SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF MISSISSIPPI

GRAY AND ASSOCIATES, INC.,
A MISSISSIPPI NON PROFIT CORPORATION
D/B/A THE LEARNING CURVE — APPELLANT

V. — CAUSE NO. 2009-CA-00199

THE STATE BOARD OF EDUCATION;
THE MISSISSIPPI DEPARTMENT OF EDUCATION;
JOHN DOES 1-10 — APPELLEES

On Appeal from the Circuit Court of the
First Judicial District of Hinds County, Mississippi

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF MISSISSIPPI

GRAY AND ASSOCIATES, INC.,
A MISSISSIPPI NON PROFIT CORPORATION
D/B/A THE LEARNING CURVE **PLAINTIFF**

V. **CIVIL ACTION NO. 25107-1235CV**

THE STATE BOARD OF EDUCATION;
THE MISSISSIPPI DEPARTMENT OF EDUCATION;
JOHN DOES 1-10 **DEFENDANTS**

CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for the Appellees, State Board of Education and Mississippi Department of Education 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 disqualification or recusal. The persons are as follows:

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This the 12th day November, 2009.

James T. Metz
Attorney of Record for Appellee

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II.

STATEMENT OF THE CASE

i) PROCEDURAL HISTORY

Gray and Associates, Inc. (hereinafter "Gray") served its "notice of claim" pursuant to the Mississippi Tort Claim Act on June 19, 2007. (Vol. 1, R. 24-28). Gray filed suit on December 11, 2007, claiming various theories of recovery including violations of its substantive and procedural due process rights as set-forth in the No Child Left Behind Act and numerous statutory. Attached to the complaint as exhibit "A" was an affidavit of Juan Gray, Executive Manager of Gray and Associates in which Mr. Gray attested to various facts. One of the facts as sworn by Mr. Gray was that , "In April of 2006, I was surprised to learn that The Learning Curve had been blacklisted off the SES list provided by the State." (Vol.1, R. 3-28).

The State Board of Education and Mississippi Department of Education (hereinafter "State") filed its Motion to Dismiss and/or for Summary Judgment, Itemization of Undisputed Facts and Memorandum Brief on July 14, 2008.(Vol.1, R. 63-67). Gray filed its response to the State's motion on September 17, 2008. (Vol. 1, R. 68-72).

The State brought its motion for summary judgment for hearing on September 19, 2008. (Vol.2, R. 1).The trial court entered its "Memorandum Opinion and Order" on September 23, 2008, granting summary judgment. (Vol. 1, R. 73-75; R.E. 3-5). Appellant filed its "Notice of Appeal" on October 21, 2008. (Vol. 1, R. 75A-75B).

ii) STATEMENT OF FACTS

Gray served its "notice of claim" pursuant to the Mississippi Tort Claim Act on June 19, 2007. (Vol. 1, R. 24-28). Gray filed suit on December 11, 2007, claiming that it was entitled to

damages based on the following:

(1) Violation of substantive due process rights.
(2) Violation of procedural due process rights;
(3) Violation of State Administrative Procedures Act;
(4) Tortious interference with contractual relationships;
(5) Intentional infliction of distress.

(Vol.1, R. 3-28).

Appellant's claim was in response to the MS Department of Education's removing Gray as an eligible supplemental education services (SES) provider. (Vol.1, R. 3-28).

Appellant alleges that it was approved as a supplemental education services (SES) provider pursuant to the No Child Left Behind Act in January, 2002. Plaintiff continued to be an approved SES provider for the school years 2003-2004 and 2004-2005.Gray complains that in March 2006, Appellees held a "competition" for placement on the approved provider list. As a result of the competition Gray was removed from the approved provider list. However, on August 16, 2006, MS Department of Education withdrew the changes and left the original approved list in place. Gray claims damages based on missed opportunities since it was not on the approved list from April 20th until July, 2006. (Vol.1, R. 3-28).

