

Case No. 2009-CA-00619

IN THE SUPREME COURT OF MISSISSIPPI

**JEFFERY B. HODGES,
AVIS H. HODGES, AND
BRITTANIE H. BURRELL**

PLAINTIFFS/APPELLANTS

VS.


ATTALA COUNTY, MISSISSIPPI

DEFENDANT/APPELLEE

Appeal from the Circuit Court of Attala County, Mississippi
Judge Lee J. Howard, Circuit Court Judge

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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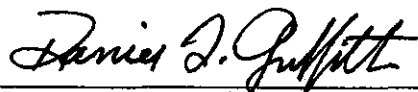
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby certifies that the persons listed below are either parties to this appeal or have an interest in the outcome of this lawsuit. These representations are made in order that the Justices of this Court may evaluate possible recusal or disqualification.

1. Jeffery B. Hodges, Avis H. Hodges, Brittanie H. Burrell, Appellants by and through Counsel, Hon. Vicki R. Slater and Hon. Bill Kirksey.
2. Ausbern Construction Company, Inc., Co-Defendant below, by and through Counsel, Hon. Michael W. Baxter and Hon. Barry D. Hassell.
3. Attala County, Mississippi.
4. Honorable Lee J. Howard, Lower Court Judge.
5. Daniel J. Griffith, Griffith and Griffith Attorneys, Counsel for Appellee.

I hereby certify that to the best of my knowledge and belief, these are the only persons having an interest in the outcome of this appeal

THIS the 18th day of November, 2009.



Daniel J. Griffith, MSB #8366
Attorney for Appellee

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STATEMENT REGARDING ORAL ARGUMENT

The lower court properly applied controlling legal authority. Neither party has argued that this legal authority should be overturned. We contend that the legal duties arising by contract in *Chisolm*¹ are identical here. This is established through a line by line comparison of the *Chisolm* Contract and the contract construed by the lower court. In the opinion of the undersigned, oral argument is not required.

¹*Chisolm v. MDOT*, 942 So. 2d 136 (Miss. 2006).

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BRIEF OF APPELLEE

I. STATEMENT OF ISSUE ON APPEAL

The legal duties arising by contract in *Chisolm* are identical here.

II. STATEMENT OF THE CASE

A. Statement of the Relevant Facts

This case arises from the death of Jeffery Brent Hodges, Jr. during the early morning hours of May 17, 2007. The one-vehicle accident occurred on Attala County Road No. 3122, at a clearly marked construction site where Ausbern Construction Company (Co-Defendant below) was building a box culvert under the road.² The subject accident occurred during the pendency of SAP 04(53), a construction contract approved by the Attala County Board of Supervisors and the Mississippi Department of Transportation, Office of State Aid Road Construction. Ausbern Construction

²Ample uncontradicted factual evidence in the file established that the deceased lived a short distance from the accident site, that the project had been under way for several months, that the deceased was traveling at a high rate of speed and that the State Crime Lab found that the deceased had a blood alcohol content of .21. (R 160-181, 299, 301-303). Although probative of other immunity points not reached by the lower court, detailed discussion is not necessary here as the plain language of the contract resolves this case in favor of Attala County.

Company maintained control over the performance of all aspects of the work. Attala County inspectors had no power to alter the contractor's performance, so long as the contractor achieved the requirements of the contract.

B. Procedural History

The Appellants seek wrongful death damages based upon a claim of a failure to warn or protect against a known dangerous condition on Attala County Road No. 3122 during the pendency of a State Aid Road Construction Contract.

C. Ruling of the Attala County Circuit Court

The lower court cited the case of *Webster v. Mississippi Publishers Corp.*, 571 So. 2d 946, 951 (Miss. 2001), for the premise that an independent contractor is "...one who contracted with another to do something for him, but was not controlled nor subject to right of control by such other with respect to his physical conduct in performance of undertaking." The lower court granted summary judgment to Attala County finding that the independent contractor defense effectively negates any issue of legal duty as to the Appellants' allegations against Attala County. (R. 325-327).

