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

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

Attorneys for Appellant:

FRANK A. RUSSELL, MSBN [redacted]
JEFFREY D. LEATHERS, MSBN [redacted]
GREER, RUSSELL DENT & LEATHERS, PLLC
117 NORTH BROADWAY STREET
POST OFFICE BOX 907
TUPELO, MS 38802–0907
TEL. NO. (662) 842–5345
FAX. NO. (662) 842-6870

IN THE SUPREME COURT OF MISSISSIPPI

JASON FARRIS APPELLANT

VS. CAUSE NO. 2009-CC-01919

MISSISSIPPI DEPARTMENT OF TRANSPORTATION APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel if record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that this Court may evaluate possible disqualifications 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 - Attorneys for Appellee
   Thomas A. Wicker, Esq.

SO CERTIFIED, this the 14th date of May, 2010.

FRANK A. RUSSELL
MSB[redacted]

GREER, RUSSELL, DENT & LEATHERS, PLLC
P. O. BOX 907
TUPELO, MS 38802
TELEPHONE: 662-842-5345

TABLE OF CONTENTS

TABLE OF CASES

I STATEMENT OF THE ISSUES

1. The Court erred in finding that the defendant was immune pursuant to the discretionary act exception of Section 11-26-9

2. The Court erred in not finding defendant excepted from sovereign immunity under the dangerous condition exception of Section 11-46-9

    a. The tree constituted an unreasonably dangerous condition

    b. The Defendant was on constructive notice of the tree that constituted a dangerous condition on the highway

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Jason Farris (Farris) filed a complaint in the Circuit Court of Lee County, Mississippi against the Mississippi Department of Transportation (hereafter "MDOT") for injuries and damages suffered when a dead tree crashed through the windshield of his truck on July 13, 2003. The admittedly dead tree fell from the right-of- way on Highway 371, in Lee County, Mississippi. Highway 371 was one of the roads inspected monthly by MDOT for hazards to the traveling public.

Farris suffers from debilitating permanent injuries. He will always suffer from a grapefruit size hernia that could not be repaired. He has been advised to move very carefully so the hernia will not burst open. (T-13-15) He also suffers from severe pain resulting from the injuries to his abdomen and intestines. These injuries make digesting food difficult. (T-19) The injuries further cause difficulty with bowel movements and urination. He also suffered a broken arm and a broken pelvis in several places. (T-16) These injuries have also had an adverse affect on his ability to seek gainful employment. Farris was a farmer, but can no longer perform the duties of farming. He has tried truck driving, but the conditions of that occupation caused a great deal of pain. Eventually Farris faced the facts and applied for Social Security disability benefits. (T-16 through T-25)

B. COURSE OF PROCEEDINGS

A bench trial was held on August 5, 2009, with a final judgment entered in favor of MDOT. The Plaintiff Farris aggrieved by the Circuit Court decision, appealed.

C. STATEMENT OF FACTS RELEVANT TO THE ISSUES

The plaintiff's case in chief presented overwhelming evidence that at the time of the accident, the subject tree had been dead for at least six months; presented an unreasonable danger to the traveling public; and should have been discovered during MDOT's inspections of Highway 371. The Plaintiff called William Jameson (Jameson) as an adverse witness. Jameson testified that he was the district engineer in the First District with the Mississippi Department of Transportation (MDOT). (T-81-82) He supervised the county inspectors, who did monthly inspections of every road in their county to determine hazards to the public. (T-83) The inspections are mandated by the State and have been conducted since the time MDOT lost sovereign immunity. (T-84-85)

The inspections are required through policy from the central office. (T-84) Function Code 504 is a function for charging out timber and brush cutting. It provides that traffic hazards be eliminated. (T-86) (R.E. 6-7) In addition, the Quality Standard For Highway Maintenance, Number Five provides that any foreign object such as tree limbs, timber...immediately adjacent to the roadway surface which causes a driving hazard shall be removed immediately. (T-93, 94) (R.E. 8) Mr. Jameson testified that a dead tree on the right of way with sufficient height to fall on an adjacent public road would constitute a hazard to the traveling public. (T-87) He further testified that he inspected the area of the accident including the remaining stump. In his opinion, the subject tree was located on the highway right-of-way. (T-86) Since the MDOT employee who inspected the road was required to report the dead tree, (T-102) Mr. Jameson concluded that if the pine tree had been found, it would have been removed. (T-98)

The deposition of Johnny Hunt was entered into evidence. Mr. Hunt testified that he inspected roads for MDOT on a monthly basis. (Dep. p. 7) His primary concern during inspections were low shoulders, pot holes, weep holes on bridges, making sure signs were up and the shoulders were not high. (Dep. p. 8) He was also concerned with dead trees because they can be a "safety issue for the traveling public". (Dep. p.12) He did monthly inspections and for thirteen months prior to the accident he did not observe a dead tree. (Dep. p. 15) (R. E. 9-21) However, Hunt testified:

> A. We have cut trees like that in times past on 145 north of Saltillo, in between Saltillo and Guntown. There was two huge pine trees that were, in fact, off the right of way and they were dead and we did cut those trees even though they were off the right of way. We had to get permission from the property owner to cut those trees and we cut those trees down.

