2008-CA-00897

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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. Joe Knight, Appellant;
2. Joyce Knight, former Plaintiff;
3. Brandi Holland, Appellant;
4. Mississippi Transportation Commission, Appellee;
5. Upshaw, Williams, Biggers, & Riddick, LLP, Attorney of record for Appellee;
6. Harlow Law Firm, attorney of record for the Appellant; and
7. Judge Henry L. Lackey.

STATEMENT OF AUTHORITIES

Page No.

Other Authorities:

STATEMENT OF ISSUES

Whether the lower Court erred in finding that the Mississippi Transportation Commission is immune from suit pursuant to the Mississippi Tort Claims Act.

STATEMENT OF CASE

Originally this matter was filed as two separate lawsuits. The Complaint in this case of Knight v. Mississippi Department of Transportation was filed on December 17, 2001, and was given the docket number C2001-180. That Complaint was amended to change the name of the Defendant to Mississippi Transportation Commission on January 15, 2002. The Complaint in Holland v. Mississippi Transportation Commission was filed on January 30, 2002, and assigned the docket number C2002-016.

Plaintiffs in the Knight case, as was originally brought were Joe Knight and Joyce Knight as Wrongful Death Beneficiaries of Charles Prather, Deceased. In the other Complaint, Brandi Holland was the Plaintiff as Beneficiary of Carolyn Prather, Deceased. Mr. And Mrs. Prather were husband and wife and were killed in the same accident which occurred on November 8, 2000, on Mississippi Highway 8, in Calhoun County, Mississippi. It is alleged that Mr. Prather was the driver of the vehicle and Mrs. Prather was the passenger. Both were apparently killed instantly.

The cases were consolidated by Orders entered by this Court dated July 29, 2003

(Knight) and August 4, 2003 (Holland). Joyce Knight dismissed her claim with prejudice by an Agreed Order dated December 29, 2004.

The Mississippi Transportation Commission filed a Motion for Summary Judgment and the trial Court sustained said Motion on or about the 12th day of May, 2008 and dismissed this case with prejudice. The Appellant's in this case filed a Notice of Appeal on that decision on or about the 21st day of May, 2008.

As previously mentioned, the two lawsuits arise out of the same accident. From the Amended Complaint filed in the Knight case, the following allegations which are pertinent here are set forth hereinafter.

"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 traveled 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 conditions that existed were readily apparent following any rainfall. Because previous accidents have occurred in the 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 statute (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 the 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 roads on days when rain had been or was falling."

The Complaint filed by Ms. Holland seeking recovery for the alleged wrongful death of her mother, Mrs. Prather, has the same substantive allegations, although the paragraph numbers are different.

The Answer and Defenses filed to the Complaint and Amended Complaint each contain a Fifth Defense, which invokes certain exemptions from liability under the Mississippi Tort Claims Act found in §11-46-9, Mississippi Code Annotated (1972), as amended. Those which

are pertinent on this Motion for Summary Judgment are subsections (1)(d)(g) and (v). These read in 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 perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;

(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;

(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;"

The Response to the Motion is supported, in addition by the pleadings by other documents in the record which include the Maintenance Reports of Ronnie Morgan, report of the survey of Joe Sutherland, expert report of John Bates, deposition of Ronnie Morgan, deposition of Gary Gann, deposition of Walter Lyons, deposition of Paul Hendrix, and deposition of John Bates. Some of the pertinent exerts from the above documents are as follows:

Between November 10, 1998 and May 5, 2000, Ronnie Morgan, Road Superintendent for MDOT, reported on 19 occasions that 1 - ½ inch rutting existed along Highway 8 from the Grenada-Calhoun County line to Calhoun City. On 6 additional occasions, Morgan reported that this section of highway had ½ inch rutting. On all 25 reports, Morgan stated "this section needs milling and overlaying" with asphalt.

Mr. Morgan also advised superintendent, Bubby Tartt, his supervisor, verbally that the section of Highway 8 where this accident occurred needed overlaying. *Morgan's deposition* pg.

24.

Officer Paul Hendrix observed water standing on Mississippi Highway 8 when investigating another accident. He further stated that the highway had ruts of about ½ inch which were ponding water. *Hendrix deposition*, page 11-12.

Prior to the Prather accident, Walter Lyons, District Maintenance Engineer for District 2 at the time of the subject accident, had performed measurements in the area where the accident occurred. He obtained the measurements because of an accident that had occurred in 1998 two years before the Prather accident. *Lyons deposition* pg. 53-54. The Mississippi Department of Transportation did have notice of a prior accident in the vicinity of the Prather accident, 2 years prior as a result of being contacted by their tort claims representative because a lawsuit was filed as a result of the 1998 accident. *Id.* pg. 57.