Gray further complains that on January 8, 2007, Appellees published a "Request for Proposal" and revised procedures for selection of SES providers, directing that all former providers must reapply. Plaintiff submitted its proposal for re-application on January 31, 2007; however, the re-application was rejected on April 20, 2007. Plaintiff was encouraged to reapply during the second round on April 22, 2007. (Vol.1, R. 3-28)

Exhibit "A" attached to the complaint was an affidavit of Juan Gray, Executive Manager of Gray and Associates in which Mr. Gray attested to various facts. One of the facts as sworn by

Mr. Gray was that , "In April of 2006, I was surprised to learn that The Learning Curve had been blacklisted off the SES list provided by the State." (Vol.1, R. 13)

The State filed its Motion to Dismiss and/or for Summary Judgment, Itemization of Undisputed Facts and Memorandum Brief on July 14, 2008.(Vol.1, R. 63-67). Gray filed its response to the State's motion on September 17, 2008. (Vol. 1, R. 68-72).

The State brought its motion for hearing on September 19, 2008. (Vol.2, R. 1). The State alleged, in defense, that (1) the claims were barred by the statute of limitations and/or repose; (2) the State's actions were discretionary; thus, protected by statutory and/or sovereign immunity; and (3) that the intentional tort claims contained a necessary element of malice of which the State is protected pursuant to *Miss. Code Ann. § 11-46-7(2)*.

In the Hearing, Gray confessed the claim based on "intentional infliction of emotional distress." (Vol. 2, R.12).

The trial court entered its "Memorandum Opinion and Order" on September 23, 2008 granting summary judgment. The Court's written opinion found that the "notice of claim" was filed more that one year after the plaintiff (Gray) was made aware of its removal from the approved list; thus, the claim was barred by the statute of limitations. The Court further found that the removal of plaintiff from the approved list was a discretionary function or duty; thus, the State was entitled to immunity as provided by statute. (Vol. 1, R. 73-75; R.E. 3-5).

III.

SUMMARY OF THE ARGUMENT

i) Statute of limitations and/or repose

Juan Gray is the Executive Manager of Gray and Associates, Inc. (Vol. 1, R. 13). Mr. Gray testified by affidavit attached to his complaint as exhibit "A" that , "In April of 2006, I was surprised to learn that The Learning Curve had been blacklisted off the SES list provided by the State." (Vol.1, R. 13). However, in Gray's "written notice" attached as exhibit "H" to the complaint, Appellant states that "The injury began in June of 2006 and was discovered by The Learning Curve sometime in July of 2006. . ." (Vol. 1, R. 27). A further inconsistency is demonstrated by Gray's statement in exhibit "A" attached to the complaint that, "Furthermore, most schools make their SES provider selections by July or August. The fact that The Learning Curve was blacklisted from April 20th until July makes it very unlikely that the Learning Curve would have been selected in several districts who would have already made their 2006-2007 decisions". (Vol. 1, R. 14). Gray, obviously, recognized its statute of limitations problem and tried to alleviate the problem by the inconsistent statements. Gray's admission that it knew that it was removed from the list in April of 2006 and that most school districts would have already made their 2006-2007 decisions demonstrates that the injury for limitations purposes occurred in April of 2006. Succinctly stated, Gray could not sell its product for the 2006-2007 school year because it knew in April of 2006 that it would not be on the approved list for the 2006-2007 school year.

