IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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NO. 2009-CA-00619

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JEFFERY B. HODGES, AVIS H. HODGES AND BRITTANIE H. BURRELL — APPELLANTS

VS.

ATTALA COUNTY, MISSISSIPPI — APPELLEES

# BRIEF OF APPELLANTS

ORAL ARGUMENT IS REQUESTED


ATTORNEYS FOR APPELLANTS:

VICKI R. SLATER, MSB [redacted]
VICKI R. SLATER, ATTORNEY AT LAW, PA
1554 LAKESIDE DRIVE
POST OFFICE BOX 23981
JACKSON, MS 39225-3981
TELEPHONE: (601) 987-8184
FACSIMILE: (601) 9987-8188
E MAIL: vicki@vickislater.com

WILLIAM B. KIRKSEY, MSB [redacted]
KIRKSEY & ASSOCIATES
POST OFFICE BOX 33
JACKSON, MISSISSIPPI 39205-0033
TELEPHONE: (601)354-4662
FACSIMILE: (601)354-2433
E MAIL: mslawyer4183@aol.com

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**JEFFERY B. HODGES,**
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**BRITTANIE H. BURRELL** — **APPELLANTS**

**VS.**

**ATTALA COUNTY, MISSISSIPPI** — **APPELLEES**

## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order for the justices of the Supreme Court and Court of Appeals to evaluate possible disqualification or recusal:

1. Jeffery B. Hodges, Appellant;
2. Avis H. Hodges, Appellant;
3. Brittanie H. Burrell, Appellant;
4. Attala County, Mississippi, Appellee;
5. Vicki R. Slater, attorney for Appellant;
6. William B. Kirksey, attorney for Appellant;
7. Danny Griffith, Esquire, Attorney for Appellee, Attala County, MS;
8. Michael W. Baxter, Esquire, Attorney for Ausbern Construction Company;
9. Barry D. Hassell, Esquire, Attorney for Ausbern Construction Company;

10. Honorable Lee J. Howard, Circuit Court Judge of the 16th Circuit Court District Sitting by Special Designation as Attala County Circuit Judge

CERTIFIED, this the 7 day of November, 2009

Respectfully submitted,

VICKI R. SLATER,
ATTORNEY FOR APPELLANTS

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## STATEMENT OF ISSUE

Is the "independent contractor" defense sufficient to sustain the lower court's grant of summary judgment in favor of Attala County, Mississippi, and against the survivors of a decedent, who was killed at night when his vehicle landed in a man-made ditch in a county road where a bridge had been removed at a pending construction site, despite evidence that the County had a separate contractual duty to "insure" proper construction, installation and maintenance of traffic control and warning devices at the construction project, and that the duty was breached?

## STATEMENT OF THE CASE

### A. Procedural History

This wrongful death suit was filed by the survivors of Jeffrey Brent Hodges, Jr. (hereafter referred to as "Survivors") against Attala County, Mississippi (hereafter referred to as "County") and Ausbern Construction Company, Inc. (hereafter referred to as "Ausbern") on March 17, 2008, alleging that the County and Ausbern negligently, wrongfully and willfully failed to warn, by erection and maintenance of sufficient barricades, against and/or correct a dangerous condition on County Road No. 3122 of which they had adequate notice and a duty to rectify, and which failure caused the death of Hodges on or about May 16, 2007, as he traveled in the eastbound lane of the County Road that night. Complaint, Record on Appeal, pp. 4-8. Answers and Defenses were duly filed and on July 25, 2008, the County filed its Motion for Summary Judgment, alleging the absence of any genuine issue of material fact with respect to its defense under the independent contractor rule and immunity from suit pursuant to MISS. CODE ANN. §11-

46-9 (Supp. 1999). Record on Appeal, pp. 55-210. The motion was fully briefed and argued, and on February 4, 2009, the lower court entered its Order granting the motion on the grounds that "Attala County is not vicariously liable for the actions of its independent contractor [, Ausbern]." Record on Appeal, pp. 325-27. On March 16 and April 6, 2009, the lower court entered its Certification of Final Judgment, Record on Appeal, pp. 361-63, and the Survivors filed their Notice of Appeal to this Court on April 15, 2009. Record on Appeal, p. 364.

