneficiary of Carolyn Prather is her daughter, Brandi Holland. (R. E. 1-6; R. 4-9; R. E. 25-29; R. 10-14).

The pertinent allegations of the Complaint, taken from the Amended Complaint filed on behalf of the Knight family are as follows.

- "5. On November 7 (sic), 2001, at approximately 11:55 p.m., Charles Prather, the driver of a 1988 Honda was traveling in an easterly direction along state Highway 8.
6. Immediately prior to the accident, rain had fallen on Highway 8 and water had collected to a depth greater than ½ inch in the travelled ruts of the asphalt roadway.

7. As Mr. Prather approached a dangerously narrow highway bridge, the tires of his vehicle lost friction with the pavement due to the ponded rainwater and hydroplaned causing the automobile to rotate clockwise. The rotation thrust the left side of the automobile into the concrete bridge abutment.
8. As a result of the crash, Charles Prather was killed.
9. The automobile collision and untimely death of Charles Prather was a direct and proximate result of negligence by the Defendant in the maintenance of Mississippi Highway 8 in the following particulars:
 - a. The asphalt surface in question was allowed to become rutted so as to allow water to pond to a depth in excess of ½ inch, a depth which is known and recognized to cause hydroplaning of vehicles traveling in such water, thereby creating a hazardous condition on the surface of the road.
 - b. ~~The hazardous roadway conditions that existed were readily apparent following any rainfall.~~ Because previous accidents have occurred at this same location, the Defendant had actual knowledge that unsafe conditions existed and knew, or should have known, that additional accidents could occur.
 - c. The bridge into which Mr. Prather's vehicle was propelled was not in compliance with the required safety appurtenances, i.e. a guardrail was not installed. The Mississippi Transportation Commission knew, or should have known, through regular inspection of bridges, that the bridge on Highway 8 was lacking a guardrail, and thus was a danger to motorists.
10. By statute, the Mississippi Transportation Commission is charged with the duty to keep existing bridges and roadways in compliance with the latest safety designs and appurtenances. The Mississippi Transportation Commission failed to both correct the substandard road and bridge conditions, and to warn of the danger they knew, or should have known existed.
11. The Mississippi Transportation Commission Design Manual sets forth as part of its overall objective the duty to maintain bridges in accordance with the latest safety devices, including guardrails. This objective was found in §11-2.07.04 SAFETY APPURTENANCES which reads in part, 'During the design of a 3R Project, all existing safety appurtenances should be examined to determine if they meet the latest safety performance and design criteria. This includes guardrails. . . Guardrails are further discussed in the manual in Chapter 9 §9-2.03 BRIDGE RAILS which states, 'Barrier protection is

normally warranted on all approach ends to bridge rails or parapets.'

12. Defendant's negligent failure to properly maintain the roadway caused the vehicle to hydroplane which resulted in Mr. Prather's inability to control the vehicle, causing his untimely death.
13. The Defendant's failure to keep the bridge at issue in compliance with state stature (sic) and regulations is the factual and proximate cause of the extensive injuries received by Mr. Prather that led to his death.
14. The failure of the Mississippi Transportation Commission to comply with its own manual governing the maintenance and upgrading of existing highways was negligent and such negligence caused the vehicle driven by the deceased, Mr. Prather, to become impaled on the bridge abutment rather than to be repelled away into the existing roadway, thereby proximately causing the death of Mr. Prather.
15. With knowledge of the propensity of the roadway to hold water and the knowledge of the bridge at issue did not meet recognized safety standards and design criteria, the Mississippi Department of Transportation failed to warn or erect signs along the right-of-way to warn motorists of the existence of such substandard and dangerous conditions and to warn travelers to reduce their speed when either approaching the bridge in question or when traveling the road on days when rain had been or was falling."(R. E. 2-5; R. 5-8 and as to the Holland Complaint, R. E. 26-28 and R. 11-13).

Although there are some minor differences between the Amended Complaint filed by the Knights and the Complaint filed by Brandi Holland, the substantive allegations pertaining to Defendant's alleged negligence and liability are essentially the same.