Plaintiff filed his "notice of claim" on June 19, 2007. (Vol. 1, R. 24-28). Plaintiff did not file his "notice of claim" within one (1) year of the actionable conduct; thus, the action is barred

by the statute of limitation and/or repose.

ii) Discretionary function immunity

The trial court correctly found that the removal from the approved list was a discretionary function and immunity from suit was proper. *Miss. Code Ann.* § *11-46-9*(1)(d) provides that a governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim based upon the exercise or performance or the failure to exercise a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

Whether governmental conduct is discretionary requires a two-prong analysis: "(1) whether the activity involved an element of choice or judgment; and if so, (2)whether the choice or judgment in supervision involves social, economic or political policy alternatives." *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So.2d 584, 588 (Miss. 2001)(citing *Jones* v. *Miss. Dep't of Transportation*, 744 So.2d 256, 260 (Miss. 1999). *Pearl Pub.* Sch. *Dist v. Groner*, 784 So.2d 911, 914 (Miss. 2001); *Brewer* v. *Burdette*, 768 So.2d 920, 922 (Miss. 2000). Conversely, governmental conduct is ministerial if imposed by law, and its performance is not dependant on the employee's judgment. *Leflore County* v. *Givens*, 754 So.2d 1223, 1226 (Miss. 2000)(citing L.W. *v. McComb Separate Mun. Sch. Dist.*, 754 So.2d 1136, 1141 (Miss. 1999); *Mohundro* v. *Alcorn County*, 675 So.2d 848, 853 (Miss. 1996)).

Appellant relies on the *Non-Regulatory Guidance* in an attempt to overcome the discretionary immunity argument. However, the Guidance states, "State and local recipients are free to implement the LEA and School Improvement requirements based on their own reasonable interpretations of the law."

The Guidance states that the State is free to implement requirements based on its own interpretation; thus, the Guidance dictates that the State use its own judgment. The process of amendment of the approved list is not dictated by law; thus, a discretionary act and not ministerial in nature. Obviously, the trial court was correct in granting immunity based on the discretionary decision.

IV.

ARGUMENT

A) DID THE COURT ERR IN GRANTING SUMMARY JUDGMENT AS TO ALL CLAIMS BASED ON THE STATUTE OF LIMITATIONS

1. Gray identifies the injury as the 2006 injury in his "written notice."

Gray complains that only one of the claims is arguably outside the statute of limitations- the removal from the approved list in 2006. Appellant argues that the 2007 requirement that the Plaintiff re-apply violated all of the same constitutional and legal requirements as the 2006 removal.

Apparently Gray overlooks that the trial court was ruling on the claim as described in the "written notice." A precursor to a viable claim is that it must be identified in the "written notice."

The Supreme Court stated in *South Central Regional Medical Center v. Guffy,* 930 So.2d 1252, 1257 (¶ 18) (Miss. 2006)) as follows:

> Pursuant to *Miss. Code Ann. § 11-46-11(2)*, there are seven required categories of information which must be included. The seven required categories are as follows: (1) the circumstances which brought about the injury; (2) the extent of the injury; (3) the time and place the injury occurred; (4) the names of all persons known to be involved; (5) the amount of money damages sought; (6) the residence of the person making the claim at the time of the injury; and (7) the claimant's residence at the time of filing the notice. The

language of *Miss. Code Ann. § 11- 46-11(2)* clearly states that "every notice of claim shall contain a short and plain statement "addressing these seven categories of information or facts upon which the claim is based and this "shall be in writing." *See Miss. Code Ann.§ 11-46-11(2).* As such, the language contained in *Mississippi Code Ann. § 11-46-11(2)* is mandatory.

Gray in his "notice of claim" states as follows:

The Extent of the Injury:

Due to the arbitrary and capricious removal of the plaintiff from the 2006-2007 ASESP list for the critical period of June 2006 until August 2006, plaintiff was barred from selection as an SES provider to additional districts.

As a result of this action, defendants cause injury to the plaintiff and a loss of both business opportunity, profit, and income. (Vol. 1, R. 27)

Succinctly stated, the trial court was ruling on the issue before it, the injury identified by Appellant as the 2006 injury. However, in addition to the limitations issue, the trial court addressed immunity and the discretionary function involved in compiling an approved list which applied to any remaining claims. The immunity available for discretionary acts is addressed in detail in following arguments.