**B. Facts**

On April 27, 2006, the County and Ausbern entered a contract for State Aid Project No. SAP-04(53) that contemplated construction on and repairs to Attala County Road No. 3122, indicated that the parties intended to work as principal and independent contractor, and incorporated by reference a "Supplement to Traffic Control Plan" dated, perhaps erroneously, December 14, 2004. Record on Appeal, pp. 87-92. That Supplement referred explicitly to the County's engineer, Christian Gardner, stating:

> Christian Gardner is designated as the responsible person to insure the Contractor constructs, installs, and maintains the devices called for on the Traffic Control Plan. An inspection of the traffic control signs and devices shall be performed at periods not exceeding one week regardless of construction activity within the project. The Contractor will be required to immediately rectify any noted deficiencies.

Record on Appeal, p. 92. During the course of the construction project Mr. Gardner prepared weekly inspection reports that noted the following failures in the placement and maintenance of barricades in the "APPROACH ZONE" of the work site on County Road No. 3122 for the weeks of May 1, 7 and 15, 2007: "missing/damaged," "improperly placed." Record on Appeal, pp. 127-129. The inspection reports dated May 24 and 29, 2007, contained no similar notations. Record

on Appeal, pp. 130-131. Prior to and including May 16, 2007, local residents observed at the construction project the absence or removal of barricades and warning devices on the eastbound lane of County Road 3122. Record on Appeal, pp. 311-316. During the late evening of May 16 or early morning of May 17, 2007, Jeffrey Brent Hodges was killed as he traveled in the eastbound lane of that road and his vehicle landed in a man-made ditch where a bridge had been removed at the construction site. Attala County Deputy Sheriff Randy Blakely prepared a Uniform Crash Report dated May 17, 2007, in which he notes after his arrival at the scene of the accident: "Upon my arrival the east bound lane construction barrier was down and it appeared that V1 hit a dirt mound where the bridge had been removed and a culvert was in place and under construction." Record on Appeal, p. 96. The diagram drawn by Mr. Blakely and reflected in that report reveals from the resting position of the his vehicle ("V1") that Hodges had indeed been traveling immediately before the accident on the eastbound lane of County Road No. 3122. Record on Appeal, p. 96.

## SUMMARY OF ARGUMENT

The lower court's exclusive and otherwise correct reliance upon *Chisolm v. Mississippi Dep't of Transp.*, 942 So.2d 136 (Miss. 2006) to justify entry of summary judgment in favor of Attala County was fatally incomplete, devoid of any consideration of evidence that the county had an independent contractual obligation to "insure" proper construction, installation and maintenance of traffic control and warning devices at the site of the accident, or that the county's duty had been breached at the time of the accident, and thus constitutes reversible error.

## ARGUMENT

### A. Standard of Review

The burden of demonstrating that there is no genuine issue of material fact for purposes of Rule 56 of the Mississippi Rules of Civil Procedure rests on the movant. *Miller v. Meeks*, 762 So.2d 302, 304 (¶ 3) (Miss. 2000). The standard of review of a lower court's grant of summary judgment is de novo. *Webb v. Braswell*, 930 So.2d 387, 395 (¶ 12) (Miss. 2006). In conducting such a review, the court must examine all evidentiary matters in a light most favorable to the party against whom the motion for summary judgment is made. *Hataway v. Estate of Nicholls*, 893 So.2d 1054, 1057 (¶ 8) (Miss. 2005). If any triable facts exist, the lower court's grant of summary judgment will be reversed. *Miller v. Meeks*, 762 So.2d at 304 (¶ 3). "An issue of fact may be present where there is more than one reasonable interpretation of undisputed testimony, where materially different but reasonable inferences may be drawn from uncontradicted evidentiary facts, or when the purported establishment of facts has been sufficiently incomplete or inadequate that the trial judge cannot say with reasonable confidence that the full facts of the matter have been disclosed." *Id.* at 304-05 (¶ 3) (citing *Dennis v. Searle*, 457 So.2d 941, 944 (Miss. 1984)).