In the Fifth Defense in each of its two Answer and Defenses, the Defendant asserted the discretionary exemption from liability found in §11-46-9(1)(d), Mississippi Code Annotated (1972), as amended which provides in pertinent part as follows:

"(1) A governmental entity and its employees acting in the course and scope of their employment or duties shall not be liable for any claim;

...

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;" (R. E. 21-22;

R. 24-25; R. E. 39; R. 32).

The Motion for Summary Judgment filed by Defendant principally relies upon the exemptions from liability found in §11-46-9(1), and particularly, the discretionary exemption quoted above found in §11-46-9(d). (R. E. 44; R. 35).

The Summary Judgment Motion is supported by the uncontradicted affidavit of Defendant's former District Two Engineer, Jimmy Dickerson, whose affidavit, paraphrased, states in part as follows.

The affidavit identifies Mr. Dickerson as being the District Engineer for District Two of the Department of Transportation since 1997. Prior to that time he was the Maintenance Engineer for District Two for 1990 through 1997. Prior to that he had been an Assistant Maintenance Engineer since 1979. Mr. Dickerson has a Bachelor's of Science Degree in Civil Engineering from the University of Mississippi granted in 1974 and had been a licensed Civil Engineer in Mississippi since 1979.

Mr. Dickerson was personally familiar with Mississippi Highway 8 based upon his employment with the Department of Transportation. This is a two lane state highway which runs in generally an east and west direction traversing, among other counties, Grenada and Calhoun.

As the District Engineer for District Two, with the assistance of his staff and working with the MDOT staff in Jackson, Mr. Dickerson made decisions pertaining to the maintenance of public highways within his district as well as recommendations for reconstruction and rehabilitation projects as well as knew construction. His maintenance decisions were made by him based upon the constraints imposed by funding allocated to the District by the Legislature of Mississippi and the Transportation Commission.

Because funds were limited for purposes of performing maintenance on existing state highways such as Mississippi State Highway 8, the District Engineer had to make judgment calls when work appears to be necessary as to what type of work is to be performed in order to maintain or upgrade the various highways within the District. There must be a balancing of the competing needs for maintenance within the District and judgment calls made as to when and where work will be performed and to what extent any safety upgrades are necessary or desirable considering the funding available for each year and the needs and/or conditions of the various highways within the District. (R. E. 71-74; R. 62-65).

The Plaintiffs responded by attempting to create an issue of fact by use of the depositions of Ronnie Morgan, Defendant's Maintenance Supervisor for Calhoun County as well as some of his Maintenance Inspection Reports, the deposition of Walter Lyons, this District's Maintenance Engineer at the time of this accident, Paul Hendrix and Gary Gann, a former Highway Patrolman and a Highway Patrolman who investigated this accident, John Bates, Plaintiffs' expert engineer and a survey done by Engineer Joe Sutherland on the area of Highway 8 in question in 2002, almost two years after the accident in question. (R. E. 86-250; R. 89-252). These were offered for the ostensible purpose of proving that the defendant had notice of an allegedly unreasonably dangerous condition.

The trial court found that the maintenance of Highway 8 was a discretionary function as provided in §11-46-9(d) and granted summary judgment. (R. E. 255-257; R. 264-266).

SUMMARY OF THE ARGUMENT

While a genuine issue of material fact clearly will preclude summary judgment, disputes of fact which are not material do not prevent entry of summary judgment.

While the Plaintiffs in this case may have raised factual issues that would preclude summary judgment based upon the exemption from liability for governmental actors found in §11-46-9(1)(v),

they have not raised any issues of fact nor cited any law precluding summary judgment for Defendant based upon the discretionary exemption from liability found in §11-46-9(1)(d).

The Plaintiffs themselves characterize this as a case of alleged negligent maintenance of a public highway with three categories of negligence: ① Failure to maintain pavement to minimize hydroplaning; ② failure to retrofit guardrails on a bridge; and ③ failure to warn of allegedly dangerous conditions of which Defendant allegedly had knowledge.

Section 11-46-9(1)(d) provides for the exemption from liability of a governmental entity based upon the exercise or performance or the failure to exercise or perform a discretionary function even if the discretion is abused.

There appears to be no issue but that the maintenance of the public highways is a discretionary function as a matter of law, including the duty to place warning signs.

