

**IN THE SUPREME COURT OF MISSISSIPPI**

**JASON FARRIS  
APPELLANT**

**v.**

**CAUSE NO. 2009-CC-01919**

**MISSISSIPPI DEPARTMENT OF  
TRANSPORTATION  
APPELLEE**


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**BRIEF OF APPELLEE,  
MISSISSIPPI DEPARTMENT OF TRANSPORTATION**

**ORAL ARGUMENT IS NOT REQUESTED**

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**ON APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI**

**THOMAS A. WICKER, MS** 

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**APPELLEE**



**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. Jason Farris, Appellant
2. Greer, Russell, Dent & Leathers, PLLC, Attorneys for Appellant  
Frank A. Russell, Esq., and Jeffrey D. Leathers, Esq.
3. Mississippi Department of Transportation, Appellee
4. Holland, Ray, Upchurch & Hillen, P.A., Attorneys for Appellee  
Thomas A. Wicker, Esq.

RESPECTFULLY SUBMITTED, this the 16<sup>th</sup> day of August, 2010.

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.

By:   
THOMAS A. WICKER, MSB   
*Attorney for the Appellee,  
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## **STATEMENT REGARDING ORAL ARGUMENT**

The issues presented for appeal in this matter can be resolved on the basis of the record and briefs of the parties. Oral argument is not necessary.

## **STATEMENT OF THE ISSUE**

The trial court should be affirmed in its finding that the Defendant was immune pursuant to the discretionary act exception under Section 11-26-9 of the Mississippi Code of 1972, as amended.

The trial court should be affirmed in its finding that this case did not present an exception from sovereign immunity.

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE**

This case involves a claim by Jason Farris against the Mississippi Department of Transportation ("MDOT") for damages sustained when a dead tree crashed through the windshield of his truck on July 13, 2003.

Farris sustained substantial injuries, but MDOT defended against the claim based upon immunity for discretionary acts pursuant to Section 11-26-9 of the Mississippi Code of 1972, as amended. MDOT also defended against the claim based upon the fact that it did not have notice of the potentially hazardous condition that might have been posed by a dead tree located within the right-of-way, but several feet back from the edge of the paved roadway, and which was not caused by neglect or other wrongful conduct of any employee or agent of MDOT.

### **B. COURSE OF PROCEEDINGS**

This matter came on for non-jury trial on August 5, 2009, pursuant to Mississippi Code Section 11-46-9(i). At the conclusion of the proof, the court having received evidence

including the testimony of the parties, and having heard argument of counsel, found for the Defendant and entered judgment in favor of MDOT (RE-3 through RE-5)<sup>1</sup>.

### C. STATEMENT OF FACTS

According to the testimony of Bill Jameson, District Engineer for MDOT, there are approximately 5,000 acres of right-of-way in Lee County, Mississippi, over the course of approximately 250 road miles which have to be inspected and maintained by 14 employees assigned to Lee County. (T-108 – T-109). Jameson further testified that the decision as to how many employees are assigned and available for work in a particular county is the result of joint input from MDOT and the State Personnel Board.

The tasks to be performed by the MDOT employees are governed, in part, by MDOT's Maintenance and Field Operations Manual (Plaintiff's Exhibit 7). Function Code 504 of the Maintenance and Field Operations Manual provides for the functional parameters in connection with how to charge time and resources internally for timber and brush cutting (T-91). These include crew size and equipment, tools, etc. Under the heading "Description", Function Code 504 provides as follows:

"The cutting and removal of trees and brush for the purpose of restoring sight distances, eliminating traffic hazards and removing offensive encroaching vegetation. This includes hand trimming around guardrail posts, bridge ends, fences, signs, etc., not done as a part of a tractor mowing operation."

(RE-6).

