IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SHERRY WILTSHIRE — APPELLANT

VS. — CAUSE NO. 2009-CA-01797

STATE OF MISSISSIPPI, BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, MISSISSIPPI FAIRGROUNDS COMMISSION, AND DEFENDANTS A - Z — APPELLEE

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

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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MFC is not entitled to immunity for its actions which caused Plaintiff's injuries because it has not proven the second prong of the PPF test.

In its Brief, MFC ignores the decision of this Court in *Pritchard v. Van Hooten*, 960 So. 2d 568 (Miss. 2007) cited by Wiltshire in her brief. As MFC argues in this case, in *Pritchard* the government entity argued that the second prong of the PPF test was met because the actions of the governmental entity favored a laudable purpose. In *Pritchard*, the laudable purpose of the governmental entity was a "well rounded education." In the present case, MFC argues the laudable purpose of MFC is the promotion of agriculture and industrial development and that 4H and the Mississippi Junior Roundup promote "important social, political and economic objections"(R302).

The Court of Appeals in *Pritchard* rejected the above argument and found that in order for the trial court to make a determination of whether the second prong of the PPF test had been met, the trial court was burdened with the task of discerning whether the decision of the governmental entity which caused the accident implicates the exercise a policy judgment of a social, economic or political nature. *Pritchard* at 583, ¶39. In making the decision as to whether the second prong of the PPF test is met, the Court cannot merely examine the intrinsic nature of the entity or its laudable or "important" purpose, but must examine

whether the specific act which caused the injury is susceptible to a policy analysis. "To do otherwise would eviscerate the social, economic, or political policy prong of the test (the second prong of the PPF test) and would allow the discretionary function immunity exception to swallow the FTCA's sweeping waiver of sovereign immunity." *Pritchard* at 583, ¶39.

In its brief, MFC cites the Court to Miss. Code Ann. §69-5-1, which states that the purpose of the MFC is to "promote agricultural and industrial development in Mississippi." Because of this laudable purpose, MFC claims that they are immune from liability for each discretionary act that they perform in the advancement of that purpose. *Pritchard* reveals the misguided premise of this argument. The Defendants in *Pritchard* were the University of Southern Mississippi and a professor at the University of Southern Mississippi. The statute that created and sets out the purpose of the University of Southern Mississippi is Miss. Code Ann. §37-119-3. That section states that the purpose of the University, "shall be to qualify teachers for the public schools of this state, allowing party institutional instruction in the art of practicing teaching in all branches of study which pertain to a common school education..." Despite this laudable and important purpose, the court in *Pritchard* still determined that the University was not immune for the acts of its employee. The positive intrinsic value of MFC or

the University of Southern Mississippi is not probative as to whether the second prong of the PPF test has been met. The burden that MFC shoulders in order to prove that it is entitled to immunity for the acts which caused the injury is to prove that those acts, allowing dogs to run free, allowing observers in close proximity to dangerous livestock in cluttered, narrow aisles and allowing inexperienced individuals to handle dangerous animals in these tight cluttered aisles in close proximity to non-participants, are subject to a policy analysis. MFC does not even pretend to examine whether the acts which caused this accident are subject to a policy analysis and the order granting summary judgment is silent on this issue.

MFC in its Brief cites the Court to four cases which it claims support its position that MFC was properly granted discretionary function immunity, *Dotts v. Pat Harrison Waterway District*, 933 So. 2d 322 (Miss. App. 2006), *Kiagler v. City of Bay St. Louis*, 12 So. 3d 577 (Miss. 2009), *Strange v. Itawamba County School District*, 9 So. 3d 1187 (Miss. App. 2009) and *Knight v. MTC*, 10 So. 2d 962 (Miss. 2009)

In the Brief of Appellant, Ms. Wiltshire has previously distinguished the facts of *Dotts v. Port Harrison Waterway District* from those of the present case (Brief of Appellant, p. 18-20). As is explained in Appelant's Brief, although the Court in *Dotts* does determine that the second prong of the PPF test is satisfied,

the rationale for the Court's decision was based upon an evaluation of the acts which caused the accident not the purposes of the organization operating the swimming area. In the present case MFC offered no evidence that the acts which caused the accident were the subject of a policy analysis and no such evaluation was performed by the Court.

In *Kiagler v. City of Bay St. Louis*, a civil action was brought against the City of Bay St. Louis on behalf of a minor child for personal injuries that the child sustained when he climbed into a false ceiling at a gym to retrieve a basketball and fell to the floor injuring his spine and neck. The claim against the City of Bay St. Louis was based upon the allegations that the City failed to properly supervise the Plaintiff and for violations of the Mississippi Fire Prevention Code.

In determining that the second prong of the PPF had been met, the Court in *Kiagler* examined the social value and economic cost of operating the Gym and supervising activities of the gym, and stated, "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." *Kiagler* at 582, ¶23. Unlike in *Kiagler*, in the present case MFC has offered no evidence that the acts which caused the accident were the subject of a policy analysis and no such evaluation was performed by the Court.

In *Strange v. Itawamba County School District*, a minor was seriously injured when he fell from the bed of a pick up truck while being transported by another student on the school grounds of Itawamba Agricultural High School in Fulton, Mississippi during school hours. *Strange* at 1188, ¶2. The Court, in determining that the school district was entitled to immunity pursuant to Miss. Code Ann.§11-46-(1)(d), found that the second prong of the PPF test was met only after examining "whether the district, through its employees, in either allowing students to ride in the back of a pick up truck on school grounds, or ignoring the fact that the students were riding on school grounds in this matter, impacted public policy. *Strange* at 1191,¶12. The Court in *Strange* went on to state, "the focus is on the nature of the actions taken, and whether they are susceptible to policy analysis. *Id.* Unlike in *Strange*, in the present case, MFC has offered no evidence that the acts which caused the accident were the subject of a policy analysis and no such evaluation was done by the Court.

