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

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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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 the possible disqualification or recusal.

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6. Honorable Malcolm Harrison, Hinds County Circuit Court Judge

7. Honorable Bobby DeLaughter former Hinds County Circuit Court Judge.

JOSEPH E. ROBERTS, JR.

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Whether the Circuit Court erred in granting Summary Judgement on the basis that the Mississippi Fair Commission and the Institutions of Higher Learning are immune from liability pursuant to Miss. Code Ann. §11-46-9(1)(d)

II. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION OF THE COURT BELOW:

On February 5, 2002, the Plaintiff, Sherry Wiltshire, was on the premises of the Mississippi State Fairgrounds to visit her son who was participating in the Mississippi Junior Roundup at the Dixie National Livestock Show, when she was injured when she was trampled by an 1100 pound cow in one of the livestock barns. (R7) The Mississippi Fair Grounds and Livestock Shows are under the control of the Mississippi Fair Commission (R16, 62) On May 2, 2003, Plaintiff filed a Complaint against the State of Mississippi, Board of Trustees of the State Institutions of Higher

Learning (IHL), the Mississippi Fairgrounds Commission (MFC)[1] and Defendants A - Z, who were the entities that were responsible for the Mississippi Junior Roundup, alleging that their joint negligence had contributed to Plaintiff's injuries. (R6) The State of Mississippi and MFC filed their Answer and Defenses on August 14, 2003, (R17) IHL filed their Answer on August 29, 2003. (R27) Both of the Answers plead Sovereign immunity as a defense to the Plaintiff's law suit.

On August 20, 2004, the State of Mississippi and MFC filed a Motion to Dismiss or in the Alternative for Summary Judgment alleging that the State of Mississippi was not a proper party, that MFC and IHL were immune from the claims of the Plaintiff in that they had Sovereign immunity pursuant to Miss. Code Ann. §11-46-9(1)(d)(g)(p)(v); that Plaintiff was a mere licensee and there was no evidence of any intentional or wanton act by the Defendants which caused Plaintiff's injury and further alleging that the sole cause of the Plaintiff's injury was "a young boy's inability to maintain safe control over a large domestic cow for reasons which may never be known or understood." (R36) On August 27, 2004, Plaintiff filed a Motion to Stay or in the Alternative for Additional Time to Respond to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment requesting to take the

[1]The Mississippi Fair Commission was originally misidentified as the Mississippi Fairgrounds Commission.

30(b)(6) deposition of the Defendants prior to the Court ruling on the Motion.(R74) On September 7, 2004, the Court entered an Agreed Order staying the case until five days after the completion of the 30(b)(6) depositions. (R77)

On August 14, 2004, IHL filed its Motion to Dismiss or in the Alternative for Summary Judgment based on substantially the same grounds as MFC's Motion.(R80) On August 21, 2004, Plaintiff filed a Motion to Stay or in the Alternative for Additional Time to Respond to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment as to IHL's Motion. (R107) An Agreed Order was entered as to that Motion on November 3, 2004. (R110)

On January 26, 2005, Plaintiff filed an Amended Complaint joining as Defendants the individuals who were responsible for controlling and supervising the cow that injured the Plaintiff. (R111) An Agreed Order allowing the Amended Complaint was entered on February 2, 2005. (R123) The State and MFC filed their Answer to the Amended Complaint on February 4, 2005. (R125) IHL filed its Answer and Defenses to the Amended Complaint on February 7, 2005. (R130) The Defendants who owned the cow filed their Answer on June 6, 2005. (R137) Micah Dingler, the individual who was attempting to control the cow at the time of the Plaintiff's injury, filed his Answer on July 5, 2005. (R143) The Motion to Dismiss or in the Alternative for Summary Judgment and Answer and Defenses of the mother

and stepfather of Micah, Charlene May and Phillip May, was filed on July 5, 2005. (R148) On July 11, 2005, Charlene May and Phillip May filed a Motion to Dismiss or in the Alternative for Summary Judgment.