### B. Application of *Chisolm*

#### 1. Legal Framework

The analytical roadmap drawn by the court in *Chisolm* is clear, but the court below simply stopped short of the appropriate destination. Contrary to the lower court's apparent impression, the dictates of *Chisolm* do not preclude a finding of governmental liability for torts merely because an independent contractor relationship between a construction company and a

political subdivision exists. The plaintiffs in that case urged the court to reverse summary judgment granted in favor of the Mississippi Department of Transportation (MDOT) on the grounds that alleged violations of the Manual on Uniform Traffic Control Devices (MUTCD) could "establish, as a matter of law, that MDOT is responsible for the torts of its independent contractor, Great River [Stone Company]." *Chisolm v. Mississippi Dep't of Transp.*, 942 So.2d at 143 (¶ 14). Having found that "the contract between MDOT and Great River . . . evidence the parties' intent for Great River to serve as an independent contractor," *id.* at 141 (¶ 8), the court rejected the plaintiffs' contention, holding that "[t]he MUTCD becomes a tool for assessing a breach of duty only after a legal duty has already been established. It cannot be used to create a legal obligation under Mississippi law. Therefore, . . . the plaintiffs cannot use the MUTCD as a method of circumventing Great River's independent contractor status to hold MDOT liable." *Id.* at 143 (¶ 15).

The court's inquiry did not, however, end with that conclusion. Its examination proceeded to identify two exceptions to the rule that a principal is not liable for the torts of an independent contractor --- situations involving intrinsically dangerous work or where the principal has a non-delegable duty --- neither of which applied under the circumstances presented. *Id.* at 143-44 (¶ 16). Finding that the "plaintiffs may not hold MDOT liable for the negligence of its independent contractor," the court moved to the next level of analysis: "We *must determine* whether the plaintiffs have presented any triable issue of fact which would establish liability for MDOT's own conduct. Unless the plaintiffs can produce *some evidence* that MDOT or its employees committed some negligent act, MDOT cannot be held liable," *id.* at 144 (¶ 18) (emphasis added), and "we need not engage in any analysis of the sovereign immunity

issue." *Id.* at 145 (¶ 22). The court determined ultimately that "the plaintiffs have presented no genuine issue of material fact regarding MDOT's liability, given the status of Great River as an independent contractor *and* the lack of negligence by MDOT or its employees." *Id.* at 145 (¶ 22) (emphasis added).

**2. Factual Distinctions Between *Chisolm* and the Instant Case**

The lower court was impressed by the factual similarities between *Chisolm* and the case at hand, noting that the same independent contractor relationship between MDOT and Great River in the former existed between the County and Ausbern in the latter. Record on Appeal p. 326. Indeed, the provisions of the boilerplate contract between MDOT and Great River quoted by the court in *Chisolm* are identical to those recited by Christian Gardner, the County engineer, in his affidavit submitted in support of the County's Motion for Summary Judgment. *Compare Chisolm*, 942 So.2d at 141 (¶ 8) *with* Affidavit of Christian Gardner, Record on Appeal pp. 117-119. Both also refer to a "Section 618.01.2 --- Traffic Control Plan," which states:

> 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 zones.

942 So.2d at 141 (¶ 8); Record on Appeal p. 119. What the court in *Chisolm* did not have before it, however, was a "Supplement to Traffic Control Plan" with reference to "Project No. SAP-04(53), Attala County, Sites 'A' & 'B'," and dated December 14, 2004, which states specifically and uniquely:

> *Christian Gardner is designated as the responsible person to insure* the Contractor constructs, installs, and maintains the devices called for on the Traffic Control Plan. An inspection of the traffic control signs and devices shall be performed at periods not exceeding one week regardless of construction activity within the project. The Contractor will be required to immediately rectify any

noted deficiencies.