While the Courts initially required that a governmental entity exercise ordinary or due care in order to invoke the discretionary exemption found in §11-46-9(1)(d), that requirement was abrogated in 2004 by the Mississippi Supreme Court.

The argument of Plaintiffs that subsection (d) of §11-46-9(1) does not apply here has no real basis, other than that is what Plaintiffs would like to happen. Using the same logic, Defendant could argue that subsection (v) upon which the Plaintiffs rely does not apply.

Holding that subsection (d) does not apply here when in fact the overwhelming weight of authority shows that maintenance of highways, including the placement of warning signs constitutes a discretionary function, would be to essentially write the discretionary exemption from the statute, contrary to the principals of statutory construction relied upon by Plaintiffs.

While there is some language in two of the cases relied upon by the Plaintiffs which suggests that in order to invoke §11-46-9(1)(d), there must be no notice of allegedly dangerous condition to

the governmental entity, this would appear to revert to law prior to the abrogation of the requirement of the exercise of due or ordinary care in order to invoke the discretionary exemption. This is clearly not the law as it stands now. It is well established that if one exemption from liability found in §11-46-9(1)(a) - (x) applies, then summary judgment must be granted regardless of whether any other possible exemption applies. *no supporting law*

Trial Court's grant of summary judgment should be affirmed.

ARGUMENT

Defendant agrees that a genuine issue of material fact will preclude summary judgment. However, disputes of fact will not preclude summary judgment unless those disputes are of a "material" fact. Sherrod v. USF&G, 518 So.2d 640, 642 (Miss. 1987); Summers v. St. Andrews Episcopal School, 759 So.2d 1203, 1208 (Miss. 2000) and Strickland v. Med Express of Mississippi, 963 So.2d 568, 572 (Miss. App. 2007). In this case, at best the Plaintiffs have raised factual issues which might preclude summary judgment based upon the exemption from liability found in §11-46-9(1)(v). They have not raised any facts nor cited any law which precludes summary judgment for the Defendant based upon the discretionary exemption from liability found in §11-46-9(1)(d).

On page 13 of their brief, the Plaintiffs themselves characterized this as a case of alleged negligent maintenance of a public highway based upon three things: (1) failure to maintain the pavement to minimize hydroplaning in rainy conditions; (2) failure to retrofit guardrails on a bridge; and (3) failure to place warning signs of alleged dangerous conditions which Defendant allegedly had knowledge.

In their argument, Plaintiffs apparently contend that because Defendant urged three of the exemptions from liability for governmental entities found in §11-46-9(1)(a) - (x) and as to one of

these there is a genuine issue of material fact, that summary judgment was inappropriately granted.¹

Defendant relied upon three of the exemptions in the trial court, §11-46-9(1)(d), (g) and (v). Defendant respectfully submits that under (d) the discretionary exemption, summary judgment was entirely appropriate and should be affirmed. That subsection states that the governmental actors are exempt from liability for events:

“(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;” (Emphasis Added).

Plaintiffs do not appear to take issue with the affidavit of Defendant’s District Engineer, Mr. Dickerson, that highway maintenance is a matter requiring judgments involving economic and policy issues and the balancing of needs within the District based upon a limited amount of funds.

Indeed, Plaintiffs could not validly contest that highway maintenance, including the placement of warning signs is a discretionary function as a matter of law. Mohundro v. Alcorn County, 675 So.2d 848, 853, 854 (Miss. 1996); Brewer v. Burdette, 768 So.2d 920, 923 (Miss. 2000); Mississippi Department of Transportation v. Cargile, 847 So.2d 258, 269 (Miss. 2003); Barrentine v. Mississippi Department of Transportation, 913 So.2d 391, 393 (Miss. App. 2005); Webb v. County of Lincoln, 536 So.2d 1356, 1359 (Miss. 1988); and Willingham v. Mississippi Transportation Commission, 944 So.2d 949, 952, 953 (Miss. App. 2006).

Following the passage of the Mississippi Tort Claims Act the Courts held initially that in order to invoke the exemption found in §11-46-9(1)(d), the governmental entity was required to have exercised ordinary or due care. See Mississippi Department of Transportation v. Cargile, *supra*, at page 268, following Jones v. Mississippi Department of Transportation, 744 So.2d 256 (Miss. 1999).

