IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

SHERRY WILTSHIRE — APPELLANT

V. — CASE NO. 2009-CA-01797

MISSISSIPPI FAIR COMMISSION, et al. — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI-FIRST JUDICIAL DISTRICT

BRIEF OF APPELLEE, MISSISSIPPI FAIR COMMISSION

MARK D. MORRISON (MSB [redacted]
ADCOCK & MORRISON, PLLC
P.O. BOX 3308
RIDGELAND, MS 39158
601-898-9887

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 disqualification or recusal.

(1) Sherry Wiltshire; Appellant

(2) Joseph E. Roberts, Jr.; Pittman, Germany, Roberts & Welsh; Counsel for Appellant

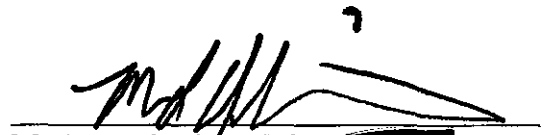
(3) Eugene C. Tullos; Tullos & Tullos; Counsel for Appellant

(4) Mississippi Fair Commission; Appellee

(5) Mark D. Morrison; Adcock & Morrison; Counsel for Appellee

(6) Hon. William F. Coleman; Hinds County Circuit Court Senior Status Judge

(7) Hon. Malcolm Harrison; Hinds County Circuit Court Judge



Mark D. Morrison (MSB[redacted]

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STATEMENT OF ISSUES

(1) Whether the trial court properly granted summary judgment in favor of the Appellee, Mississippi Fair Commission, under MRCP 56 and Miss. Code Ann. §11-46-9(1)(d).

STATEMENT OF THE CASE

This appeal arises from the grant of summary judgment by the trial court thereby dismissing with prejudice Appellant's, Shirley Wiltshire ("Wiltshire"), claims against the Mississippi Fair Commission ("MFC") under §11-46-9(1)(d) of the Mississippi Tort Claims Act ("MTCA") (R471-476; RE079-084). On or about February 5, 2002, Wiltshire traveled from Raleigh, Mississippi to the Mississippi State Fairgrounds in Jackson for purposes of visiting with her son, Josh, who was a member of the Smith County 4-H contingent at the 37th Annual Dixie National Livestock Show that was being held. While her son was not an actual participant (i.e., showing an animal) that day, she made the trip to accompany him in the activities and to visit with other Smith County residents. Wiltshire arrived at the fairgrounds around 4:00 p.m., and within thirty (30) minutes of her arrival, while trying to find the Smith County 4-H group, the subject incident occurred (R45-46; RE026-027). While Wiltshire has virtually no personal knowledge of the facts and circumstances of the event, it is undisputed that a cow got loose from a young boy that was leading it in one of the barns, while Wiltshire was walking in the same general vicinity, and she was subsequently trampled to the ground by the cow, resulting in rather severe injuries to her leg (R46-47, 49; RE027-028, 030).

Wiltshire commenced this litigation on or about May 2, 2003, seeking compensation for her injuries against, amongst other defendants, MFC (R6-16; RE006-016). While somewhat vague in its allegations, Wiltshire's Complaint, and discovery conducted thereafter in this litigation, makes clear that her claims and causes of action are grounded in negligence, and more specifically, premises liability. In any event, and regardless of the theory, it is undisputed that all such claims are governed by the MTCA.

Following the completion of substantial discovery, MFC filed its initial dispositive

motion, seeking a dismissal with prejudice of Wiltshire's claims (R36-73; RE017-054). This initial motion was heard before the trial judge, resulting in a denial of the same as "premature" (R296-301; RE055-060). Specifically, and while the trial court held that MFC's conduct in question was clearly discretionary in nature, the court further found that insufficient proof had been offered as to the "public policy" prong of the required analysis under Mississippi law for discretionary function immunity. After the passage of sufficient time in order to address this issue, MFC and it's co-Defendant, Board of Trustees of State Institutions of Higher Learning ("IHL"), renewed their dispositive motions (R302-319; RE061-078), supplying the court with the "public policy" evidence that eventually resulted in summary judgment awarded to both of these entities (R471-476; RE079-084). Aggrieved by this decision, Wiltshire ultimately appealed the trial court's adverse ruling following settlement with the remaining co-Defendants (R481-482; RE085-086).