Record on Appeal p. 92 (emphasis added). If the words "designate," "responsible" and "insure" have any rational import they must be construed minimally as constituting "some evidence" of intent to require of Christian Gardner something more than merely the filing and shuffling of inspection reports. They clearly refer to an additional, independent "duty" of some sort, the nature and extent of which are certainly subject to discovery and debate, but cannot be determined summarily on the exiguous record presently before this Court.

Moreover, the court in *Chisolm*, unlike the lower court herein, had before it no proof that an alleged duty of a governmental employee was breached and that notice of the breach was, at the very least, inferentially charged to him. Attached to Christian Gardner's affidavit are weekly inspection reports that note the following failures in the placement and maintenance of barricades in the "APPROACH ZONE" of the work project for the weeks of May 1, 7 and 15, 2007: "missing/damaged," "improperly placed." Record on Appeal pp. 127-129. The inspection reports dated May 24 and 29, 2007, suggest by the absence of similar notations that the failures previously observed no longer existed.[1] Record on Appeal, p. 130-131. Attached to the affidavit of Attala County Deputy Sheriff Randy Blakely is a Uniform Crash Report dated May 17, 2007, in which Mr. Blakely notes after his arrival at the scene of the accident: "Upon my arrival the

[1] The inference permitted by these reports is that Mr. Gardner discharged a "duty" he had under the Supplement to Traffic Control Plan after the accident by implementing subsequent remedial measures, proof of which was offered rather for the purpose of establishing precisely the existence of a duty than to prove breach thereof. MISS. R. EVID. 407. *See Sumrall v. Mississippi Power Co.,* 693 So.2d 359, 365 (Miss. 1997) (evidence of subsequent remedial measure admissible to establish defendant's control of worksite where defendant claimed site was controlled by independent contractor). The lower court never considered the evidence in this context because it never reached the question of the County's "duty" in its erroneously truncated analysis.

east bound lane construction barrier was down and it appeared that V1 hit a dirt mound where the bridge had been removed and a culvert was in place and under construction." Record on Appeal p. 96. Indeed, the diagram drawn by Mr. Blakely and reflected in the Uniform Crash Report reveals from the resting position of the his vehicle ("V1") that Jeffrey Hodges had been traveling immediately before the accident on the eastbound lane of County Road No. 3122, the very lane for which the "construction barrier was down." Record on Appeal p. 96. Finally, the affidavits of three individuals familiar with the scene offered in opposition to the County's Motion for Summary Judgment establish the removal or absence of barricades from the eastbound lane of the road both prior to and including May 16, 2007. Record on Appeal pp. 311-316.

Unlike the record before the court in *Chisolm*, the same proof offered in support of and in opposition to the County's Motion for Summary Judgment thus supports a reasonable interpretation of facts that demonstrates: (1) the duty of a county employee, Christian Gardner, to "insure" the proper installation and maintenance of traffic control devices at the project in question; (2) the existence of a dangerous condition created by "missing/damaged," "improperly placed" or "down" construction barriers or barricades; and (3) actual notice of the dangerous condition and absence or removal of warning devices so well in advance of the date of the accident that (4) ample opportunity for implementing remedial measures to prevent the accident existed.[2] *See Canizaro v. Mobile Communications Corp.*, 655 So.2d 25 (Miss. 1995) (issues of

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[2] These inferential facts implicate two immunities or exemptions from governmental liability itemized in the Mississippi Tort Claims Act: §§11-46-9(1)(v) and (w), which provide:

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claims:
>
> (v) Arising out of an injury caused by a dangerous condition on the property of the governmental entity *that was not caused* by the negligent or other wrongful conduct of an

material fact exist where there is more than one reasonable interpretation that may be given undisputed testimony).

### 3. The Lower Court's Flawed Analysis

The court in *Chisolm* devoted considerable analytical effort in search of a governmental "duty," but found none. The lower court in this case never reached that question, opting instead to rely exclusively upon the existence of an independent contractor relationship between the County and Ausbern to conclude that "Attala County is not vicariously liable for the actions of its independent contractor" and dismiss the case summarily. Record on Appeal p. 327. As support it quoted the following language contained in the December 14, 2004, Supplement to Traffic Control Plan:

> Within three weeks of a traffic related accident occurring within the limits of the project, the Contractor shall provide the County Engineer with a copy of an accident report for each accident. If analysis of the accident report by appropriate personnel reveals that correction [sic] action is required, the Contractor shall proceed immediately with same. . . . The Contractor will be required to immediately rectify any noted deficiencies.