(R152)

On January 23, 2006, Plaintiff filed her Joint Response and Memorandum of Authorities on Defendant's Motion to Dismiss or in the Alternative for a Motion of Summary Judgment. (R159) On January 26, 2006, IHL filed its Reply to Plaintiff's Response to Summary Judgment. (R285) On January 27, 2006, the State and MFC filed their Rebuttal in Support of Motion to Dismiss or in the Alternative for Summary Judgment. (R290) On January 30, 2006, an Agreed Judgment of Dismissal with regard to the claims against the State was entered. (R295) The Circuit Court conducted a hearing on MFC's and IHL's Motions to Dismiss pursuant to Rule M.R.C.P. 12(b) and for Summary Judgment. An Order Denying the Motions of MFC and IHL to Dismiss or in the Alternative for Summary Judgment was entered on March 8, 2006. (R296; RE12)

Less than seven weeks later, on April 25, 2006, IHL renewed its Motion for Summary Judgment which had previously been denied by the Court. To this Motion IHL attached the Affidavit of Susan Holder, who was the State Program Director for 4-H Youth Development through the Mississippi State University Extension Service,

discussing the 4-H Youth Program and the history of the Mississippi Junior Roundup, and also making the self-serving conclusory statement that the Junior Roundup "serves to promote the importance of social, political and economic objectives." (R302) On May 5, 2006, an Order was entered granting the Motion to Dismiss as to Phillip May and denying the Motion to Dismiss as to Charlene May. (R321) On July 12, 2006, Plaintiff filed her Response and Memorandum in opposition to IHL's Motion for Summary Judgment. (R324) On June 19, 2006, IHL replied to Plaintiff's Response and Memorandum in Opposition to Defendant's Renewed Motion for Summary Judgment. (R333) On June 23, 2006, MFC filed their qualified Joinder with IHL's Motion. (R339) On September 5, 2006, Charlene May filed a Memorandum Brief in Support of Defendant's Renewed Motion for Summary Judgment. (R341) On September 5, 2006, Charlene May Renewed her Motion for Summary Judgment. (R353) On September 8, 2006, MFC filed a Supplemental Motion to Dismiss or in the Alternative for Summary Judgment. (R387) On September 12, 2006, Plaintiff filed her Response and Memorandum in Opposition to MFC's Renewed Motion for Summary Judgment. (R392) On September 12, 2006, Plaintiff filed her Supplemental Response and Memorandum in Opposition to Defendant's Supplemental Motion to Dismiss or in the Alternative for Summary Judgment. (R459) On October 12, 2006, MFC filed its Rebuttal in Support of

Supplemental Motion to Dismiss or in the Alternative for Summary Judgment. (R466)

On November 2, 2006, without hearing, the Circuit Court, entered its Memorandum and Opinion and Order granting MFC's and IHL's Motion for Summary Judgment pursuant to Miss. Code Ann. §11-46-9(1)(d), determining that MFC and IHL were immune, from liability in the case pursuant to the Mississippi Tort Claims Act. (R471; RE6) It is from this Order that this Appeal is taken.[2]

B. FACTS

On February 5, 2002, Mrs. Wiltshire arrived at the Mississippi State Fairgrounds ("Fairgrounds"), in Jackson, to visit her son, Josh, who was participating in the Mississippi Junior Roundup at the Dixie National Livestock Show. (R201) As Ms. Wiltshire was walking down a narrow aisle cluttered with lawn chairs, "show boxes", fans, tools, and propane heaters to meet her son, an 1100 pound cow named "Nola" trampled Mrs. Wiltshire causing severe injury to her right leg. (R206, 429) Mrs. Wiltshire was rushed to the Baptist Hospital in Jackson where she was hospitalized for eleven days. (R206)

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There was no certificate in the Order pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure, as to the finality of the judgment in the Order. The remainder of the claims were settled and the Judgment of Dismissal with Prejudice as to the remaining claims was entered on January 23, 2009. (R477)

Prior to the accident, 12 year old Micah Dingler had been leading Nola to get some water when she got spooked. (R424) Micah was inexperienced in leading this cow at the Mississippi Fairgrounds. (R425, 426) It has been alleged by the Plaintiff that Nola was spooked either by an unleashed dog and/or by the narrow cluttered aisles that MFC and IHL allowed to exist in the livestock barn. (R428) (R330) Defendants, Debbie and Mike Alexander ("Alexanders"), were the owners of the cow that Micah was leading before the accident occurred. (R222)