¹Defendant will not here, nor did it in the trial court, engage in arguing the “facts” relied upon by Plaintiffs as it views them as immaterial.

✓

In 2004 the Mississippi Supreme Court in Collins v. Tallahatchie County, 876 So.2d 284, 289 (Miss. 2004), ruled that any requirement that ordinary care or due care be exercised by the governmental entity in order to invoke the exemption of §11-46-9(1)(d) was an erroneous interpretation of the statute. The abrogation of any requirement that the governmental actor exercise ordinary or due care in order to invoke the exemption from liability found in §11-46-9(1)(d), has been recognized in Chisholm v. Mississippi Department of Transportation, 942 So.2d 136, 142, n.1 (Miss. 2006) and in Willingham v. Mississippi Transportation Commission, *supra* at 952.

Plaintiffs appear to argue that because §11-46-9(1)(v) was also urged upon the trial court that this somehow renders §11-46-9(1)(d) inapplicable. Plaintiffs argue that the Barrentine v. Mississippi Department of Transportation, case, *supra*, does not apply because it does not deal with §11-46-9(1)(v) which Plaintiffs wish to apply here to the exclusion of §11-46-9(1)(d). Using their logic, the same thing could be said by the Defendant for the cases most strenuously argued by the Plaintiffs which do not appear to squarely address the discretionary exemption found in subsection (d). See Fraizer v. Mississippi Department of Transportation, 970 So.2d 221 (Miss. App. 2007) and Mississippi Department of Transportation v. Trosclair, 851 So.2d 408 (Miss. App. 2003).

Plaintiffs, in their brief, contend that it is the Court's duty to interpret the statutes enacted by the Legislature and to neither broaden or restrict them. Mississippi Insurance Guaranty Association v. Cole, 954 So.2d 407 (Miss. 2007). Defendant agrees that this is a correct statement of law, however, the argument made by Plaintiffs that somehow subsection (d) of §11-46-9(1) does not apply to functions which the Supreme Court has previously declared to be discretionary functions, would appear to fly in the face of this principal of statutory interpretation, inasmuch as it would restrict subsection (d) and make subsection (v) superior or paramount in cases of highway maintenance. There is nothing in the statute that would indicate such an interpretation should be

made.

There does appear to be some language in the Court of Appeal's opinion in Jones v. Mississippi Transportation Commission, 920 So.2d 516, 519 (Miss. App. 2006), which suggests that in order to invoke §11-46-9(1)(d), as to the discretionary function of placing warning signs, there must be no notice of an alleged dangerous condition to the governmental entity. Defendant cannot find anything that would be the basis for this in the statute, and in fact, engrafting such a requirement onto the discretionary function exemption would appear to be a return to the law prior to Collins v. Tallahatchie County, *supra*. This language was carried over and relied upon in Fraizer v. Mississippi Department of Transportation, *supra*, most heavily relied upon by the Plaintiffs. However, as the Defendant reads these cases it appears that the primary focus of the Appeals Court in both of these cases was on subsection (v) and (w), the latter of which is not at issue here. The basis for decision in both of these cases was the application of subsection (v), and therefore, Defendant respectfully submits that the discussion concerning the requirement that there be no notice of an alleged dangerous condition in order to invoke the discretionary exemption in subsection (d), should be considered as dicta.²

Defendant respectfully submits that it is quite clear that highway maintenance, which is the issue here, including the placement of warning signs, is firmly established in Mississippi jurisprudence as a discretionary governmental function. Therefore, as a matter of well established law, §11-46-9(1)(d) clearly applies. The law is also quite clear that if one of the exemptions from liability found in §11-46-9(1)(a) - (x) applies, it does not matter if the application of other

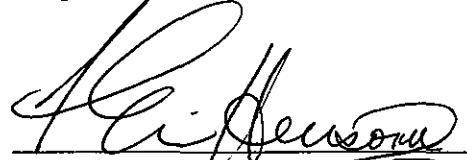
²Interestingly, in Willingham v. Mississippi Transportation Commission, *supra*, the Court of Appeals held that §11-46-9(1)(d) applied to a failure to warn. There is nothing in the statute that supports a "disqualification" of subsection (d) if the government actor had notice of an allegedly dangerous condition. In fact the language indicates the opposite, extending the exemption to an abuse of discretion.

exemptions in that section involve a question of material fact, summary judgment must still be granted on the exemption which is established as a matter of law. *Willing v. Estate of Benz*, 958 So.2d 1240, 1253, 1254 (Miss. 2007).