D. Standard of Review

Issues of law, are reviewed under a *de novo* standard.³

III. SUMMARY OF THE ARGUMENT

Pursuant to the plain language of the contract, the lower court properly found that Attala County did not have a legal duty to the Appellants' decedent. While the construction work had to comply with the approved specifications and the Traffic Control Plan, the contractor maintained

³*Broome v. City of Columbia*, 952 So. 2d 1050 (Miss. Ct. App. 2007) (Citing *City of Jackson v. Brister*, 838 So.2d 274, 277-78 (Miss. 2003)).

control over the performance of all aspects of the work. Additionally, Attala County inspectors had no power to alter the contractor's performance, so long as the requirements of the contract were observed.

IV. ARGUMENT

It is well-settled in our jurisprudence that a governmental entity enjoys immunity from the acts of a non-employee acting within the course and scope of his or her employment. In *Mitchell v. City of Greenville*,⁴ the City was not liable for a dangerous condition created on its public right-of-way by a private contractor. Similarly, in *Lumberman's Underwriting Alliance v. The City of Rosedale*,⁵ summary judgment was granted to the City of Rosedale on a claim brought by the fire insurance carrier for a local grocery store that burned when its sprinkler system failed. There, a moonlighting city employee who went onto private property to turn off a leaking water valve was held as a matter of law to have been outside the course and scope of his employment with the City of Rosedale.⁶ In *Eatman v. The City of Moss Point*,⁷ Eatman filed suit against the City of Moss Point because its off-duty employee was in an accident. The employee was driving his own vehicle beyond the city limits where his normal employment activities would not have been required. In *Heirs and Wrongful Death Beneficiaries of Branning ex rel. Tucker v. Hinds Community College District*,⁸ a community college was not liable where an airport management company was found to

⁴*Mitchell*, 846 So. 2d 1028 (Miss. 2003).

⁵*Lumberman's Underwriting Alliance*, 727 So. 2d 710 (Miss. 1998).

⁶*Id.*

⁷*Eatman*, 809 So. 2d 591 (Miss. 2000).

⁸*Tucker*, 743 So. 2d 311, 318 (Miss. 1999).

be an independent contractor. In *Rolison v. City of Meridian*,⁹ the City was not liable where the court deemed an umpires' association an independent contractor.

No provision under the Mississippi Tort Claims Act waives the shield of immunity to allow for tort liability to a governmental entity for the actions of third parties who are not employees of that entity acting within the course and scope of their employment. The Mississippi Independent Contractor Rule states: "An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other, nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." Under the general rule, the independent contractor's principal has no vicarious liability for the torts committed by the independent contractor or its employees in the performance of the contract. *Chisolm v. MDOT*, 942 So. 2d 136, 141 (Miss. 2006), (citing *Richardson v. APAC-Mississippi, Inc.*, 631 So. 2d 143, 148 (Miss. 1994), and *Heirs & Wrongful Death Beneficiaries of Branning ex rel. Tucker v. Hinds Cnty. Coll. Dist.*, 743 So. 2d 311, 318 (Miss. 1999)).

In *Chisolm v. MDOT*, 942 So. 2d 136 (Miss. 2006), a one-car accident occurred when a vehicle struck an eighteen-inch bolt lying in the road at a construction site. The construction was being performed by a private company under a contract awarded through the Mississippi Department of Transportation. The plaintiff sued the independent contractor and MDOT. The Mississippi Supreme Court held that the plaintiff could not hold MDOT liable for the actions of the independent contractor. The Court also declined to allow the plaintiff to use the Manual of Uniform Traffic Control Devices to circumvent the status of the independent contractor. "The MUTCD becomes a tool for assessing a breach of duty only after a legal duty has already been established. It cannot be

⁹*Rolison*, 691 So. 2d 440, 445 (Miss. 1997).

used to create a legal obligation under Mississippi law."

In *Chisolm*, the following contract specifications were quoted by the Court:

Section 104.01 - Intent of Contract

The Contractor shall furnish all labor, materials, equipment, supplies, transportation, supervision, methods and procedures necessary to complete the work in accordance with the plans, specifications and terms of the contract.

Section 104.04 - Maintenance of Traffic

The Contractor shall keep the portion of the project being used by public traffic in satisfactory condition for traffic to be adequately accommodated. The Contractor shall be bound to the provisions of this subsection and other applicable provisions of the contract with regard to the safe and convenient passage of traffic.