According to the testimony, MFC and IHL were the entities which jointly operated the Mississippi Junior Roundup and were concurrently responsible for the safety and the entities of the livestock barns where the accident occurred. (R17, 38, 43, 44)

III. SUMMARY OF THE ARGUMENT

The Circuit Court erred in considering the renewed Motions for Summary Judgment of the Defendants, the Mississippi Fair Commission and the Institutions of Higher Learning. The arguments set out in the renewed Motions for Summary Judgment were a mere rehash of the arguments that the trial court had previously found were unsupported by the evidence in initially denying the Motions for Summary Judgment. The new evidence that was produced by the Defendants in the form of the affidavit of Susan Holder, who is the State Program Leader for 4-H Youth

Development through the Mississippi State Extension Service, was not new evidence that was unavailable to the Defendants at the time of the previous hearing and the factual allegations in the affidavit should have been disregarded by the trial court. Based upon the foregoing, the trial court erred in rehearing the Motions for Summary Judgment filed by the Defendants MFC and IHL.

Even if the Court was not in error in hearing the renewed Motions for Summary Judgment, the Court was in error in granting the Motions for Summary Judgment. The trial court's basis for granting the Motion for Summary Judgment was that MFC and IHL were immune from liability pursuant to Miss. Code Ann. §11-46-9(1)(d). This statute grants immunity to governmental agencies if the actions they committed which caused the injury were discretionary in nature **and** involved a social, economic, or political policy analysis or decision. The Plaintiff does not contest that the first prong of the test was met by MFC and IHL. The second prong of the test which requires the governmental agency to prove that the actions which caused the injury involved a social, economic or political policy analysis or decision was not met.

While the Affidavit of Susan Holder submitted by the Defendants in support of the second prong of the test does discuss the laudable purpose of 4-H and the Mississippi Junior Roundup, it does not discuss whether the actions of the Defendants

which caused Plaintiff's injuries, i.e. allowing dogs to run unleashed,[3] leaving aisles cluttered with observers in close proximity to dangerous livestock and allowing inexperienced persons to handle potentially dangerous livestock, are activities that are grounded in "social, economic or political policy." For that reason, MFC and IHL did not meet their burden of proving that they were entitled to immunity pursuant to Miss. Code Ann. §11-49-9(d). Based upon the foregoing, the trial court erred in granting Summary Judgment to MFC and IHL.

IV. ARGUMENT

A. ISSUE

Whether the Circuit Court erred in considering the renewed Motions for Summary Judgement of the Defendants, the Mississippi Fair Commission and Institutions of Higher Learning.

STANDARD OF REVIEW

"A Motion to Set Aside or Reconsider an order granting Summary Judgment will be treated as a motion under Rule 59(e). *Allen v. Mayer* 587 So. 2d 255, 261 (Miss.1991)" *Brooks v. Roberts* 882 So. 2d 229, 233 (Miss. 2004) "A motion for reconsideration is to be treated by the trial court as a post-trial motion under M.R.C.P. 59(e). *Boyes v. Schlumberger Tech. Corp.*, 792 So. 2d 262, 265

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[3]The Fair commission has now changed its policy and no longer allows dogs on the premises other than those that aid the handicapped. (R265)

(Miss. 2001)(quoting In re *Estate of Stewart*, 732 So. 2d 255, 257 (Miss. 1999)). *Id.* Regarding the propriety of reconsidering a judgment, the United States Court of Appeals for the Fifth Circuit has stated that " '[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly.' A motion for reconsideration may not be used to rehash rejected arguments or introduce new arguments." *LeClerc*, 419 F.3d at 412 n. 13 (internal citation omitted). Nor may it be used "to resolve issues which could have been raised during the prior proceedings." *Westbrook*, 68 F.3d at 879 (citations omitted)." *Point South Land Trust v. Gutierrez*, 997 So. 2d 967, 976 (Miss. Ct. App. 2008)