A survey was performed on October 18, 2002 by Joe Sutherland, a licensed engineer and land surveyor for Grenada. His survey limits were from the west end of the second and fourth bridges on Highway 8 from Grenada-Calhoun County line to 400 feet west of each bridge. His survey reveals 21 locations in the eastbound lane where the depth of rutting near the fourth bridge (that is the bridge that Prater impacted) was from 0.01 to 0.03 feet in depth, which is in excess of the amount of depth necessary to cause hydroplaning. *John Bates Expert Report* pg. 7.

This accident occurred during a heavy rainstorm which is an easy event for highway engineers to predict and plan for. It is this engineer's opinion that the Prater vehicle hydroplaned as a result of excessive ponding on the highway and that the proximate cause of the accident was the State's failure to maintain their highway in a safe condition. *Expert report of John Bates* and *Deposition of John Bates.*

Based on the Sutherland survey we can see that there was some considerable ponding on

the South rut line on the east bound lane. Based on the Sutherland survey and the ponding that was occurring on Mississippi Highway 8 the rutting was such that a car would have a retardation on the left wheel but would have unretarded movement of the right wheel, which would cause a counter clockwise rotation, and so that tells us that it is – that the dynamics of the collision it is reasonable to expect that there was left side drag. Left side drag is a subdivision of the subject of hydroplaning. *Bates deposition* pg. 71-72.

The investigating officer, Gary Gann also testified he believed that the Prather vehicle hydroplaned. *Gann deposition* pg. 26.

The ponding on Mississippi Highway 8 was not an open and obvious danger. "When there is an intense rainfall that you have water all over the pavement, so a driver would not be able to readily and quantitatively be able to see that he's going into a rutting that is significant versus just the heavy intense rainfall. *Bates deposition*, pg. 101.

SUMMARY OF ARGUMENT

The trial Court erred in granting the Defendant's Motion for Summary Judgment and finding that the Mississippi Transportation Commission is exempt under the Mississippi Tort Claims Act. The placing of warning signs in and of itself is a discretionary function for which the Mississippi Transportation Commission would normally have immunity. That, however, is not the situation in the present case. In the present case the Mississippi Transportation Commission failed to protect or warn against a known non-obvious danger which is not discretionary but a duty imposed by Mississippi Code Annotated §11-46-9(1)(v) and therefore the Mississippi Transportation Commission is not immune from suit in this case.

As stated in Frazier v. Mississippi Department of Transportation, 970 So.2d 221 (Miss App. 2007) the decisive question under the Mississippi Tort Claims Act is whether the Mississippi Transportation Commission had notice of the dangerous condition, as they clearly did in this case. If they did have notice of the alleged dangerous condition and failed to repair or warn their immunity has been waived. Unless obvious

Plaintiffs' in this case like in the case of Mississippi Department of Transportation v. Trosclair, 851 So.2d 408 (Miss. App. 2003) will prove through the testimony of there expert witness that a dangerous condition existed on the section of Mississippi Highway 8 where the Prather vehicle hydroplaned out of control and struck a bridge abutment. That this accident was the result of the negligence of the Mississippi Transportation Commission in maintaining the subject highway. Also that the Commission knew or should have known of this dangerous

condition, and that it failed to warn the public of same. The Commission knew or should have known based on Morgan's reports, Morgan's verbal notification to his superior, previous accidents of which the Commission had actual notice as well as previous accidents they should have known about, and notice based on previous lawsuits filed. The expert will further testify that the dangerous condition was not open and obvious to one exercising due care. He will testify that when there is an intense rainfall that you have water all over the pavement, so a driver would not be able to readily and quantitatively see that he's going into a rutting that is significant versus just heavy intense rainfall.

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)(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.

ARGUMENT

If no genuine issue of material fact exists then the moving party is entitled to Judgment as a matter of law. Rule 56, Mississippi Rules of Civil Procedure and Summers v. St. Andrew's Episcopal School, 759 So.2d 1203, 1208 (Miss. 2000). Party moving for summary judgment carries the burden of demonstrating that no genuine issue of material fact exists. Rule 56, *Mississippi Rules of Civil Procedure* and Chisolm v. Mississippi Department of Transportation, 942 So.2d 136 (Miss. 2006). The non-moving party must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Dailey v. Methodist Medical Center, 790 So.2d 903, 915-16 (Miss Ct. App. 2001).

"This Court employs a de novo standard of review of a lower court's grant of summary judgment and examines all the evidentiary matters before it: admissions in pleadings, answers to interrogatories, depositions affidavits, etc." McMillan v. Rodriguez, 823 So.2d 1173, 1176-77 (Miss. 2002).