SUMMARY OF THE ARGUMENT

The trial court was eminently correct in its decision to award MFC summary judgment as to Wiltshire's claims and causes of action. Based upon the evidence adduced during the discovery process in this litigation, it cannot be genuinely disputed that the conduct of the MFC as it pertained to the livestock event at which Wiltshire was injured was discretionary in nature, and further, that such responsibilities were fraught with public policy decisions, rendering MFC immune from liability under §11-46-9(1)(d). Wiltshire's "procedural argument," i.e., that somehow MFC's renewal of its dispositive motion and the trial court's consideration of the same was improper, should fall upon deaf ears as it's not supported by the actual facts nor Mississippi law. As such, MFC respectfully submits that the trial court's grant of summary judgment should be affirmed as a matter of law.

ARGUMENT

(A) MFC'S Renewal of its Dispositive Motion was Procedurally Proper

Wiltshire and her counsel expend a great deal of time and ink addressing what they contend was the procedural impropriety of the trial court's willingness to re-visit MFC's initial dispositive motion, ultimately leading to the dismissal of their claims. The cases cited in support of this argument are unpersuasive as they fail to address the precise set of circumstances confronting the trial court and parties to this litigation. Stated a bit differently, Wiltshire has failed to cite a single case which stands for the proposition that it is in fact improper for a trial court to re-examine a given party's motion for summary judgment prior to trial.

Several, if not virtually all, of the cases cited by Wiltshire address the treatment of separate motions to either set aside or reconsider the ***granting*** of summary judgment as "post-trial" motions under MRCP 59(d). See, e.g., Brooks v. Roberts, 882 So.2d 229, 233 (Miss. 2004); Boyles v. Schlumberger Tech. Corp., 792 So.2d 262, 265 (Miss. 2001); Allen v. Mayer, 587 So.2d 255, 261 (Miss. 1991). It is wholly understandable that a party's efforts to obtain relief from the granting of a dispositive motion might be reviewed under MRCP 59 as the judgment in such instances signals a termination of the litigation if not otherwise set aside. However, such was not the case procedurally and/or factually in the instant litigation.

In fact, and as admitted by Wiltshire in her own brief, the trial court expressly held that MFC's initial dispositive motion was "premature," and thus denied based upon a failure to address to the court's satisfaction the "public policy" prong of the discretionary function immunity analysis required under our case law. Taking its cue and direction from the trial court, MFC re-urged its dispositive motion after this deficiency was cured via the submission of an affidavit procured by IHL's counsel. Thus, the MRCP 59 analysis or factors cited by Wiltshire

are simply inapplicable based upon the undisputed procedural history of the dispositive motion proceedings in the trial court below. This is especially true since our appellate courts have cautioned that dispositive motions addressing the immunities available under the MTCA should be addressed at the earliest possible stage of the litigation. Chapman v. City of Quitman, 954 So.2d 468, 473 (Ms.Ct.App. 2007)(citing Mitchell v. City of Greenville, 846 So.2d 1028, 1029 (Miss. 2003)).

(B) MFC was Properly Granted Discretionary Function Immunity

As Wiltshire has acknowledged or stipulated, the only substantive issue before this Court as to the trial court's grant of summary judgment concerns not whether MFC's conduct in providing the venue for the subject livestock was discretionary in nature; rather, the only question is whether the second prong or element of the analysis, i.e., "public policy" considerations, was sufficient to merit summary judgment in MFC's favor. It is undisputed that in Jones v. MDOT, 744 So.2d 256, 260 (Miss. 1999), this Court adopted "public policy function" test for use by our trial courts in determining whether discretionary function immunity is available to state actors under §11-46-9(1)(d). In the slightly more than a decade since Jones was decided, our appellate courts have had several occasions to apply this test to a wide variety of factual circumstances, some of which are analogous to the present case.

By way of example, in Dotts v. Pat Harrison Waterway District, 933 So.2d 322, 327- 328 (Ms.Ct.App. 2006), the court upheld the trial judge's ruling in favor of the defendant under §11-46-9(1)(d), finding the manner in which a public swimming area was managed was rooted in public policy considerations, balancing the need for safety against the desire to provide recreational opportunities to the general public. Indeed, the absence of proof as to specific policy discussions amongst the defendant's board of directors was insufficient to deny immunity since

evidence of the actual thought processes were not necessary. Dotts, 933 So.2d @ 327-328. Rather, "the focus is on the nature of the actions taken, and whether they are susceptible to policy analysis." Id.