DISCUSSION

IHL and MFC filed their original Motions to Dismiss or in the Alternative for Summary Judgment alleging sovereign immunity pursuant to Miss. Code Ann. §11-46-9(1)(d) on August 14, 2004 (R107) and August 20, 2004 (R36) respectively. The trial court entered its Order denying the Motions for Summary Judgment of MFC and IHL to Dismiss or in the Alternative for Summary Judgment on March 8, 2006. (R296; RE12) The trial court in its Memorandum Opinion and Order Denying the Motions for Summary Judgment of MFC and IHL specifically addresses Miss. Code Ann. §11-46-9(1)(d), and whether MFC and IHL were entitled to immunity pursuant to the above section. In determining that MFC and IHL were not entitled to Summary Judgment on this issue, the trial court

made the following determination:

> the record presented to the Court in the case sub *Judice* did not contain any evidence, by affidavit or otherwise, that the MFC or IHL engaged in any policy or any decision-making process concerning any of the aforesaid matters complained of by the Plaintiff. It thus follows, as the Court held in [*Bridges v. Pearl River Water Supply Dist.*, 793 So. 2d 584, 589-90(Miss. 2001)], that granting the MFC's and IHL's dispositive motions on the grounds of governmental immunity is premature.

Memorandum Opinion and Order (R298; RE14)

On April 25, 2006, less than seven weeks after the trial court entered its Order denying the dispositive motions of MFC and IHL, IHL renewed its Motion for Summary Judgment this time attaching the affidavit of Susan Holder discussing the 4-H program, and also making the self serving allegations that the program served to promote "important social, political and economic objectives." (R302) MFC filed its qualified Joinder with IHL's Motion on June 23, 2006. (R339)

Although the Affidavit of Ms. Holder addressed generally the 4-H program and the history of the Mississippi Junior Roundup and the laudable objectives of these programs, it did not examine the actions which Plaintiff alleges were committed by IHL and MFC, which caused and/or contributed to Plaintiff's injuries i.e.: failing to insist that dogs were leashed, and allowing observers in close proximity to the dangerous livestock in narrow, cluttered aisles. On November 2, 2006, without the benefit of a hearing on the renewed Motions, the

trial court entered its Memorandum Opinion and Order reversing its previous decision and granting MFC's and IHL's Motion for Summary Judgment pursuant to Miss. Code Ann. §11-46-9(1)(d).(R471; RE6) MFC's and IHL's argument in their renewed Motions for Summary Judgment were merely "rehashes" of the same argument simply with the addition of the Affidavit of Susan Holder.

"[I]n order to succeed on a Rule 59(e) Motion, the movant must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii) need to correct a clear error of law or to prevent manifest injustice. *Bang v. Pittman*, 749 So.2d 47, 52-53(Miss. 1999). *Brooks v. Roberts*, 882 So. 2d 229. The Supreme Court reviews a trial court's denial of a Rule 59 motion under an abuse of discretion standard. *Bang*, 749 So. 2d at 52." *Brooks v. Roberts*, 882 So. 2d 229, 233 (Miss. 2004). None of the prerequisites to the Court reconsidering the Motions exists.

Although the Circuit Court order refers to a slight shift in the Court's thinking on the public policy prong, the public policy function test was first adopted by the Mississippi Supreme Court in *Jones v. Miss. Dept. Of Transportation*, 744 So. 2d 256 (Miss. 1999) which was well before the trial court initially considered the Summary Judgment issue. There had been no change in controlling law which should have necessitated the Circuit Court considering Motions for Reconsideration of the previously denied Motions for Summary

Judgment.

With regard to the availability of new evidence not previously available, the only additional evidence which MFC and IHL submitted in support of their renewed motions was the Affidavit of Susan Holder. There is no reason to believe, and neither MFC or IHL offered any proof, that this affidavit, or the information contained therein was not available seven weeks before MFC and IHL elected to refile their Motions.

Finally, there is no need of correcting clear errors of law or to prevent manifest injustice. There is no allegation that there had been a clear error of law or that justice would not have been served by the previous denial of the Motion for Summary Judgment.

In that MFC and IHL failed to meet their burden of proof that at least one of the factors existed to allow the trial court to reconsider its previous ruling, the trial court clearly abused its discretion in reconsidering MFC's and IHL's Motions for Summary Judgment.