CONCLUSION

In conclusion Defendant respectfully submits that it is quite clear from the overwhelming weight of authority that the maintenance of the public highways, including the placement of warning signs is a discretionary function as was correctly found by the trial court. Since the Plaintiffs' entire claim, as they admit, is based upon highway maintenance, it is clear that the provisions of §11-46-9(1)(d) apply here as a matter of law and that therefore the Trial Court's grant of Summary Judgment Dismissing the Amended Complaint and the Complaint of the Plaintiffs should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, F. Ewin Henson III, do hereby certify that I have served the above and foregoing Brief of

Appellee by mailing the same as follows:

Honorable Betty W. Sephton
Clerk, Mississippi Supreme Court
P. O. Box 117
Jackson, Mississippi 39205-0117

Rusty Harlow, Esquire
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Honorable Henry L. Lackey
Circuit Judge
Third Circuit Court District
P. O. Box T
Calhoun City, Mississippi 38916

Certified, this the 27th day of September, 2008.



F. EWIN HENSON III

§ 11-46-7

Note 8

Action against deputy sheriff for damages arising out of arrestee's death was barred by statute of limitations under the Mississippi Tort Claims Act (MTCOA), as deputy was not named in original action filed in federal district court within the

CIVIL PRACTICE AND PROCEDURE

statute of limitations, and no notice of action was given to deputy until a full two years after the alleged conduct. *Conrod v. Holder* (Miss. 2002) 825 So.2d 16. Limitation Of Actions \Rightarrow 124

§ 11-46-8. Foster parents; liability for inadequate supervision or care

Mississippi Department of Human Services licensed foster parents shall be covered under this chapter for claims made by parent other than the foster child which are based on inadequate supervision or inadequate care of the foster child on the part of the foster parent. Added by Laws 1999, Ch. 518, § 2, eff. July 1, 1999.

Research References

Encyclopedias

Encyclopedia of Mississippi Law § 67:21, Definition of Employee.

§ 11-46-9. Governmental entities and employees; exemption from liability

Text of section effective on the later of July 1, 2007 or when Laws 2007, Ch. 582, § 21, is effectuated under Section 5 of the Voting Rights Act of 1965

(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:

(a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

(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;

(c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;

(e) Arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation;

(f) Which is limited or barred by the provisions of any other law;

(g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

(h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature;

(i) Arising out of the assessment or collection of any tax or fee;

(j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;

(k) Arising out of the imposition or establishment of a quarantine, whether such quarantine relates to persons or property;

(l) Of any claimant who is an employee of a governmental entity and whose injury is covered by the Workers' Compensation Law of this state by benefits furnished by the governmental entity by which he is employed;

(m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed;

(n) Arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work;

(o) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including, but not limited to, any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USCS 715 (32 USCS 715), or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;

(p) Arising out of a plan or design for construction or improvements to public property, including, but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;

(q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways;

(r) Arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities;

(s) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;

(t) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;

(u) Arising out of or resulting from riots, unlawful assemblies, unlawful public demonstrations, mob violence or civil disturbances;

(v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care;

(w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice;

(x) Arising out of the administration of corporal punishment or the taking of any action to maintain control and discipline of students, as defined in Section 37-11-57, by a teacher, assistant teacher, principal or assistant principal of a public school district in the state unless the teacher, assistant teacher, principal or assistant principal acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety; or

(y) Arising out of the construction, maintenance or operation of any highway, bridge or roadway project entered into by the Mississippi Transportation Commission or other governmental entity and a company under the provisions of Section 1 or 2 of Senate Bill No. 2375, 2007 Regular Session, where the act or omission occurs during the term of any such contract.

(2) A governmental entity shall also not be liable for any claim where the governmental entity:

(a) Is inactive and dormant;

- (b) Receives no revenue;
- (c) Has no employees; and
- (d) Owns no property.