Similarly, in the case of Kaigler v. City of Bay St. Louis, 12 So.3d 577, 582 (Ms.Ct.App. 2009), the court affirmed summary judgment in favor of the defendant, based upon discretionary function immunity, where a child fell through a ceiling tile while trying to retrieve a basketball at a public gym. In addressing the public policy portion of the test, the court specifically held that: "Because the social value and economic cost of operating the Gym and supervising the activities at the Gym go into determining the most effective use of the Gym, part (b) of the test is also satisfied." Kaigler, 12 So.2d @ 582. The decision in Knight v. MTC, 10 So.2d 962, 968-969 (Ms.Ct.App. 2009) itself stands as yet another illustration of applicability of discretionary function immunity to a state agency, but it also contains a good summary of various other cases in which governmental conduct has been held "to involve the implementation of social, economic or political policy." Of particular note in Knight is the court's recitation of the following:

> "The supreme court has stated that 'when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a [g]overnmental agent to exercise discretion, it must be presumed that the agent's acts are *grounded in policy when exercising that discretion*'."

Knight, 10 So.3d @ 969 (citing Dancy v. E. Miss. State Hosp., 944 So.2d 10, 18 (Miss. 2006)(emphasis in original).

The policy implications at issue in this litigation bearing upon the MFC's conduct in hosting the livestock show are readily apparent when consideration is given to not only the Affidavit of Dr. Holder (R307-311; RE066-RE070) which was attached as a exhibit, but also

various Mississippi statutes addressing the MFC and livestock shows in general. By way of example, the very statute that created the MFC, Miss. Code Ann. §69-5-1, begins as follows:

> "In order to promote agricultural and industrial development in Mississippi and to encourage the farmers to grow better livestock and agricultural products, there is hereby created a body politic and corporate to be hereafter known as the 'Mississippi Fair Commission'."

Similarly, and although not expressly made applicable to "livestock shows" until after the subject incident, Miss. Code Ann. §95-11-1 stands as further evidence, beyond Dr. Holder's affidavit, of the important public policy implications impacted by the operation of such events: "The Legislature also finds that the state and its citizens derive numerous economic and personal benefits from such activities." In conclusion, there is simply no directive from our Legislature, under Miss. Code Ann. §69-5-1, et seq., mandating the manner in which MFC is obligated to conduct those livestock shows that it hosts. Clearly, policy decisions are necessarily involved in these events for which, with all due respect, our court's are ill-equipped and forbidden to "second guess". See, e.g., Strange v. Itawamba County Sch. Dist., 9 So.3d 1187, 1191 (Ms.Ct.App. 2009)(Court refused to second guess Legislature's refusal to make riding unrestrained in bed of trucks illegal).

CONCLUSION

Based upon the foregoing, MFC respectfully submits that the trial court ultimately reached the correct result in this matter as it concerned Wiltshire's claims against it under the MTCA. MFC's role in supplying the venue for the livestock event at which Wiltshire was injured is the very sort of activity by a governmental agency for which discretionary function immunity was created by our Legislature. Accordingly, MFC requests that this Court affirm the trial court's ruling in its favor as a matter of law.

CERTIFICATE OF SERVICE

I, Mark D. Morrison, do hereby certify that I have this day caused a true and correct copy of the above and foregoing instrument, document or pleading to be served upon the following:

Joseph E. Roberts, Jr., Esq.
Post Office Box 22985
Jackson, Mississippi 39225-2985

Eugene C. Tullos, Esq.
Post Office Box 74
Raleigh, Mississippi 39153-0074

Michael J. Wolf, Esq.
Post Office Box 1163
Jackson, Mississippi 39215-1163

Hon. William Coleman
Post Office Box 22711
Jackson, MS 39225-2711

Hon. Malcolm Harrison
Post Office Box 22711
Jackson, MS 39225-2711

THIS, the 4th day of June, 2010.

Mark D. Morrison