Section 105.10 - Duties of the Inspector

Inspectors employed by the Department will be authorized to inspect all work and materials. The inspection may extend to all parts of the work and to the preparation, fabrication or manufacture of the materials. The inspector will not be authorized to alter or waive the provisions of the contract, to issue instructions contrary to the plans and specifications, or to act as foreman for the contractor.

Section 107.10 - Barricades, Warning Signs & Flaggers

The Contractor shall provide, erect and maintain all necessary barricades, lights, danger signals, signs and other traffic control devices...and shall take all necessary precautions for the protection of the work and safety of the public. . . . Suitable warning signs shall be

provided to properly control and direct traffic.... Such warning signs shall be constructed and erected in accordance with the provisions of this contract.

Section 107.17 - Contractor's Responsibility for Work

Until release of maintenance in accordance with 105.16, the Contractor shall have the charge and care thereof and shall take every precaution against injury or damage by action of the elements or from any other cause, whether arising from the execution or non-execution of the work.

Section 618.01.2 - Traffic Control Plan

This work also consists of complying with the contract requirements of the Department's Traffic Control Plan. The purpose of the Traffic Control Plan is to maintain through and local traffic safely through construction zone. *Id.*, 942 So. 2d 136, 141-142.

The *Chisolm* Court went further to discuss the import of the contract language upon the ability of a third party to bring a tort claim against MDOT, stating:

While the construction work had to comply with MDOT's specifications and the Traffic Control Plan, Great River maintained control over the performance of all aspects of the work. Additionally, MDOT inspectors had no power to alter Great River's performance, so long as the requirements of the contract were observed. Based on the clear language of the contract, we agree with the trial courts and the Court of Appeals that Great River was an independent contractor. *Chisolm*, 942 So. 2d 165, 168, 2005 Miss. App. LEXIS 560 at *9. See also *Tucker*, 743 So. 2d at 318 (county college not liable where airport management company found to be an independent contractor); *Rolison v. City of Meridian*, 691 So. 2d 440, 445 (Miss. 1997) (city not liable where umpires' association found to be an independent contractor)." *Id.*, 942 So. 2d 136, 142-143.

The Appellants take no issue with the holding of *Chisolm* or the matching contract language found in the instant contract. Instead, the Appellants argue that *Chisolm* is distinguishable based

upon a partial quote from the language of a traffic control supplement applicable to the instant contract. (R. 310). The Appellants focus on the use of the word “insure” in the final paragraph of this document. Yet, this is merely designating Attala County Engineer Christian Gardner as the inspector for the project. (See **Section 105.10 - Duties of the Inspector, *infra***). In proper context, the plain language of this contract speaks for itself. The supplement expressly states “The requirements of this special provision do not alter or in any way change the requirements of the forgoing or any other requirements of the Contract except as specifically stated herein as an alteration or change.” The supplement clearly makes no changes to the applicable legal duty created under the contract, stating “The Contractor will be required to immediately rectify any noted deficiencies.” Significantly, “**Section 105.10**” was included in the *Chisolm* Contract as well. In short, *Chisolm* is not distinguishable.

V. CONCLUSION

In *Parsons v. Miss. State Port Auth. at Gulfport*, 2008 Miss. App. LEXIS 705, the Mississippi Court of Appeals recognized that *Miss. Code Ann. § 11-46-9(1)(f)* (Supp. 2008), of the MTCA clearly allowed other immunities to remain in effect after its passage. *Id.* Similarly, a dispositive legal duty issue was affirmed in conjunction with MTCA immunities in the case of *Gammel v. Tate County Sch. Dist.*, 2008 Miss. App. LEXIS 691. Although multiple other immunity provisions apply here, legal duty is dispositive under controlling legal authority. Clearly, the independent contractor defense effectively negates any issue of legal duty for the Plaintiffs’ allegations of failure to warn or protect against a dangerous condition on the road at issue. Attala County did not have a duty to maintain the site; therefore the ruling of the lower court should be affirmed.

RESPECTFULLY SUBMITTED this the 18th day of November, 2009.

ATTALA COUNTY, MISSISSIPPI, Appellee

By: 
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CERTIFICATE OF SERVICE

I, Daniel J. Griffith, Attorney for Attala County, Mississippi, Mississippi, do certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee* to the following:

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DATED this 18th day of November, 2009.

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