Jameson testified that the guidelines contained in the Maintenance and Field Operations Manual were just that – "guidelines". The frequency of inspections, the number of persons conducting inspections, the method and mode of inspections, the

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<sup>1</sup> References to the Record Excerpts are designated as "RE-1", etc. References to the trial transcript are designated as "T-1", etc. References to the Appeal Record are designated as "R-1", etc. References to the Appellee's Record Excerpts are designated as "ARE-1", etc.

speed of travel for inspections are all “judgment calls”. (T-105 – T-109). The preface to MDOT’s Standard Operating Procedures (“S.O.P.”) contained in the Maintenance and Field Operations Manual for removal of trees and vegetation are consistent with Jameson’s testimony. S.O.P. No. MND-50-03-00-000 states, at page 1 of 13:

PURPOSE: Quality standards are an important part of the Maintenance Management System because they define the way a highway should look or function as a result of the maintenance effort. Most maintenance activities cannot be quantitatively defined because they are so complex and diverse. Therefore, the standards are generally written descriptions of the completed activity rather than a measured value.

The purpose of the quality standards is to provide guidance to a supervisor in the evaluation of work accomplishments and to establish a level of consistent maintenance service throughout the State.

Changes in available funds, equipment or personnel will require adjustments in the standards from time to time. Consequently, these standards do not establish legal criteria as they are intended to function primarily as a guide for maintenance activities. The judgment of trained maintenance personnel must be relied upon to determine what methods and materials will best achieve the desired results in keeping with the prime objective of the department which is to provide the motorist with a safe, smooth riding surface and an adequately signed, satisfactorily drained, well kept roadway in the most economical manner possible.

(ARE-1, Emphasis added).

S.O.P. No. MND-50-03-00-000 then goes on to address roadway surface maintenance for bituminous at pages 2 of 13 (ARE-2) and 3 of 13 (RE-8), addressing slippery pavement, raveling, potholes, excessive settlement or heave, and, relative to this

particular case, debris on the traveled way. The latter consideration, listed as number 5 under the priorities, states as follows:

“Any foreign object such as tree limbs, timber, blowout tires, bricks, etc., on or immediately adjacent to the roadway surfaces which cause a driving hazard shall be removed immediately.”

When questioned about this particular language, Jamison testified that the words “immediately adjacent to the roadway surfaces” refer to debris that is down and on the surface and either on the roadway itself or adjacent to the roadway and lying on the shoulder width. (T-9 – T-94). According to Jamison’s testimony it would not include a dead tree on the backside of a ditch located some 10 to 12 feet from the back of a 60 foot right-of-way.<sup>2</sup>

Jamison testified that while it would be desirable to remove dead trees that might constitute a hazard if they fell, it was not feasible to do so because of the lack of adequate manpower, the number of dead trees, and the fact that dead trees cannot always be discerned from the inspections which are conducted and, even where dead trees are identified, it cannot always be determined whether or not they are within the right-of-way. (T-116).

On this particular stretch of roadway, monthly inspections were conducted by Johnny Hunt, an employee of MDOT, and his inspection reports for approximately one year prior to the event were introduced as evidence. (Plaintiff’s Exhibit No. 5, RE-9 – RE-21). In addition to the reports being introduced, Hunt’s deposition testimony was introduced by the Plaintiff. Both the testimony of Jamison and Hunt, as well as Hunt’s monthly reports, indicated that this particular dead pine tree had not been observed during the monthly inspections.

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<sup>2</sup> The Plaintiff introduced no testimony with regard to where exactly the pine tree at issue stood in relationship to the edge of the paved road. The Plaintiff’s expert, Mike Williams, who had not made any actual measurements, estimated that the pine tree was located approximately 10 to 12 feet from the back edge of the right-of-way (T-55), which would place it approximately 48 to 50 feet from the center line of the highway and, in any event, more than 30 feet from the edge of the roadway.



The Plaintiff called as an expert witness a forester, Mike Williams, who testified generally as to how a pine tree which succumbed to pine needles would appear over the course of several months (T-46 – T-54). It was Williams' opinion that such a pine tree would stand out from surrounding vegetation (T-58). However, Williams' examination of the scene of the accident occurred almost five years after the event (T-61), when surrounding vegetation had been removed. When viewing photographs that were more contemporary with the event, he could not state with certainty that the pine tree would have been readily observable to someone making an inspection by driving down the roadway (T-65 – T-69).