Defendant's moved for summary judgment based upon three exemptions from liability under §11-46-9(1)(d),(g), and (v).

In the present case, the Defendant is charged with negligence in the maintenance of a public highway based upon (1) failure to maintain the pavement so as to minimize hydroplaning in rainy conditions; (2) failure to place guardrails on the bridge; and (3) failure to place warning signs of alleged dangerous conditions of which the Commission had knowledge.

The Defendant cited the case of Collins v. Tallahatchie County, 876 So.2d 284 (Miss.

2004) for its contention that the due care standard has been abolished in section 11-46-9(1)(d) and therefore acts requiring discretion, whether or not, the discretion be abused are immune under the Act. The Collins case is different from this matter, in that, the Collins decision focused on section 11-46-9(d)(1). The Collins case did not deal with the issue of failure to warn of a known dangerous condition under 11-46-9(1)(v) as is the situation in the instant case.

The Defendant also cited the case of Barrentine v. Mississippi Department of Transportation, 913 So.2d 391, 393 (Miss. App. 2005) for its contention that the placement of warning signs as a matter of law is a discretionary function. However, Barrentine case in not controlling in this matter. The Barrentine case dealt simply with the placement of warning signs as a discretionary function under 11-46-9-(1)(d), it did not however, consider section 11-46-9(1)(v) which deals with an injury arising out of a dangerous condition that the government had notice of, either actual or constructive, and failed to protect or warn the public of the dangerous condition. Since the Barrentine court did not consider this section of the statute which Plaintiffs contend is controlling in the present case, the Barrentine decision is inapplicable.

The Defendant finally cited the case of Willingham v. Mississippi Transportation Commission, 944 So.2d 949 (Miss. App. 2006) for its contention that it is elementary and common knowledge that driving is more dangerous and should be approached more carefully during bad weather, such as the weather alleged in the Complaint here. In that case the Defendant points out that the Court held that although the pavement in that case was rutted and may have heightened the risk for hydroplaning, the risk of hydroplaning during rainfall is an open and obvious danger and therefore the Mississippi Transportation Commission is shielded from liability for failure to warn under §11-46-9-(1)(v). *Id.* The Defendant fails to point out the Court went on to state in its ruling that "no evidence was offered by the Appellants to indicate

that the rutting was so severe that it posed a hidden danger to travelers who where exercising due care." *Id. emphasis added.* The present case is distinguishable from the Willingham case because the Plaintiff's in this case will offer evidence that the rutting in this case was so severe that it posed a hidden danger to travelers who were exercising due care.

In the record is an Order entered by Judge Albert B. Smith, III in which he found that the decision of whether ordinary care was exercised is a question for the finder of fact after hearing all the evidence. The Judge further found in his order that whether or not a low spot in the road is an open and obvious danger under the conditions present in that matter could not be determined as a matter of law at that point in the litigation.

The Court in Frazier v. Mississippi Department of Transportation, 970 So.2d 221 (Miss App. 2007) points out in its decision that "a government entity charged with maintaining and repairing roads, owes a duty to warn motorist or repair roads only if it is 'given notice of a dangerous condition.' As we have previously stated, '[i]n the absence of notice, a government entity's decision to maintain or repair roads, or to place traffic control devices or signs, is purely discretionary, and the entity will be immune from suit even upon proof of an abuse of discretion.'" Barrentine v. Mississippi Department of Transportation, 913 So.2d 391 (Miss App. 2005). Thus the decisive question under the guidelines of the Mississippi Tort Claims Act is whether MDOT had notice of the alleged defective seal. If MDOT did not have notice of the alleged dangerous condition, it is immune from liability and whether or not to use roads signs is discretionary" *Id. Emphasis added.* In the Frazier case MDOT did not have notice of the alleged dangerous condition however, in the current case the evidence will prove that the Mississippi Transportation Commission had notice of the dangerous condition and failed to warn the public of the danger or repair the condition.

Plaintiffs' contend that the present case is more similar to the case of Mississippi Department of Transportation v. Trosclair, 851 So.2d 408 (Miss. App. 2003) in that this case actually deals with §11-46-9(1)(v) of the Mississippi Tort Claims Act. In the Trosclair case the Court found that the evidence supported trial judge's findings that "(A) there was a dangerous 3-5 inch drop-off along the irregular edge of the pavement that extended over 500 feet; (B) the hazardous condition resulting in the 3-5 inch drop-off and irregular pavement edge was created by the negligence and wrongful conduct of the Department employees; (C) the evidence clearly established that Department through its employees, either knew or should have known that this dangerous drop-off and irregular edge existed prior to the accident; (D) since the final paving in this area had been completed on November 29 or 30, the Department had adequate opportunity to protect or warn against the hazard created by the drop-off and irregular pavement area; and (E) the Department is liable for failing to warn of this dangerous condition since, as shown by the testimony, the hazard was not obvious to anyone including the investigating officer Otis Kaufman, and Ruby Lynn Morris, who was driving her vehicle behind Susan and Bridget" *Id.* pg. 413-414.