Hunt dep. page 26, lines 9-15.

Aside from Hunt's monthly inspections, one MDOT employee traveled that road every day. (Dep. 23)

Plaintiff's expert, Charles M. Williams, a forester for 28 years, inspected the remaining portions of the tree that injured Mr. Farris (hereafter "subject tree"), as well as photographs taken of the scene of the accident. (Exhibits 1-10) In Mr. Williams' opinion the subject tree died from an infestation of bark beetles. (T- 42) Mr. Williams testified that a tree will undergo visual effects from the infestation. For the first two or three weeks it would appear discolored and develop popcorn looking manifestations on the tree. (T-43-44). In another three to four weeks the needles would turn a pale green, then dark or reddish brown. (T-44) At this point the tree is dead and due to the visual effects it is very prominent in the forest. (T-46) Three to six months after death, the bark will slip from

the tree and the trunk will turn gray. (T-47-48) Mr. Williams also testified that if a dead tree is not cut down, it will fall. (T-57) Based on Mr. Williams' inspection, the subject tree followed this normal pattern of deterioration. The subject tree was dead and the bark had turned gray. (T- 50) The subject tree appeared as though the bowl or trunk broke off from the stump. Most of the bark was missing, it had gone through the slippage stage. (T. 51) He further testified that as of July 13, 2003, the subject tree had been dead for six months or longer. (T-60). Inspection of the scene also revealed that there was nothing in the way of the tree being visible from the roadway. (T-54)

III. SUMMARY OF THE ARGUMENT

The lower court erred in its application of the Tort Claims Act. The evidence established the existence of state regulations that required inspections of the subject right of way. These regulations also established that all trees of a certain girth and within thirty foot of the public road were to be cut level with the ground. There is simply no room for a judgment call to be made.

The lower court also failed to fully apply the exemptions to the Tort Claims Act. Specifically sub-section (v) which addresses dangerous conditions located on government property. The evidence at trial established that had MDOT exercised ordinary care in their duty of keeping the highway safe for public use, it would have known the tree presented a danger to the public in its use of the highway. By requiring plaintiff to bring forth evidence of actual notice, the lower court improperly applied the Tort Claims Act.

IV. ARGUMENT

A. Standard of Review

It is well settled that, "[a] trial judge's finding is entitled to the same deference as a jury and will not be reversed unless manifestly wrong." *Mississippi Dep't of Transp. v. Johnson, 873 So. 2d 108, 111 (P8) (Miss. 2004).*

However, the Supreme Court applies a de novo standard of review for questions of law, including the proper application of the MTCA. *City of Jackson v. Brister*, 838 So.2d 274, 278 (Miss. 2003) (citing *Maldonado v. Kelly*, 768 So.2d 906, 908 (Miss. 2000)). In an MTCA-based claim, the judge sits as the finder of fact. *Miss. Dep't of Wildlife, Fisheries and Parks v. Brannon*, 943 So.2d 53, 56 (Miss. App. 2006) (citing MISS. CODE ANN § 11-46-13 (1) (Rev. 2002)).

B. The Court erred in finding that the defendant was immune pursuant to the discretionary act exception of Section 11-26-9

Mississippi's sovereign immunity is fashioned 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 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;

Tort Claims Act 11-46-9 (1) (d)

> "In determining whether governmental conduct is discretionary the Court must answer two questions: (1) whether the activity involved an element of choice or judgment; and if so, (2) whether the choice or judgment in supervision involves social, economic or political policy alternatives." *Dancy v. E. Miss. State Hosp., 944 So. 2d 10, 16 (P18) (Miss. 2006)* (citation omitted). Regarding the first question, this Court must first determine whether the function is discretionary or ministerial. *Id.* at 16. A duty is discretionary if it requires an official to use her own judgment and discretion in order to carry out the duty. *Id.* (citation omitted). "On the other hand, 'a duty is ministerial and not discretionary if it is imposed by law and its performance is not dependent on the employee's judgment.'" *Miss. Dep't of Human Servs. v. S.W., 974 So. 2d 253, 258 (P11) (Miss. Ct. App. 2007)*; *see, e.g., Barrett v. Miller, 599 So. 2d 559, 567 (Miss. 1992)*
>
> * * *
>
> [t]he United States Supreme Court has explained that '[t]he requirement of judgment or choice is not satisfied if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.' *Id.* (quoting *United States v. Gaubert, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991)*

