IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JASON FARRIS — APPELLANT

VS. — CAUSE NO. 2009-CC-01919

MISSISSIPPI DEPARTMENT OF TRANSPORTATION — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MS

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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REPLY BRIEF OF APPELLANT

Comes the Appellant, Jason Farris, and submits the following in reply to the Brief of Appellee and would show unto the Court as follows, to-wit:

I. THE TRIAL COURT INCORRECTLY APPLIED THE DISCRETIONARY ACT EXCEPTION OF SECTION 11-26-9

MISS CODE ANN 65-1-65 requires that Mississippi Department of Transportation conduct inspections of the roadways. Despite Defendant's arguments that budget constraints prevent the Highway Department from doing its job, this stretch of highway was inspected on a monthly basis. (Appellant's R.E. 9-21) by MDOT employee Johnny Hunt. Mr. Hunt's method for inspections is not a "judgment call" as argued by Defendant, but a function that is either performed properly or negligently. That is, the inspections must have been performed using ordinary care. *Ladner v Stone County*, 938 So.2d 270, 275 (Miss. App. 2006). If not for the statutory requirement, whether to inspect could be said to be discretionary, how the inspection took place would be ministerial. However, the requirements of a statutory duty outweigh the discretionary function immunity. (*Ladner*, at 275-76, citing *L.W. v. McComb Sep. Mun. Sch. Dist., 754 So.2d 1136, 1142 (P28) (Miss. 1999)* Defendant argues that the guidelines for inspections

contained in the Maintenance and Field Operations Manual were just that - "guidelines" (Appellee brief page 2) and do not control how the inspections are to be performed, trying to make an argument that the inspections were a discretionary duty. However, the trial testimony indicated that following the mandates of the statute, inspections are required through policy from the central office. (T-54) Function Code 504 describes timber and brush cutting and provides that traffic hazards be eliminated. (R.E. 6-7) Mr. Jamieson, the District Engineer for MDOT, testified that a dead tree on the right of way of sufficient height would constitute a hazard. (T-87) Mr. Jamieson admitted that the inspectors did not perform a properly mandated inspection because the focus of the concern was pot holes, low or high shoulders and downed signs. (T-83 and T-85). Further, Mr. Jamieson testified that MDOT had the money, manpower and equipment to remove the dead tree (T-99).

MDOT inspectors had a duty to use ordinary care to inspect not only for slippery pavement, raveling, potholes, excessive settlement or heave, but they also had a duty to inspect and discover all hazards on the highway and right of way, including dead trees that could, and did, cause a driving hazard to the traveling public.

The inspector from MDOT should have located the dead tree prior to its falling on the highway. Mr. Hunt, who conducted the inspections, testified, "I am not going to say that I wasn't looking for dead trees"..."Just something that I missed in that - - in those particular inspections". (Hunt dep. p. 18) Mr. Hunt testified that his inspections consisted of a "windshield" inspection and would stop or slow down if he saw a low shoulder, pothole or if debris was building up on a guardrail. (Hunt dep. 26)

Not only was the highway inspected monthly but an employee of MDOT drove

through the area on a daily basis. (Hunt dep. p. 23) The only expert that testified, Mr. Williams, opined that the tree was dead and had been for at least six months (T-60), and was on the MDOT right of way. (T. 65)[1] Mr. Williams also testified that there was nothing in the way of the dead tree being visible from the roadway (T.-54)[2].

This case clearly falls within the dangerous condition exemption of the MTCA, (1) a dangerous condition, (2) on government entity's property, (3) which the government caused, **or** of which it had notice and time to protect or warn against, and (4) the condition was not open and obvious. MISS. CODE ANN 11-46-9 (l) (v) (Rev. 2002). (emphasis added)

II. THE LOWER COURT WAS INCORRECT IN HOLDING THE DEFENDANT IMMUNE UNDER THE DANGEROUS CONDITION EXCEPTION OF SECTION 11-46-9

Defendant argues, and the lower Court held, that it did not have actual notice that the tree was dead or noticeable prior to accident but failed to address the issue of constructive notice of a dangerous condition. Since the uncontroverted testimony was that the tree had been dead for more than six months prior to the accident, and that area of the well-traveled highway had been inspected monthly, MDOT was at the very least on

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[1] Defendant argued, that there was no testimony regarding the location of the subject tree, however, Mr. Williams testified it was "10 to 12 feet inside of the right of way" (T-65), and it obviously was close enough to the roadway that when it fell, it fell into the highway injuring Plaintiff. Mr. Jamieson, an MDOT employee also testified the subject tree was located on the highway right of way (T-86)

[2] Defendant argued that Mr Williams could not state with certainty that the tree was observable by someone driving down the highway. The context in which Mr. Williams was testifying at that time was that he could not determine the species or size of trees from the quality of the photographs provided to him.

constructive notice of the hazardous condition.

> In determining whether a party is on constructive notice of such a dangerous condition, this Court must look to the following factors: (1) the length of time the defect has existed; (2) the nature or character of the defect; (3) the publicity of the place where the defect exists; (4) the amount of travel over the street; and (5) any other factors or circumstances in evidence which tend to show notoriety. *City of Jackson v. Locklar, 431 So.2d 475, 480 (Miss. 1983).*

Jones v. Miss. Trans Comm., 920 So.2d 516, 520 (Miss. App. 2004).

Defendant further argues that there was no evidence that the dead tree would have been noticeable. Mr. Williams went into great detail explaining the process of the death of the tree and the visible effects from a bark beetle attack. The resin would start to ooze from the lower 20 feet of the tree that gives a popcorn look to the tree (T-43), the tree will suffer a discoloration giving it a pale green color in striking contrast to the surrounding trees (T-43), then the needles would turn dark brown (T-44) and at that time it is dead. (T-46) The tree would have been visible from the highway (T-54).

Further, the lower Court was in error in finding that the dead tree did not pose a dangerous condition. It is obvious from the accident that occurred that this dead tree posed a dangerous condition. Mississippi law recognizes that dead trees pose a dangerous condition. *Barron v. City of Natchez*, 229 Miss. 276, 90 So.2d 673 (1956). This case held that ordinary care should be used in keeping the highway safe, which is the same standard applied years later by the Court in determining the standard for inspections of the highway. *Ladner*, supra.

III. CONCLUSION

While Defendant's argument may be persuasive that MDOT cannot be held liable for every dead tree on the highway, it should be held liable in this case. Not only was this

stretch of the highway inspected on a monthly basis by MDOT employees who testified that they were required to inspect for hazards, including dead trees, and the only expert testimony offered was that of Charles M. Williams, a forester for 28 years, who testified that the tree was clearly visible and had been dead for at least six months prior to the accident. The tree obviously posed a dangerous condition since it fell on the highway severely injuring Plaintiff. This case clearly falls under the Mississippi's sovereign immunity exception found at MISS. CODE ANN., § 11-46-9 (l) (d) (v).

CERTIFICATE OF SERVICE

This is to certify that I, Frank A. Russell, have this day served a true and correct copy of the above and foregoing Reply Brief Of Appellant on Thomas A. Wicker, Esq., and Honorable Thomas J. Gardner, III, by placing same in the United States Mail, postage prepaid, and mailing to them at their usual office address of P. O. Box 409, Tupelo, MS 38802 and P. O. Drawer 1100, Tupelo, MS 38802, respectively.

This the 30TH day of August, 2010.

FRANK A. RUSSELL