2. Gray's claim is barred by the Statute of Limitations and/or Repose.

Mississippi Code Ann. § 11-46-11(2) states as follows:

All actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based and not after; provided, however, that the filing of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for a period of ninety-five (95) days. The limitations period provided herein shall control ands shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations which would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

The statute dictates that all actions shall be commenced within one (1) year next after the

date of the actionable conduct. The filing of a "notice of claim" will toll the statute of limitations for a period of ninety-five (95) days; however, the "notice of claim" must be filed within the one (1) year, otherwise, the claim is barred.

Exhibit "A" attached to the complaint was an affidavit of Juan Gray, Executive Manager of Gray and Associates in which Mr. Gray attested to various facts. One of the facts as sworn by Mr. Gray was that , "In April of 2006, I was surprised to learn that The Learning Curve had been blacklisted off the SES list provided by the State." (Vol.1, R. 13) Plaintiff filed his "notice of claim" on June 19, 2007. (Vol. 1, R.24-28). Plaintiff did not file his "notice of claim" within one (1) year of the actionable conduct; thus, the action is barred by the statute of limitation.

Appellant's admission by affidavit of Juan Gray that it was aware of the removal from the approved list in April of 2006 starts the one (1) year statute running. The facts are strikingly similar to those in *Black v. Ansah*, 876 So.2d 395 (Miss. 2003). In that case Black's contract for employment was not going to be renewed and her last day of employment was May 11, 2000. She received notice of the supposed tortious conduct much earlier than May 2000, but the question was when she first became able to sue on her claim. Dr. Black argued that she timely filed her claim even under the Mississippi Tort Claims Act because her claim did not "accrue" and the limitations period did not begin to run until the last day of her employment on May 11, 2000. The Supreme Court rejected her argument and stated, "We find no reason to conclude that a person with known and measurable harm that awaits solely the passage of time to inflict itself, may not sue because of that futurity until the time has passed." *Ansah* at 398.

Plaintiff knew in April 2006, that it was going to be removed from the approved list in June 2006; thus, the statute of limitations begun to run and obviously expired in April 2007. The

one (1) year statute of limitations is a bar to plaintiff's claim since the "written notice" was filed on June 17, 2007.

Gray argues that before there can be a cause of action for a tort, there must be both the tortious conduct and an injury. In Support of its position, Appellant cites *McMillan v. Puckett*, 678 So.2d 652, 654; however, it acknowledges and recognizes that this argument is contradictory to the argument in *Black v. Ansah.* An obvious distinguishing characteristic between the two cases is that *Ansah* is a case governed by the Tort Claim Act contrary to *McMillan v. Puckett;* thus, any comparison is highly suspect.

Obviously, recognizing its predicament, Appellant attempts to distinguish the two cases by arguing that the instant case was such a clear violation of Federal law, that it thought the matter would be corrected upon bring the clear violation of law to the State's attention. However, Gray cites no case law dictating that correcting a clear violation stays the running of the statute of limitations. Indeed, no such clear violation exists, the amending of the approved list is a discretionary function and not a violation. This discretionary function is discussed in detail in following arguments and will not be discussed at this juncture for the sake of brevity.

B) REMOVAL OF APPELLANT FROM THE APPROVED LIST WAS A DISCRETIONARY FUNCTION AND SUBJECT TO IMMUNITY

1. STATUTORY IMMUNITY

The MTCA provides for governmental immunity in certain enumerated instances. *Mississippi Code Ann. § 11-46-9(1)* provides:

> A governmental entity and its employees acting within 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 a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not

the discretion be abused.