In *Knight v. MTC,* a driver and an occupant in a car accident died after their vehicle struck a bridge on Mississippi Hwy. 8 in Calhoun County, Mississippi. A lawsuit was filed against the Mississippi Transportation Commission (MTC) alleging that the MTC negligently maintained Hwy. 8 and had failed to warn of dangerous conditions on the road, thus, causing the accident. *Knight* at 964, ¶1.

The MTC filed a Motion for Summary Judgment pursuant to Miss. Code Ann. §11-46-9(1)(d) (Supp. 2008), claiming that road maintenance was an exercise of MTC's discretionary function. In support of its Motion, MTC submitted an affidavit from a former MTC engineer stating that "the MTC was authorized by statute to use its discretion in maintaining the roads under its jurisdiction and consider the policy implications of doing so." *Knight* at 966. ¶7.

The affidavit further explained that:

> Because firms were limited for purposes of performing maintenance on existing state highways, the district engineer had to make a judgment call on work that appeared to be necessary as to what type of work was to be performed in order to maintain or upgrade the various highways within the district. There must be a balancing of competing needs for maintenance within the district and judgment calls made as to when and where work will be performed as to what extent that any safety upgrades are necessary or desirable considering the funding available for each year and the needs and/or conditions of the various highways within the district.

Knight at 966. ¶7.

The Circuit Court granted Summary Judgment to MTC reasoning that "the maintenance of Highway 8 at the time of the accident required that exercise of engineering judgment and judgment as to the allocation of limited financial resources in order to perform maintenance on the various public highways within the district where the bridge is located." *Knight* at 966, ¶3. In *Knight*, the Court

of Appeals found that the second part of the PPF test was met and granted immunity to the governmental entity only after if determined that "the duty to maintain highways and place warning signs clearly requires the MTC to consider the policy considerations of doing so." *Knight* at 970, ¶28. In the present case, there is no proof that policy decisions were made with regard to allocation of limited resources regarding the acts of MFC which caused the accident and injuring Wiltshire.

MFC quotes from *Knight* claiming that, "there is a presumption that an agent's acts are grounded in policy when exercising discretion."*Id.* This premise does not apply in the present case. This citation from *Knight* addresses situations where there is an established governmental policy which expressly or impliedly by statute, regulation, and agency guidelines allows the agent discretionary authority. In the present case, there is no such expressed or implied discretionary authority which is provided by statute, regulation or guideline. In *Knight*, the Court found that "the statute governing the placement of traffic-control devises is found in Mississippi Annotated Section 63-3-303 (Rev. 2004). Section 63-3-303 states in part:

> The commissioner of public safety and the State Highway Commission shall place and maintain such traffic-control devices conforming to its manual and specifications, upon all state and county

> highways *as it shall be necessary* to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic.

Knight at 970, ¶ 26.

The Court continued and stated that "the duty to maintain highways and place warning signs clearly requires the MTC to consider the positive considerations of doing so." *Knight* at 970, ¶28. In the present case MFC offered no evidence that the acts which caused the accident were the subject of a policy analysis or involved the expressed or implied discretion of MFC as set out in a statute, regulation or guideline and no such evaluation was performed by the Court.

In determining whether the second prong of the PPF test had been met, the Court in *Dotts, Kiagler, Strange* and *Knight* considered the specific actions which the governmental entity was performing which caused the injury. Such evaluation and proof is absent in the present case. Therefore, the prerequisites for the satisfaction of the second prong of the PPF test that were met in *Dotts, Kiagler, Strange* and *Knight* by the evaluation of the accident causing actions of the governmental entity, have not been met in the case *sub judice*.

In *Pritchard*, in analyzing whether the professor was entitled to immunity under the second prong of the PPF test for his failure to put down dry sand in order to avoid molten iron from burning the ankle of a student, the Court said, "it

is difficult for this Court to fathom how [the professors] failure to put down dry sand involved a policy judgment of a social, political, or economic nature. The failure to put down dry sand did not necessitate a selection between alternative policy objectives, and, like driving an automobile in the course and scope of employment, could not have been based upon any governmental regulatory purpose. Therefore, the act is not susceptible to policy analysis. We find that USM is not protected by discretionary function immunity and that it is liable for [the professor's] negligence pursuant to the waiver of sovereign immunity qualified at Miss. Code Ann. §11-46-5. *Pritchard* at 583, ¶40. Much like the facts in *Pritchard,* it is difficult to fathom how the acts of MFC in causing the accident in this case by allowing dogs to run free, allowing observers in close proximity to dangerous livestock and cluttered, narrow isles and allowing inexperienced individuals to handle dangerous in these tight cluttered isles in close proximity and not participants are subject to a policy analysis. In any event, it was MFC's burden to prove their entitlement to immunity which they failed to do.

CONCLUSION

Based upon the foregoing, Wilshire respectfully request the Court to reverse and remand the Circuit Court's grant of immunity pursuant to Miss. Code Ann. §11-46-1(d) to MFC for its actions in causing to Wiltshire's injuries.

DATED, this the 30th day of August, 2010.

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CERTIFICATE OF SERVICE

I, Joseph E. Roberts, Jr., do hereby certify that I have this day forwarded, by United States mail, postage prepaid, a true and correct copy and an electronic copy of the above and foregoing Reply Brief of Appellant to the following:

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