Knight v Miss. Transp. Comm'n, 10 So.3d 962, 968 (Miss. App. 2009)

In the present case, the statute imposes a duty on the director of the State Highway Department to organize an inspection of the public right of way. Mississippi Code provides as follows:

> It shall be the duty of the State Highway Commission to have the State Highway Department maintain all highways which have been or which may be hereafter taken over by the State Highway Department for maintenance in such a way as to afford convenient, comfortable, and economic use thereof by the public at all times. To this end it **shall be the duty** of the director, subject to the rules, regulations and orders of the commission as spread on its minutes, **to organize an adequate and continuous patrol for the maintenance, repair, and inspection of all of the state-maintained state highway system**, so that said highways may be kept under proper maintenance and repair at all times.

MISS. CODE ANN § 65-1-65 (emphasis added)

The duty to organize an adequate and continuous patrol is ministerial. The statute specifically requires the organization of a patrol to inspect the roadway. There is no discretion.

In *Ladner v Stone County*, 938 So.2d 270 (Miss. App. 2006), the plaintiff Carrie Ladner suffered severe injuries when she wrecked her car while driving over a bridge, which had collapsed. Ladner sued Stone County, State Aid Road Construction, and State Aid Engineer Floyd Kirk. All Defendants moved for a directed verdict which was granted by the trial judge. *Id.* The Plaintiff appealed. *Ladner* held the duty to maintain State Aid roads and bridges is delegated to the boards of supervisors in their respective counties. *Miss. Code Ann. § 65-9-25* (Rev. 2001). While the State Aid office has the authority to maintain and repair roads, it is not obligated to do so. *Jenkins v. Miss. Dep't of Transportation, 904 So.2d 1207, 1211 (Miss. Ct. App. 2004))*. The Court held that to maintain a cause of action, plaintiff must prove duty, breach, causation and damages. Since the State Aid defendants did not have a duty to repair or maintain the bridge, Ladner could not maintain a negligence action against them for breach of this duty. *Id.*

The *Ladner* Court found that Defendant Stone County's duty to inspect the bridge was imposed by statute. If the law imposed a duty, that duty must be performed with ordinary care. *Id. (citing L.W. v. McComb Separate Municipal School District., 754 So.2d at 1142* (Miss. 1999). Stone County, through its Board of Supervisors, was under the statutory duty to "properly maintain" and to inspect State Aid roads such as Kirby Creek Bridge. *Id.* The county road manager testified that he never inspected the bridge despite several reports from an engineer that the bridge was in ever worsening condition and in

need of repair. The court found enough evidence to remand the case for the presentation of the county's defense.

The case *sub judice* deserves the same approach set out by the *Ladner* court. The defendant is charged with the duty to maintain all highways which have been or which may be hereafter taken over by the State Highway Department for maintenance in such a way as to afford convenient, comfortable, and economic use thereof by the public at all times. To this end it **shall be the duty** of the director, subject to the rules, regulations and orders of the commission as spread on its minutes, **to organize an adequate and continuous patrol for the maintenance, repair, and inspection of all of the state-maintained state highway system**, so that said highways may be kept under proper maintenance and repair at all times. MISS. CODE ANN. § 65-1-65. Further, the Mississippi Department of Transportation requires that all trees more than four inches in diameter to be removed within its thirty feet easement. (T-86) There is simply no discretion involved in the department's obligation to remove trees from the right of way. Of the four elements of a cause of action: Duty, breach, cause and damages, duty is established by statute.

C. The Court Erred in Not Finding Defendant Excepted from Sovereign Immunity under the Dangerous Condition Exception of Section 11-46-9

To state a cause of action under the dangerous condition exemption of the MTCA, a plaintiff must show (1) a dangerous condition, (2) on the government entity's property, (3) which the government entity 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(1)(v) (Rev. 2002).

In *Miss. Dep't of Wildlife, Fisheries & Parks v. Brannon,* 943 So.2d 53 (Miss. App. 2006), a premises liability action pursuant to the Tort Claims Act, Plaintiff fell on a drop off and alleged that the drop off was a hazardous condition created by the Defendant. Although Plaintiff was awarded damages, the Supreme Court reversed and rendered, based on a finding that the Defendant did not have actual or constructive notice of the hazard. The Department claimed immunity because the condition was not caused or existed because of its negligence and it had no actual or constructive notice of the condition. *Id.* The Court had to consider the applicability of 11-46-9 (1) (v) . The immunity defense could be defeated if Plaintiff could prove:

> (1) a dangerous condition, (2) on the government entity's property, (3) which the government 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. (emphasis added)

Tort Claims Act 11-46-9 (1) (v) *Id* at ¶ 31; *Lowery v. Harrison County Bd. of Supervisors, 891 So.2d 264, 267 (P12) (Miss. Ct. App. 2004).*

1. The Tree Constituted An Unreasonably Dangerous Condition

The trial court found "There is no evidence that MDOT knew of the existence of the dead tree or that it constituted a danger to those using the roadway until it fell onto the paved portion of the highway and struck the Plaintiff". (R.E.4) Because the trial court found the tree did not constitute a danger, the court never considered whether the MDOT was exempted from governmental immunity pursuant to 11-46-9 (1) (v). This constitutes clear err on the part of the trial court.