B. ISSUE

Whether the Circuit Court erred in granting Summary Judgement on the basis that the Mississippi Fair Commission and the Institutions of Higher Learning are immune from liability pursuant to Miss. Code Ann. §11-46-9(1)(d).

STANDARD OF REVIEW

A *de novo* standard of review is used to examine a lower court's grant or denial of summary judgment. *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1040 (Miss. 2003). The proponent of a summary judgment motion bears the burden of showing that there are no genuine issues of material fact. *Id.* The Supreme Court or court of Appeals must all evidence in the light most favorable to the nonmoving party. *Id.* at 1041.

Summary judgment is proper only if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact." M.R.C. P. 56(c). For summary judgment purposes, a fact is "material" if it tends to reSolve any of the issues properly raised by the parties. *Glinsey v. Newson*, 911 So. 2d 661, 663 (Miss. App. 2005) (citing *Webb v. Jackson*, 583 So. 2d 946, 949 (Miss. 1991)). When considering a Motion for Summary Judgment, a trial court must view the sources listed above in the light most favorable to the non-moving party. *Id.* (citing *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 362 (Miss. 1983)). However, "[i]ssues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." *Titus v. Williams*, 844 So. 2d 459, 464 (Miss. 2003). Also, the moving party has the burden of demonstrating that no genuine issue of material

fact exists. *Id.* Furthermore, a summary judgment motion should be denied unless a court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim. *Rush v. Casino Magic Corp.*, 744 So. 2d 761 (Miss. 1999).

DISCUSSION

The Circuit Court granted MFC's and IHL's Motions for Summary Judgment based upon Miss. Code Ann. §11-46-9(1)(d). Miss. Code Ann. §11-46-9(1)(d) states, "(1) 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 or perform a discretionary function or duty on the part of a governmental entity or employee therefore, whether or not the discretion be abused."

The Court in *Jones v. Mississippi Dept. Of Transportation, 744, So. 2d 256, 260 (Miss. 1998)* (citing *United States v. Gaubert,* 499 U.S. at 323, 111 S. Ct. 1267) explained that in determining whether governmental conduct is discretionary so as to afford the governmental entity immunity pursuant to Miss. Code Ann. §11-46-9(1)(d), "we employ the two-part public policy function test. The test requires a determination of (a) whether the activity involves an element of choice or judgment, and if so, then it must be determined (b) whether the choice or judgment involves social, economic, or political policy." This test is also

recognized in *Dotts v. Pat HarriSon Waterways District*, 933 So. 2d 322, 326 (Miss. App. 1999). *Dotts* is cited by the trial court as authority for its Order granting Summary Judgment in favor of MFC and IHL.

The Mississippi Court of Appeals in *Chapman v. City of Quitman*, 954 So. 2d 468 (Miss. App. 2007) explains the analysis this way:

> In determining whether governmental conduct is a "discretionary function or duty" within the meaning of Section 11-46-9(1)(d) of the MTCA, this Court must utilize the public policy function ("PPF") test as adopted by the Mississippi Supreme Court in *Jones v. Mississippi Department of Transportation*, 744 So. 2d 256, 260 (¶11)(Miss. 1999)(citing *United States V. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991)). The two prongs of the PPF test properly acknowledge the purpose of the discretionary function immunity, which is "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." Id. at (¶10) (citing *Gaubert*, 499 U.S. at 323, 111 S. Ct. 1267). The first prong requires a determination of "whether the activity involved 'an element of choice or judgment.'" *Id.* (Quoting *Gollehon Farming v. United States*, 17 F. Supp. 2d 1145m, 1154 (D.Mont. 1998)). If answered in the affirmative, the second prong involves a determination of "whether the choice involved social, economic or political policy." *Id*; see also *Stewart v. City of Jackson*, 804, So. 2d 1041, 1047(¶ 11) (Miss. 2002) (holding that decisions regarding transporting elderly patient did not involve Social, economic, or political policy); *Dotts v. Pat Harrison Waterway Dist.* 933 So. 2d 322, 326 (¶ 9) (Miss. Ct. App. 2006) (finding that waterway district's decisions regarding the operation of swimming facilities were grounded in public policy).