(3) If a governmental entity exempt from liability by subsection (2) becomes active, receives income, hires employees or acquires any property, such governmental entity shall no longer be exempt from liability as provided in subsection (2) and shall be subject to the provisions of this chapter.

Laws 1984, Ch. 495, § 6; Laws 1985, Ch. 474, § 5; Laws 1987, Ch. 483, § 5; Laws 1993, Ch. 476, § 4; Laws 1994, Ch. 334, § 1; Laws 1995, Ch. 483, § 1; Laws 1996, Ch. 538, § 1; Laws 1997, Ch. 512, § 2, eff. July 1, 1997. Amended by Laws 2007, Ch. 582, § 21, eff. on the later of July 1, 2007 or from and after effectuation under Section 5 of the Voting Rights Act of 1965, as amended and extended.

For text of section effective until the later of July 1, 2007 or until Laws 2007, Ch. 582, § 21, is effectuated under Section 5 of the Voting Rights Act of 1965, see § 11-46-9, in the main volume

Historical and Statutory Notes

The 2007 amendment in: par. (1)(o), inserted commas to bracket "but not limited to"; and added par. (1)(y), relating to highway, bridge and roadway projects under S.B. 2375 of the 2007 Regular Session [S.B. 2375 became effective as Laws 2007, Ch. 582], and made wording and punctuation changes to accommodate this addition.

Sections 26 and 27 of Laws 2007, Ch. 582 provide:

"SECTION 26. The Attorney General of the State of Mississippi shall submit this act, immediately upon approval by the Governor, or upon approval by the Legislature subsequent to a veto, to the Attorney General of the United States or to

the United States District Court for the District of Columbia in accordance with the provisions of the Voting Rights Act of 1965, as amended and extended.

"SECTION 27. This act shall take effect and be in force from and after July 1, 2007, if it is effectuated on or before that date under Section 5 of the Voting Rights Act of 1965, as amended and extended. If it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended, after July 1, 2007, this act shall take effect and be in force from and after the date it is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended."

Law Review and Journal Commentaries

A review of the substantive provisions of the Mississippi Governmental Immunity Act: Employees' individual liability, exemptions to waiver of immunity, non-jury trial, and limitation of liability. Fraiser, 68 Miss.L.J. 703 (1999).

Legal aspects of school violence: Balancing school safety with student's rights. Watkins, Hooks, 69 Miss.L.J. 641 (2000).

Meaningful Judicial Review: A Protection of Civil Rights Board of Trustees of the University of Alabama v. Garret. Rogers, 22 Miss.C.L.Rev. 101 (Fall 2002).

Mississippi Tort Claims Act: Is Discretionary Immunity Useless? Comment, Walker, 71 Miss. L.J. 695 (Winter 2001).

Research References

ALR Library

- 58 ALR 4th 559, Governmental Tort Liability as to Highway Median Barriers.
- 43 ALR 4th 19, Validity and Construction of Statute or Ordinance Limiting the Kinds or Amount of Actual Damages Recoverable in Tort Action Against Governmental Unit.
- 19 ALR 4th 532, Liability, in Motor Vehicle-Related Cases, of Governmental Entity for Injury, Death, or Property Damage Resulting from Defect or Obstruction in Shoulder of Street or Highway.
- 4 ALR 4th 865, Liability of Governmental Unit or Its Officers for Injury to Innocent Occupant of Moving Vehicle, or for Damage to Such Vehicle, as Result of Police Chase.
- 97 ALR 3rd 11, Liability, in Motor Vehicle-Related Cases, of Governmental Entity for

Injury or Death Resulting from Ice or Snow on Surface of Highway or Street.

- 41 ALR 3rd 700, Personal Liability of Policeman, Sheriff, or Similar Peace Officer or His Bond, for Injury Suffered as a Result of Failure to Enforce Law or Arrest Lawbreaker.
- 38 ALR 3rd 830, Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting from Lack or Insufficiency of Supervision.
- 34 ALR 3rd 1008, Liability of Highway Authorities Arising Out of Motor Vehicle Accident Allegedly Caused by Failure to Erect or Properly Maintain Traffic Control Device at Intersection.
- 26 ALR 3rd 1142, Municipal Liability for Personal Injury or Death Under Mob Violence or Antilynching Statutes.