Record on Appeal p. 326. It then observed: "This language expressly states that the Contractor is responsible for certain duties. While the language dictates what will happen *after* an accident

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> 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.

(emphasis added). The lower court did not discuss the issues thus raised because it found sufficient alone the existence of an independent contractor relationship between the County and Ausbern to warrant summary judgment.

occurs, the converse can be true as well. The wording in this Supplement evidences that the Contractor is also responsible for actions *prior* to an accident." Record on Appeal p. 326 (emphasis in original). The court thus conjured gratuitously a "converse" inference unfavorable to the parties *opposing* summary judgment, in violation of the principles governing Rule 56, and inexplicably omitted through its ellipsis the very language in the Supplement that "designates" specifically Christian Gardner as the "responsible person" to "insure" contractual compliance and from which an inference favorable to those parties should have been drawn. *See* Record on Appeal p. 92.

The Survivors herein have never contended that the County is "vicariously liable for the actions" or derelictions of Ausbern, which makes the stated grounds for summary dismissal of their case a straw man. The existence *vel non* of an independent contractor relationship is uncontested --- and immaterial. The lower court simply and blatantly ignored material facts and reasonable inferences drawn therefrom, transposed the words "after" and "prior" to support a capricious inference of its choosing, granted summary judgment without adherence to the directives of *Chisolm* and then cited *Chisolm* as the foundation of its ruling. *See Miller v. Meeks*, 762 So.2d 302, 304-05 (¶ 3) (Miss. 2000) (issue of fact may be present where materially different but reasonable inferences may be drawn from uncontradicted evidentiary facts) (citing *Dennis v. Searle*, 457 So.2d 941, 944 (Miss. 1984)). The resulting decision cannot survive de novo scrutiny.

## CONCLUSION

The lower court's failure to address the real genuine issue of material fact in this case, i.e., the existence of a separate governmental duty, is an unfortunate consequence of deliberate

deletion, a wrongful circumvention of the instructive template prescribed by the court in *Chisolm*, and a reversible contravention of Rule 56. For these reasons the decision of the court below should be reversed and this case remanded for further proceedings.

JEFFREY B. HODGES, AVIS H. HODGES
AND BRITTANIE H. BURRELL,
APPELLANTS

BY: _____
VICKI R. SLATER,
FOR THE APPELLANTS

OF COUNSEL:

VICKI R. SLATER, MSB[redacted]
VICKI R. SLATER, ATTORNEY AT LAW, P.A.
1554 LAKESIDE DRIVE
POST OFFICE BOX 23981
JACKSON, MISSISSIPPI 39216
TELEPHONE: (601)987-8184
FACSIMILE: (601)987-8188

WILLIAM B. KIRKSEY, MSB#MSB[redacted]
KIRKSEY & ASSOCIATES
POST OFFICE BOX 33
JACKSON, MISSISSIPPI 39205-0033
TELEPHONE: (601)354-4662
FACSIMILE: (601)354-2433

## CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that I have this day filed the original and all copies required with the Clerk of the Supreme Court of the State of Mississippi and that I have caused to be served a true and correct copy of the foregoing on the following persons:

Honorable Lee J. Howard
Circuit Court Judge of the 16th Circuit Court District
Sitting by Special Designation
Post Office Box 1344
Starkville, Mississippi 39760

Danny Griffith, Esquire
Griffith & Griffith
123 South Court Street
Post Office Drawer 1680
Cleveland, Mississippi 38732

Michael W. Baxter, Esquire
Barry D. Hassell, Esquire
Copeland, Cook, Taylor & Bush, P.A.
600 Concourse, Suite 200
1076 Highland Colony Parkway
Post Office Box 6020
Ridgeland, Mississippi 39158

So certified, this the 17 day of November, 2009.

Vicki R. Slater