Id. at 475

Applying the PPF test to the facts of this case, Plaintiff does not contest that the first prong of the test is met. The activity which caused the injury involves an element of choice or judgment. In order to prevail on their claim of immunity,

however, MFC and IHL had the additional burden of proving that the second prong of the PPF test was also met. The second prong of the test involves a determination that the activity which caused the injury involves social, economic or public policy. This prong was not met by MFC and IHL, and therefore, they are not entitled to immunity for their actions which caused the Plaintiff's injury.

The trial court granted summary judgement in this case in favor of MFC and IHL and opined that the second prong of the PPF test had been met based upon the affidavit of Susan Holder that was filed in support of the renewed Motions for Summary Judgement. Although the Affidavit is very thorough in describing the laudable purposes of the 4-H program and the Junior Rodeo Roundup, it does not offer any insight into whether the actions of MFC and IHL, in allowing dogs to run free at the show unleashed or allowing observers in close proximity to dangerous livestock in cluttered, narrow aisles, or allowing inexperienced participants to handle dangerous animals in this tight proximity are activities that are grounded in "social, economic or political policy". While the trial court observed in its Order that the law requires that before immunity is granted the movant has the burden of proving that the "actions" of the Defendants for which immunity is claimed be susceptible to a public policy analysis, the Order does not address how the actions of the organizers of the livestock show which caused Plaintiff's injuries, by allowing dogs to roan free, leaving livestock in close

proximity to nonparticipants in tight cluttered aisles and allowing inexperienced participants to handle dangerous animals in this tight proximity, is susceptible to a social, economic or political policy analysis. *Dotts* explained the rationale for the second prong of the PPF test this way,

> This prong of the discretionary exception test protects only those discretionary actions or decisions based on considerations of public policy." *Elder v. United States*, 312 F. Ed 1172, 1176 (10th Cir. 2002) (citing *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed.2d 531 (1988))." *Dotts* at 327 "The purpose is to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* (Quoting *Berkovitz*, 486 U.S. at 536-37, 108 S. Ct. 1954). The pertinent inquiry, then, is whether the decision "implicates the exercise of a policy judgment of a social, economic, or political nature." *Id.* At 1181 (quoting *Duke v. Dept. of Agric.*, 131 F. Ed 1407, 1411 (10th Cir. 1997)).

Dotts at 327.

"Our focus is on the nature of the acts taken and their susceptibility to policy analysis; we do not examine the actual subjective thought processes of the government decision maker. *Dotts at 328 (also cited in Pritchard v. Von Houten*, 960 So. 2d 568, 582 (Miss. App. 2007)).

Although the trial court in its Order cites to *Dotts* as support for its opinion, the Court of Appeals in *Pritchard,* in distinguishing *Dotts,* found that in *Dotts,* unlike in this case, the Court examined whether the alleged actions which caused the injury "the enclosure of a swimming area, the placement of signage, and the provision of safety equipment and lifeguards were grounded in public policy

because the costs and practicality of those decisions could be weighed against their value to the public. *Id.* at 327-28 (¶ 16)." *Pritchard* at 582 Additionally, in *Dotts*, the Court observed that the trial "court also found that the decisions of PHWD about the enclosure of the swimming area, the signage at the pond, and the provisions concerning lifeguards and lifesaving equipment are all grounded in public policy. After weighing the costs and practicality of these provisions against the value to the public to have such provisions, the trial court found PHWD's decisions to be grounded in public policy." *Dotts* at 327.

Unlike in *Dotts,* the trial court in this case did not examine whether the actions which cause the injury were susceptible to a policy analysis. The trial court instead improperly focused on the organization itself and "the policy implications of programs such as 4H and the Future Farmers of America . . . and how these groups conduct their livestock shows are susceptible to policy analysis" (Memorandum and Order R475). Instead of examining the actions which caused the injury, the trial court simply examined whether the organizations, 4-H, FFA, Junior Rodeo Roundup and "such programs" are laudable programs. Plaintiff would not disagree that "such programs" are laudable programs, but proving that fact does not provide MFC and IHL immunity. For the second prong of the PPF test to be met, MFC and IHL had the burden of proving that the actions which caused the injury were susceptible to a public policy analysis by MFC and IHL.

