

IN THE SUPREME COURT OF MISSISSIPPI

copy

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

FILED

OCT 07 2008

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

APPELLANT

v.

Cause No. 2008-TS-00897

**MISSISSIPPI TRANSPORTATION
COMMISSION (MTC)**

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF CALHOUN COUNTY, MISSISSIPPI
THIRD JUDICIAL DISTRICT**

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENTS REQUESTED

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STATEMENT OF AUTHORITIES

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Frazier v. Mississippi Department of Transportation,
970 So.2d 221 (Miss App. 2007).....4, 5

Jones v. Mississippi Department of Transportation,
920 So.2d 516 (Miss App. 2006).....5

Other Authorities:

Miss. Code Ann. §11-46-9 (1972).....4, 5, 6

ARGUMENT

Defendant's in their brief argue that there "is no genuine issue but that the maintenance of a public highway is a discretionary function as a matter of law, including the duty to place warning signs." That is not the case though the statute makes it clear that maintenance of a public highway or the placing of warning signs is not a discretionary function when there is a known dangerous condition. The discretionary function only applies when there is no knowledge of a dangerous condition. Frazier v. Mississippi Department of Transportation, 970 So.2d 221 (Miss App. 2007). Plaintiff's believe that the only valid reading of the statute is that 11-46-9(1)(d) does not apply to this case because this case does not involve simply maintaining the highway or placing warning signs. This case deals with the failure to warn of a known dangerous condition and is therefore covered under 11-46-9(1)(v).

Defendant's further contend in their brief that applying section (v) as Plaintiff's suggested in their brief would make subsection (v) paramount to subsection (d). That is not the case because subsection (d) applies when there is no knowledge of a dangerous condition but just the general maintenance of a road or the placing of warning signs. However, when there is knowledge of a dangerous condition then the statute makes it clear that subsection (v) applies and not subsection (d). When there is knowledge of a dangerous condition the duty to repair or warn of the condition is no longer discretionary but is a requirement in order to maintain the governmental immunity granted under 11-46-9. If the Department fails to repair or warn of this dangerous condition of which they had knowledge then they are no longer immune from suit

under the Mississippi Tort Claims Act. To read the statute any other way would render subsection (v) meaningless, which clearly does not seem to be what congress intended, or they would not have bothered including that section in the statute.

The Defendant's did find some language in Jones v. Mississippi Department of Transportation, 920 So.2d 516 (Miss App. 2006) which suggests that in order to invoke subsection (d) as to the discretionary function of placing warning signs, there be must be no notice of an alleged dangerous condition to the government entity, which plaintiffs believe is the correct reading of the statute. However, Defendant's go on to argue that they cannot find any basis for that interpretation in the statute, which Plaintiff's find to be completely inaccurate since that is the entire purpose of including subsection (v) in the statute.

Defendant's further argue that the consideration of section (d) in the case of Frazier v. Mississippi Department of Transportation, 970 So.2d 221 (Miss App. 2007) should be considered dicta because the basis of the decision was subsection (v). This argument has no basis in that in the Frazier case the court clearly addresses both subsection (d) and subsection (v) and found that when there is notice of a dangerous condition then (v) applies because that is no longer a discretionary function that would fall under (d). The Frazier case is the only case cited that appears to directly deal with both sections of the statute that we are dealing with in the present case.

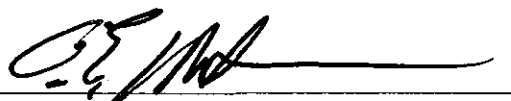
Plaintiffs believe that the case law and statute make it very clear that failure to warn of or repair a known dangerous condition does not fall under the discretionary function exemption in 11-46-9(1)(d). Therefore since this case does not fall under subsection (d) the only other section left to consider is subsection (v). Plaintiffs have raised issues of fact with regards to subsection

(v) which require that the grant of Defendant's Motion for Summary Judgement be reversed and this case be remanded for trial on the merits.

CONCLUSION

In conclusion, Plaintiffs' respectfully submit that this is not a matter of law, but a question of fact, and that the Defendant should not have been granted summary judgment. The Defendant is not immune under the Mississippi Tort Claims Act based on §11-46-9(1)(d) or 11-46-9 (1)(v) in that the rutting in the road was a dangerous condition of which the Defendant had knowledge, and, of which, the Defendant did not warn the public. Further, the rutting based on testimony by Plaintiff's expert witness is not an open and obvious condition for which warning is not required, although in Plaintiffs' opinion that is a question of fact to be left to the trier of fact not a question of law. Whether Plaintiffs' were exercising due care on the night in question is also a question of fact not a question of law. The Plaintiff's request this Court reverse the trial courts grant of summary judgment and allow this matter to go to trial on the issues of fact.

Respectfully Submitted,



A.E. (Rusty) Harlow, Jr.


CERTIFICATE OF SERVICE

I, A.E. (Rusty) Harlow, Jr. one of the attorneys for the Appellant do hereby certify that I have this day served a true and correct copy of the above and foregoing Reply Brief, by mailing the same, postage prepaid to the following:

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Judge Henry L. Lackey
Calhoun County Circuit Court Judge
P.O. Drawer T
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This the 7th day of October, 2008.


A.E. (Rusty) Harlow, Jr.