The Plaintiff, who lived within two miles of the accident scene, and drove on that particular stretch of highway on a frequent basis, testified that while he had noticed other dead trees that "stuck out like a sore thumb", he had not seen this particular tree prior to the accident. (T-34 – T-35).

No evidence was presented as to any other person who could testify that the dead tree would have been noticeable or even observable prior to the accident. The Court itself, in hearing the testimony and examining photographs taken shortly after the accident, noted that this was an area where other trees and vegetation grew up and presented solid growth as seen in Plaintiff's photographic exhibits 1C, 1D, 1G and 1H. (RE-4).

In short, this case involves a tragic accident in which the Plaintiff, traveling on Highway 371 shortly before a summer rain storm, was struck by a falling tree which had not been discovered or observed by anyone prior to the accident and of which the Defendant had neither actual or constructive knowledge. Inspections for *potential* hazards such as dead trees were conducted at the discretion and judgment of MDOT employees. (T-117, lines 20-27).

The trial court properly discounted the testimony of the Plaintiff's expert, a professional forester, who testified based upon his inspection of the scene some five years after the accident to the effect that the subject tree could have been seen from the roadway. The Plaintiff's expert's testimony was based upon observing the scene of the accident after additional surrounding vegetation had been cleared, from a fixed point on the roadway observed in a photograph along one particular narrow sight line, or from aerial observation. The Mississippi Department of Transportation does not conduct inspections with professional foresters, on foot, or via aerial observation. As testified by Johnny Hunt and Bill Jamison, monthly inspections are conducted by driving the roadways at approximately 50 to 55 miles per hour and making a "windshield inspection" unless they are specifically notified of a particular hazard (T-84 –T-89; Hunt deposition at pp. 7 & 12).

As further testified by Jamison and Hunt, the monthly roadway inspections involve more than simply looking for dead trees at the back of rights-of-way, that include higher priorities such as missing or downed signage, cracks in the pavement, potholes, shoulder defects, and debris which is actually on or down immediately adjacent to the roadway (Id.).

The trial court correctly found, based upon its review of the evidence presented, that the particular hazard in this case, a tree blown down immediately before or during a rainstorm, was not caused by any action or neglect of the Defendant, and constituted a potential hazard of which the Defendant had neither actual nor constructive knowledge prior to the accident.

### **SUMMARY OF THE ARGUMENT**

The lower court correctly found that the Defendant did not cause the hazard in question and did not have actual or constructive knowledge of the hazard, was was correct in

holding that the Defendant was entitled to immunity as its actions constituted discretionary functions.

## **ARGUMENT**

### **A. STANDARD OF REVIEW**

There is no dispute with regard to the standard of review in this matter. In a bench trial, the trial judge's findings are entitled to the same deference as those of a jury and will not be reversed unless manifestly wrong. *Mississippi Department of Transportation v. Johnson*, 873 So.2d 108, 111 (Miss. 2004); and *Mississippi Department of Wildlife, Fisheries & Parks v. Brannon*, 943 So.2d 53, 56 (Miss. App. 2006).

In this case the trial court found that there was no evidence that MDOT knew of the existence of the dead tree, which was located more than 30 feet from the paved portion of the roadway, approximately five to ten feet into the area of the right-of-way (RE at pages 3, 4). The trial court further found that the personnel of the Mississippi Department of Transportation traveled the highway on a regular basis checking for problems on the paved portion and the adjoining mowed part of the right-of-way, but that time and circumstances did not provide for the inspection of unmaintained portions of the right-of-way where the fallen tree had grown. The court further found that the witnesses for the Defendant testified that if a dead tree was located or reported and was found to be a hazard it would be removed.