Mississippi law has held for decades that trees can become a dangerous condition. In *Barron v. City of Natchez*, 229 Miss. 276; 90 So. 2d 673 (1956), plaintiffs filed lawsuit for damages sustained when their vehicle was crushed by a falling, decayed tree that had been growing on property abutting the highway with limbs that overhung the highway. The owner of the property on which the tree was located had notified the City of Natchez of the decayed, rotten and dangerous condition of the tree, and had requested that the City remove the same so that it would not overhang the street. *Id.* A case of first impression, the court held that future cases would turn on one question. "Whether or not the failure of a municipality to remove a decayed and dead tree when it overhangs a public street is a failure to exercise reasonable care to maintain the street in a reasonably safe condition for the use of those traveling the same who are exercising reasonable care for their own safety". The Court found that a question of fact existed:

> It is not to be understood that the highway officials may at their own free will enter upon the lands of others and cut trees, even for use on the highway, but we do say that if they know, or **in the exercise of ordinary care in their duty of keeping the highway safe for public use should know, that a tree is dangerous to the safety of the public in its use of the highway, it is its duty to enter upon the land and remove the danger.**

Id. at 287 (emphasis added)

The trial court's decision improperly found the subject tree did not constitute a danger to those using the roadway until it fell onto the paved portion of the highway and struck the Plaintiff. This logic must fail. The same argument could be made for a bullet or a speeding train, two objects that should clearly be considered dangers.

2. The Defendant Was on Constructive Notice of the Tree That Constituted A Dangerous Condition On The Highway

Once a government entity is on notice of a dangerous condition on their property, it becomes duty bound to warn or provide relief to the public. *Jones v. Miss Trans. Comm., 920 So.2d 516, 520 (Miss. Ct. App. 2006).* In determining whether a party is on constructive notice of such a dangerous condition, a court will 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. *Id. at 519 (citing City of Jackson v. Locklar, 431 So.2d 475, 480 (Miss. 1983)).*

In *Jones*, the plaintiff filed a lawsuit alleging the Mississippi Transportation Commission was liable for failing to correct a defective shoulder which according to plaintiff resulted in an auto accident. *Id.* at 518. The circuit court dismissed plaintiff's claim citing the absence of any notice to the government entity. *Id.* The appellate court affirmed the trial court decision citing a want of evidence, including the fact that the plaintiff failed to introduce any evidence that the defect was noticeable upon passing. *Id.* at 520.

The court has consistently looked to whether the defect was noticeable by the employees of the government being charged with liability. In *Brannon, supra*, the court in determining the issue of constructive notice found that the defect in the shoulder was covered by leaves and pine straw. 943 So.2d at 65. In fact, in determining constructive notice, *Brannon* does not identify any other factor to review. *Id.* The court instead

defended its analysis by reference to well establishes precedent:

> The fact that mere passers-by did not observe or discover a dangerous defect is not sufficient to relieve a municipality of constructive notice; but, if the defect or danger be such as not to be observable by those who constantly pass day by day or who for years have lived and labored at the location in question, constructive notice cannot be charged upon the municipality unless the danger was the result of faulty work by the municipality itself.

Id. (citing *Dow v. D'Lo*, 169 Miss. 240, 248-49, 152 So. 474, 475-76 (1934).

The lower court found no evidence that MDOT knew of the existence of the dead tree. However, the lower court did not make any finding as on the issue of constructive notice. Had it done so, it would have found MDOT received the notice required to waive immunity. The only evidence entered at the trial was the uncontroverted testimony that the tree had been dead for at least six months. (T-60) The tree had gone through several stages of death, with the decaying tree becoming more noticeable at each successive stage. (T-46) In Williams' opinion, a lay person should have detected the dying pine tree. (T-58) As the expert further opined, the decaying pine would have made a "striking contrast" from the evergreens surrounding the decaying pine. (T-58). Precedent compels one to weigh the evidence submitted at trial. When one does so, it is clear MDOT was on constructive notice.

V. CONCLUSION

This Court should find that MDOT was under constructive notice of the dead tree and that it posed a hazardous condition to the traveling public. This Court should further find that MDOT is not subject to immunity pursuant to MISS. CODE ANN. § 11-26-9 (1) (v). This cause of action should be reversed and remanded to the lower Court for a trial on damages.

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 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 14th day of May, 2010.

FRANK A. RUSSELL