The Affidavit does not speak at all to this issue.

Additionally, MFC and IHC had the burden of proving that each of the actions which are alleged to have caused the injury to the Plaintiff were actions which would meet the second prong of the test. The Mississippi Court of Appeals explained this burden as follows: " We note that the applicability of one or more immunity provisions does not necessarily provide immunity for separate, independent acts or omissions that contribute to the damage or injury made the basis of a claim or claims. In this regard, each alleged negligent act or omission must be considered independently to determine whether immunity is appropriate under any MTCA exemption." *Chapman v. City of Quitman* at 476 FN5 Therefore, even if MFC and IHL are entitled to immunity for one part of their actions, such fact does not necessarily provide them immunity for other actions which are not necessarily the subject of a policy analysis.

There is a difference between acts of governmental entities which call for policy decision and simple acts of negligence committed by a governmental employee. As Justice Kitchens explained in his dissent in *Covington County School District v. Magee,* 29 So. 3d 1,(Miss. 2010):

> *Stewart v. City of Jackson*, 804 So. 2d 1041(Miss. 2002), is helpful in making such a determination. The plaintiff in *Stewart* alleged that she fell and was injured when a bus driver employed by the City of Jackson failed to assist her into an adult day-care center. *Id.* at 1047-48. The plaintiff contended that, although the defendant bus driver

> was acting with discretion when she decided not to assist the plaintiff into the adult day-care center, the acts or omissions of the City of Jackson and the bus driver were not policy-based, and that, therefore, the City of Jackson was not immune pursuant to Section 11-46 -9. *Id.* at 1048.
>
> This Court agreed with the plaintiff, noting that it "must distinguish between real policy decisions implicating governmental functions and simple acts of negligence which injure innocent citizens." *Id.* (quoting *Gale v. Thomas*, 759 So. 2d 1150, 1162 (Miss. 1999)). The Court held that, because the acts or omissions of the city's bus driver did not involve real policy decisions implicating governmental functions, the Mississippi Tort Claims Act did not afford immunity protection to the City of Jackson.

*Id.*at 9

In *Prichard v. Van Houten*, 960 So. 2d 568 (Miss. App. 2007) the Mississippi Court of Appeals considered a case where a student was injured when a professor at USM failed to take reasonable precautions during an "iron pour" in an artistic iron casting class. The allegation of negligence was that USM professor failed to insure that students weren't burned from molten iron spillage by failing to put down dry sand before the iron pour. The Court found that their was no disagreement that the negligent actions of the professor were not ministerial and involved an element of choice or discretion, however, the Court in *Prichard* recognized that "not all discretionary duties are protected by immunity. *Jones*, 744 So. 2d at 260. While the majority of day-to-day acts in governmental operations involve the exercise of Some form of discretion, it is only those decisions which are based on considerations of public policy that are protected.

Dotts, 933 So. 2d at 327 (¶ 15) (citing *Elder v. U.S.* 312 F. 3d 1172, 1176 (10th Cir. 2002))" *Pritchard* at 502 In reversing and remanding the case for a trial limited to damages only, the Court of Appeals in *Prichard* found that the actions of the profesSor, while discretionary, did not provide him immunity stating:

> in this case, it is difficult for this Court to fathom how (the professor's) 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 government 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 Von Houten's negligence pursuant to the waiver of sovereign immunity codified at Mississippi Code Annotated section 11-46-5. Therefore, we reverse and remand this case for a trial limited to the issue of damages.

Pritchard at 583

As in the present case, in *Pritchard* the governmental entity argued that the actions at the iron pour favored a "well rounded education." The Court of Appeals rejected that argument reasoning "in *Duke v. Department of Agriculture*, 131 F.3d 1407, 1411 (10th Cir. 1997), the Tenth Circuit rejected the idea that a choice involving any hint of policy concerns would be within discretionary function immunity because that approach would "eviscerate" the social, economic, or political policy prong of the test and would allow the discretionary function immunity exception to "swallow the FTCA's sweeping waiver of sovereign immunity." *Duke* reiterated *Gaubert's* holding that the task before the court was

to discern if the decision or nondecision implicated the exercise of a policy judgment of a social, economic or political nature. *Id.* at 141" *Pritchard* at 583.