A) COURSE AND SCOPE

It shall be a rebuttable presumption that any act or omission of an employee within the time and place of his employment is within the course and scope of his employment. *Section 11-46-5 (3).*

Mississippi law provides that an activity must be in furtherance of the employer's business to be within the scope and course of employment. *Cockrell v. Pearl River Valley Water Supply District*, 865 So.2d 357 (Miss. 2004), citing *L.T. ex rel. Hollins v City of Jackson* 145 F.Supp.2d 750, 757 (S.D. Miss 2000)(citing *Estate of Brown ex rel Brown v. Pearl River Valley Opportunity, Inc.*, 627 So.2d 308 (Miss. 1993), aff'd mem. 245 F.3d 790 (5th Cir.2000). To be within the course and scope of employment, an activity must carry out the employer's purpose of the employment or be in furtherance of the employer's business. *Seedkem South, Inc. v. Lee*, 391 So.2d 990, 995 (Miss. 1980).

Gray does not challenge that the state actors were within the course and scope of their employment by amending and/or purging the approved list. Obviously, the creation and/or modification of a list of approved providers is within the course and scope of the state employees' employment.

B) DISCRETIONARY ACTION

Whether governmental conduct is discretionary requires a two-prong analysis: "(1) whether the activity involved an element of choice or judgment; and if so, (2)whether the choice or judgment in supervision involves social, economic or political policy alternatives." *Bridges v. Pearl River Valley Water Supply Dist.*, 793 So.2d 584, 588 (¶ 15)(Miss. 2001)) (citing *Jones v.*

Miss. Dep't of Transportation, 744 So.2d 256, 260 (Miss. 1999). *Pearl Pub. Sch. Dist. v. Groner*, 784 So.2d 911, 914 (Miss. 2001); *Brewer v. Burdette*, 768 So.2d 920, 922 (Miss. 2000). Conversely, governmental conduct is ministerial if imposed by law, and its performance is not dependant on the employee's judgment. *Leflore County v. Givens*, 754 So.2d 1223, 1226 (Miss. 2000)(citing *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So.2d 1136, 1141 (Miss. 1999); *Mohundro v. Alcorn County*, 675 So.2d 848, 853 (Miss. 1996)).

As discussed above, the State and its employees are immune to any claim based on a discretionary function of its employees, whether or not that discretion be abused; thus, the State's immunity turns on whether creating a new list of approved SES providers was discretionary. Conduct is discretionary if it involved an element of choice or judgment and that choice or judgment in supervision involved social, economic or political policy alternatives.

a) Element of Choice or Judgment

Governmental conduct is considered ministerial if is imposed by law and the performance of the duty is not dependent on the employee's judgment. *Strange v. Itawamba County School District*, 9 So. 3d 1187 (Ct.App. 2009), citing *Jones v. Mississippi Department of Transportation*, 744 so. 2d 256, 260 (P11) (Miss. 1999) (citing *United States v. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

Gray argues that the NCLB Act **mandated** inaction until the approved provider fell below a certain standard; thus, the action was not discretionary. However, Appellant's cited authority demonstrates otherwise.

Gray cites its authority as follows:

An SEA must use a consistent policy for withdrawing supplemental educational service

> providers from the State-approved list. The statute requires an SEA to remove from the approved list any provider that fails, for two consecutive years to contribute to increased student proficiency relative to State academic content and achievement standards.

D-4, SES Non-regulatory guidance of 2005, United States Department of Education.

Conduct is considered ministerial if imposed by law; however, the authority cited by Gray by its very terms dictates that it is a *non-regulatory guidance.* Indeed, a non-regulatory guidance is not imposed by law. A non-regulatory guidance does not dictate a certain conduct, thus, it is not an imposition of law which takes away any element of choice. The very terms of the guidance defeats Gray's argument.

Remarkably, at page ii of the cited *Non-Regulatory Guidance*, the Guidance states, "State and local recipients are free to implement the LEA and School Improvement requirements based on their own reasonable interpretations of the law."