It is the Supreme Court's duty to interpret the statutes enacted by the legislature and to neither broaden nor restrict the legislative act. *Mississippi Insurance Guaranty Association v. Cole*, 954 So.2d 407 (Miss. 2007). When a statute is not ambiguous, the Supreme Court applies the statute according to its plain meaning and need not apply principles of statutory construction. *Id.*

APPLICATION OF LAW TO FACTS

The Defendant points out in its Memorandum in Support of its Motion for Summary Judgment that the Plaintiff's referred to the danger of hydroplaning in their Complaint and

Amended Complaint as apparent. Plaintiffs' were asserting that the danger was apparent to the Mississippi Transportation Commission not to the general public, in that, the Commission conducted studies on roads and knew the extent of the rutting and the effect that rutting has on increasing the risk of hydroplaning, as well as the Commission knew or should have known of several previous accident in this location. The decedents' in this case did not have access to the reports showing the number of prior accidents in the area, the degree of rutting on the road, or the studies showing the dangers of rutting to the degree it existed on Mississippi Highway 8. The Mississippi Transportation Commission did have this information yet they failed to protect motorist from the dangerous condition.

Plaintiffs' in this case like in the Trosclair case will prove through the testimony of there expert witness that a dangerous condition existed on the section of Mississippi Highway 8 where the Prather vehicle hydroplaned out of control and struck a bridge abutment. That this accident was the result of the negligence of the Mississippi Transportation Commission in maintaining the subject highway. Also that the Commission knew or should have known of this dangerous condition, and that it failed to warn the public of same. The Commission knew or should have known based on Morgan's reports, Morgan's verbal notification to his superior previous accidents of which the Commission had actual notice as well as previous accident they should have known about, and notice based on previous lawsuits filed. The expert will further testify that the dangerous condition was not open and obvious to one exercising due care. He will testify that when there is an intense rainfall that you have water all over the pavement, so a driver would not be able to readily and quantitatively see that he's going into a rutting that is significant versus just heavy intense rainfall.

The Defendant's in this case argue that Mississippi Code Annotated §11-46-9(d) applies,

and that the Mississippi Transportation Commission if exempt from liability. The defense argues that the placement of warning signs is a discretionary function and therefore Mississippi Transportation Commission is exempt from liability for failure to warn. That argument completely ignores section (v) of the statute which states that they are not immune for failure to warn of a known dangerous condition. It is the Supreme Court's duty to interpret the statutes and enacted by the legislature and to neither broaden nor restrict the legislative act. *Mississippi Insurance Guaranty Association v. Cole*, 954 So.2d 407 (Miss. 2007). When a statute is not ambiguous, the Supreme Court applies the statute according to its plain meaning and need not apply principles of statutory construction. *Id.* This is an unambiguous statute which states that the government is not exempt from liability for failure to warn of a known non-obvious danger. Accepting the Defendant's argument would abrogate this entire section of the statute which clearly does not appear to be the intent of the legislature.

Whether or not the Plaintiff's were exercising due care and whether the dangerous condition was obvious in Plaintiffs' opinion is a question of fact, not law, to be determined by the trier of fact, therefore summary judgment was not appropriate in this case.

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)(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.

REQUEST FOR ORAL ARGUMENT

The Plaintiffs/Appellants respectfully request oral argument. This case involves evidentiary issues of relevance and prejudice which are difficult to accurately describe and which may be better appreciated upon oral argument. It addition, it is expected that the Court will have many questions which may be answered at oral argument. In addition, Appellant's believe oral discussion of the facts and the applicable precedent would benefit the Court.

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 Brief, by mailing the same, postage prepaid to the following:

F. Ewin Henson, III
Upshaw, Williams, Biggers, Beckham, & Riddick. LLP
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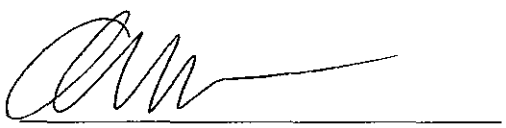
Judge Henry L. Lackey
Calhoun County Circuit Court Judge
P.O. Drawer T
Calhoun City, Mississippi 38916

This the 27th day of August, 2008.



A.E. (Rusty) Harlow, Jr.