In the present case the Circuit Court made no examination of whether the actions by the defendants were susceptible to a policy analysis. *Pritchard* speaks to this by stating, '[i]n certain circumstances, it may be obvious that a decision implicates none of the public policies that ordinarily inform an agency's decision making.' *Elder*, 312 F.3d at 1182. Thus, the activity of driving an automobile in the course and scope of an official's employment, though requiring the official's use of discretion, is not protected by discretionary function immunity because the official's discretionary decisions could not be based upon any regulatory purposes the government authority seeks to accomplish. 583 *Gaubert,* 499 U.S. at 325 n. 7, 111 S. Ct.1267" *Pritchard* at 582.

In the present case there was no proof that the actions of MFC and IHL in causing Plaintiff's injuries were the subject of policy decisions. In fact in the deposition of Gregory Young, the 30(b)(6) representative of MFC acknowledged upon being shown photographs of a cluttered aisle, that the aisles should not be cluttered, "because it's kind of - it looks unsafe, it's quite crowded." (R272)

The actions of MFC and IHL in the manner in which they maintained the premises of the livestock barn were simple acts of negligence, like the negligent driving of a car, and were certainly not the subject of a policy decision or analysis.

For the reason that MFC and IHL failed to meet their burden in proving the second prong of the PPF test, the trial court erred in granting Summary Judgment in this case.

Additionally there still remain genuine issues of material fact regarding Ms. Wiltshire's claims under Miss. Code Ann. §11-46-9(v). Assuming arguendo, if the MFC's and IHL's actions or inactions are determined to be discretionary, they are still not entitled to immunity. The relevant provision of the statute provides immunity for acts only if it was:

> (v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an 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.

Miss. Code Ann. §11-46-9(v). Under this statute, the governmental entity will not be granted immunity if the Plaintiff can prove (1) a dangerous condition, (2) on a governmental entity's property, (3) which the governmental entity caused by negligence or wrongful conduct, or of which it had actual or constructive notice and adequate time to protect from or warn against, and (4) the condition was not open and obvious. *Dotts v. Pat Harrison Waterway District* at 328 MFC and IHL had constructive knowledge of the dangerous condition existing on the Fairgrounds. They allowed participants to place their belongings in the aisles,

causing congestion and clutter. They permitted dogs to run loose upon the fairgrounds, exciting the cattle and creating a probability of injury. These dangerous conditions caused and/or contributed to Ms. Wiltshire's injuries. The Defendant's failure to cure these dangerous conditions, when they knew or should have known of the danger, constitutes negligence.

The Defendants permitting the participants to place their belongings in the aisles, made the animals have to walk down a narrower aisle in close proximity to non-participants, thus creating a dangerous condition upon the premises of which the Defendant had actual or constructive knowledge. This dangerous condition also made the livestock more susceptible to being spooked. The Defendants had actual or constructive knowledge of the dangerous condition created by the participants, and negligently failed to protect Ms. Wiltshire. MFC and IHL have not provided sufficient evidence proving that they are entitled to immunity under Miss. Code Ann. §11-46-9(v); and genuine issues of material fact exist regarding Defendant's liability for the dangerous conditions upon the Fairgrounds, thus precluding summary judgment.

V. CONCLUSION

As demonstrated above this Court erred in not only considering the issues on the renewed Motions for Summary Judgment, but also in granting Summary Judgment for the reasons stated. The actions complained of by the Plaintiff,

allowing dogs to run unleashed, allowing the aisles to be cluttered while observers were in close proximity to dangerous animals and allowing inexperienced participants to handle these dangerous animals in these tight quarters were simple acts of negligence and not actions grounded in public policy decisions. The Summary Judgment granted by the Circuit Court on behalf of the Defendants should be reversed and this case should be remanded to the Circuit Court for trial.

DATED, this the 18th day of May, 2010.

Respectfully,

SHERRY WILTSHIRE

By: _____
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VI. 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 Brief of Appellant to the following:

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THIS, the 18th day of May, 2010.

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