Further, appellant complains that the *Non-Regulatory Guidance* requires that an SEA must use a consistent policy for withdrawing supplemental educational service providers from the State-approved list. The State by letter dated August 16, 2006 and attached as Exhibit "C" to Gray's complaint states as follows:

> The 2002 Request for Proposals noted that the ASESP list would be updated on a regular basis. In March of this year, the MDE solicited proposals from potential supplemental educational services providers to update the ASESP list. Additional services providers were approved by the Mississippi Board of Education at its June, 2006 meeting. The 2003 ASESP list, including the most recent update remains in effect and is available for use by schools who have not made adequate yearly progress for the last three years.
>
> In August of this year, the MDE again solicited proposals for potential supplemental educational services providers. This request for proposals is now withdrawn. During the 2006-2007 school year, the MDE will review the provision of supplemental education services as required by NCLB and the MDE's procedures for implementing this requirement and for developing an ASESP list. The MDE anticipates that the review will result in the compilation of a new list of ASESP based on revised requirements and

procedures.

(Vol. 1, R.19)

The letter further states that the original January, 2003 list remains in effect to date.

(Vol. 1, R.19).

The original list remained in effect on August 16, 2006; thus, any claim of Gray that the actions of the State were inconsistent is without merit. Proof of inconsistency requires more than one act. Since the original list remained in effect, inconsistency cannot be shown.

The Court of Appeals recently observed as follows:

In *Collins v. Tallahatchie County*, 876 So. 2d 284, 289 (¶ 16) (Miss. 2004), the supreme court held that the discretionary duties in *section 11-46-9(1)(d)* do not contain a duty of ordinary care. Similarly, *Collins* also points out that *section 11-46-9(1)(d)* exempts governmental entities from liability for discretionary functions, "whether or not the discretion be abused." *Id. at 289 (¶17)* (quoting *Miss. Code Ann.* § 11-46-9(1)(d) (Rev. 2002)).

Strange v. Itawamba County School District, 9 So. 3d 1187, 1192 (¶ 16)(Ct. App. 2009)).

Indeed, the statute is clear , a governmental entity is exempt from liability for discretionary functions, even if the discretionary is abused; thus, Gray's argument alleging inconsistency, even if proven, offers no relief.

The creation of a new list of SES providers involved an element of choice or judgment. Stated another way, the state actors could require potential providers to submit new and updated applications for approval or keep the old list in place. The decision was totally in the state actors

discretion; thus, the decision involved an element of choice. The element of choice made the decision a discretionary decision. This decision was what the statutory immunity was designed to protect; thus, the first of the two-prong test is meet.

b) Social, Economic or Political Policy

The final element of the two-prong test requires that the choice or judgment involves social, economic or political policy alternatives. It cannot seriously be argued that the choice to require a new list of providers of educational services does not involve social, economic or political policy alternatives. Indeed, it can be argued that providing adequate and up to date qualifications to provide educational services to children involves social, economic **and** political policy.

The State's decision to update its approved provider list meets the two-prong test resulting in its immunity. Finally, as expressed in statute, the State is immune even if the discretion be abused; thus, the State is entitled to summary judgment based on statutory discretionary immunity.

c) Intentional Infliction of Distress

Gray's complaint states that it seeks damages for intentional infliction of distress for its wrongful denial of SES status. However, any claim based on intentional infliction is abandoned and/or confessed.

During oral arguments, Gray announced to the Court, ". . .the intentional infliction of emotional distress claim is excluded by the Tort Claim Act, and we'll confess that portion of it. I'm not sure why that was even included in the complaint." (Vol. 2, R. 12)

VI.

CONCLUSION

State Board of Education and Mississippi Department of Education respectfully request that this Court affirm the Circuit Court's Order granting summary judgment.

THE STATE BOARD OF EDUCATION;
THE MISSISSIPPI DEPARTMENT OF EDUCATION

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CERTIFICATE OF SERVICE

I, James T. Metz, attorney for the Appellees, The State Board of Education; The Mississippi Department of Education, this day served a true and correct copy of the above and foregoing instrument, upon:

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John D. Moore, Esquire
Post Office Box 3344
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Honorable William F. Coleman
Circuit Court Judge
Post Office Box 27
Raymond, Mississippi 39154

This the 12th day of November, 2009.

James T. Metz