In this case, the evidence adduced at trial supports the lower court's findings of fact. The only evidence presented in support of the Plaintiff's contention that the Defendant was on constructive notice of the potential hazard of a dead tree growing back in the woods approximately 50 feet from the center line of the two-lane highway was the testimony of the Plaintiff's expert who did not even have personal knowledge of the site conditions at the

time of the accident, but relied upon photographs taken by Plaintiff's counsel. The testimony of the Plaintiff's expert that the dead tree would have been easily recognized and observed is directly contradicted not only by the testimony of Johnny Hunt, the highway department employee who conducted monthly inspections of the road, but by the Plaintiff himself, who testified that while he saw other dead pine trees that "stuck out like a sore thumb", he did not observe this particular tree despite the fact that he traveled this stretch of highway on an almost daily basis and lived within two miles of the site of the accident.

Accordingly, this court should give due deference to the findings of fact made by the trial court judge and affirm the same.

**B. THE TRIAL COURT CORRECTLY APPLIED THE DISCRETIONARY ACT EXCEPTION OF SECTION 11-26-9.**

When Mississippi, as a matter of public policy, did away with sovereign immunity, it established certain exceptions to liability under Section 11-26-9 of the Mississippi Code of 1972, as amended. The two exceptions addressed by the trial court are contained in subsections (1)(d) and (1)(v). The statute provides for the exceptions as follows:

"(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 thereof, whether or not the discretion be abused;

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

As stated above, the evidence adduced at trial clearly indicates that discretion and policy considerations as to manpower, budget, priorities and the like are exercised in

connection with the maintenance and inspection of state highways from the highest levels down to the individual employee, particularly with regard to the frequency, means, method, and even traveling speed of inspecting highways for dead trees located on the rights-of-way, but not actually fallen onto the roadway or immediately adjacent thereto. The highway department simply does not have the resources, budget or personnel to conduct the sort of inspection demanded by Plaintiff's counsel at trial. Understandably, it is the preference of highway department personnel to discover and remove trees in circumstances which do not pose an immediate danger to the traveling public, and under circumstances that do not involve an emergency situation such as trees fallen during storm conditions when those same storm conditions complicate their removal and endanger the state employees responsible for doing so.

Bill Jamison testified that, given sufficient resources and manpower, he would like to discover and remove all of the dead pine trees which line the 250 plus miles of roadway in Lee County for which he is responsible, but it would simply be impossible given the fact that he has only 14 people assigned to maintenance for that county (T-116).

This court has heretofore recognized that the maintenance of state roads and highways is a discretionary function of the Mississippi Department of Transportation and that even if the Mississippi Department of Transportation had actual or constructive notice of poor road conditions this would not constitute a waiver of immunity under Section 11-26-9(1)(d). See, *Lee v. Mississippi Department of Transportation*, 37 So.3<sup>rd</sup> 73, 77 [2] (Miss. App. 2009); see also, *Knight v. Mississippi Transportation Commission*, 10 So.3<sup>rd</sup> 962 (Miss. App. 2009). In *Knight, Supra*, the court specifically addressed the argument raised by the Plaintiff in this case that Section 65-1-65 of the Mississippi Code imposes a

ministerial duty on the Mississippi Transportation Commission. In rejecting that argument, the court stated:

“The above statutes do not impose any specific directives ‘as to the time, manner and conditions for carrying out’ the MTC’s duty in maintaining highways or posting traffic control or warning devices; thus, the above duties are not ministerial in nature. *See Collins*, 876 So. 2d at 829, n.9. In fact, all three statutes [including 65-1-65] require that the MTC use its judgment and discretion in carrying out the duties prescribed therein”

10 So.3<sup>rd</sup> 962 at 970.

Both the facts and the law in this case support the trial judge’s holding that the Defendant was entitled to sovereign immunity under the discretionary acts exception.

**C. THE LOWER COURT WAS CORRECT IN HOLDING THE DEFENDANT WAS IMMUNE UNDER THE DANGEROUS CONDITION EXCEPTION OF SECTION 11-46-9(1)(v)**

As indicated above, the evidence in this case overwhelmingly supports the finding that the Defendant not only had no actual knowledge of the potentially dangerous condition posed by the dead pine tree located in the wooded area past the mowed area of the right-of-way of Highway 371, but had no constructive knowledge of the same. The Plaintiff’s reliance on the cases cited in the Appellant’s Brief is misplaced. First, even assuming that *Barron v. City of Natchez*, 229 Miss. 276, 90 So.2<sup>nd</sup> 673 (1956) is applicable under the Mississippi Tort Claims Act, the case is factually distinguishable because in *Barron* the municipality had been given specific notice of that particular hazardous condition which involved a dead tree limb overhanging the street in question.

More recent decisions cited by the Plaintiff are also authority for affirming the lower court’s judgment. In *Jones v. Mississippi Transportation Commission*, 920 So.2<sup>nd</sup> 516 (Miss. App.2006), the court held:

“Only when given notice of a dangerous condition does a governmental entity become duty-bound to warn or provide relief for the dangerous

condition of those who use the roads. In the absence of notice, a governmental entity's decision to maintain or repair roads, or to place traffic control devices or signs, is purely discretionary, and the entity will be immune from suit even upon proof of an abuse of discretion. Thus, the question of whether MTC had notice of the defective shoulder is of paramount importance to Jones's case. Simply put, if MTC had no notice of the dangerous condition, it is immune from liability."

So.2<sup>nd</sup> 516 at 519 (citations omitted).

The Plaintiff also cites *Mississippi Department of Wildlife, Fisheries & Parks v. Brannon*, supra, in support of his position that the Defendant was on constructive notice. However, this Court reversed and rendered the lower court's judgment in favor of the Plaintiff in that case, specifically finding that the lower court erred in holding that "the condition of the feathering and sloping at the edge of the roadway in the public pedestrian walkway should have been inspected, found and repaired. Park employees did not repair same." In rejecting that finding by the trial court, the appeals court stated:

"This is simply not the appropriate standard. The trial judge's conclusion makes the Department an insurer against all injuries which may occur on the premises."

943 So.2d 53, 66 (emphasis added).

The duty which would be imposed upon the Defendant if the Plaintiff's position were to be accepted would be that of identifying every dead pine tree anywhere within the right-of-way along every mile of State maintained highway in Mississippi. Essentially, the State would become the guarantor on a strict liability basis of any member of the traveling public who was injured by a falling tree regardless of actual knowledge on the part of the Mississippi Transportation Commission. This is simply not, nor has it ever been, the law in this State. In fact, as this court held in *Lee v. Mississippi Department of Transportation*, supra, even if the Defendant had actual or constructual knowledge of the pine tree in this particular instance, the decision as to whether and when to remove that potential hazard

would be one left to the discretion and judgment of the highway department, for which it would be accorded full immunity under the statute.

### CONCLUSION

The evidence in this case and the authority cited above are overwhelmingly in favor of affirming the lower court's decision and judgment in favor of the Appellee, Mississippi Department of Transportation.

RESPECTFULLY SUBMITTED, this the 16<sup>th</sup> day of August, 2010.

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**CERTIFICATE OF SERVICE**

I, Thomas A. Wicker, one of the attorneys for the Appellee, Mississippi Department of Transportation, do hereby certify that I have this day mailed via United States mail, proper postage prepaid, a true and correct copy of the above and foregoing to the following:

Honorable Thomas J. Gardner, III  
Circuit Court Judge  
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DATED, this the 16<sup>th</sup> day of August, 2010.

  
THOMAS A. WICKER, MSB # [REDACTED]

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**MISSISSIPPI DEPARTMENT OF  
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**APPELLEE**

**CERTIFICATE OF FILING**

I, Thomas A. Wicker, one of the attorneys for the Appellee, Mississippi Department of Transportation, do hereby certify that I have this day mailed the original and three (3) copies and an electronic disk of the Brief of Appellee, Mississippi Department of Transportation, by U.S. mail, postage prepaid, to Kathy Gillis, Clerk, Supreme Court of Mississippi, P.O. Box 249, Jackson, Mississippi 39205-0249.

RESPECTFULLY SUBMITTED, this the 16<sup>th</sup> day of August, 2010.

HOLLAND, RAY, UPCHURCH & HILLEN, P.A.

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