IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NUMBER 2010-CA-01306

CARL KEITH BLACKSTON, ET. AL. — APPELLANTS

VERSUS

GEORGE COUNTY MISSISSIPPI — APPELLEE

ON APPEAL FROM
THE CIRCUIT COURT OF GEORGE COUNTY, MISSISSIPPI
CIVIL ACTION NO: 2007-0165(1)

REPLY BRIEF OF PLAINTIFF/APPELLANT

CARL KEITH BLACKSTON, ET. AL.

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ORAL ARGUMENT REQUESTED

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Abuse of discretion or no abuse of discretion, that is the question. In addressing the first two argument raised on appeal by George County regarding causation of the accident (placing dirt in the road) the plaintiff's response has been made in Appellant's Brief and George County has not presented anything different in its breif that would require additional authority. What is different is the manner in which the undisputed facts are presented to this Court by George County to this Court.

Addressing the second argument by George County, to-wit:

> **"B. The trial court's conclusions that, if the dirt in the roadway was the cause of the cause of the accident, it was open and obvious, and George County was thus immune from liability, was supported by substantial evidence, is not manifestly wrong or clearly erroneous, and no incorrect legal standard was applied.**

The issue of "open and obvious danger" is largely fact driven by each case and there is no set and fast rule by which an automatic decision can be made. So this issue turns on the proposition of what facts were presented for consideration by the Court as to "open and obvious danger"? NOT one witness for George County Testified as to whether the danger of the dirt drive was open and obvious. NOT ONE WITNESS FOR GEORGE COUNTY! Plaintiff can not be faulted because the County did not call any witnesses or put on any proof as to this issue. The witness, Plaintiff, Carl K. Blackston, testified that he saw the dirt in the road, that it was not obvious to him that it was dangerous (Plaintiff's brief Page 4 &5). In fact, this finding by the Trial Judge completely disregarded the sworn testimony of Ralph Aryers, Marissa Christian, Jerome Blackston and Keith Blackston. Now the question turns on "if" the Trial Judge did not abuse his discretion, then what was in the record to support the Trial Judge's decision that the danger of the dirt in the road was open and obvious? The answer is simple, NONE!!! The only

proof before the Court that the dirt drive did not appear to be dangerous was that of Plaintiff, Carl Blackston. The testimony and Exhibit "1" make it more than clear that all of the drives shown in Exhibit "1" all extended out into the road. The County created a dangerous condition on Mt. Pleasant Road by the manner in which it constructed the private drives and endangered its citizens by it carelessness. Further it is undisputed that the County failed to place any warnings about the dirt drives extending into the public road. Exhibit "1" of the record is an inanimate object that accurately presents the manner in which the drive in question was constructed. It is obvious that the Trial Judge abused his discretion and ignored the undisputed facts arriving at this decision and this Court should reverse his decision and either enter judgment here on remand for entry of Judgment for the Plaintiffs.

RESPONSE TO CROSS- APPEAL

"A. **The trial court clearly erred when it denied George County's Motion to Dismiss and/or for Summary Judgment based upon the statute of limitations, because the denial letter sent by George County's Liability insurer qualfies as a "notice of denial of claim" under the MTCA."**

This whole issue turns on one single proposition - **can a governmental entity delegate a statutory duty?** I believe this to be a case of first impression as all of the reported cases consulted concerning this matter involved a denial letter being sent by the "governmental entity." The most recent case where a denial letter was sent is Lee v. Memorial Hospital, 999 So.2d 1263 (Miss.2008). This case involved the computation of time under §11-46-11(3). A recent case, Delta Regional Medical Center v. Green, 43 So.3d 1099 (Miss. 2010), brought § 11-42-11 current and cleared up prior ambiguities in the statute but did not specifically address if the governmental entity could delegate giving notice of denial. The Plaintiff and the Trial Judge did agree on this one thing, that the duty of denial of a claim is not one to be delegated as the statute

did not provide for delegation. In the *Lee* case the Court noted " * * * Section 11-46-11(1) is a hard-edged, mandatory rule which the Court strictly enforces." This entire argument was presented to this Court in Cause No. 2008-M-01033 where George County sought Interlocutory Appeal which was denied. See Plaintiff's response to Defendant's Motion for Summary Judgment attached hereto as Exhibit "B".

I. ARGUMENT

GEORGE COUNTY HAS NO AUTHORITY TO DELEGATE A STATUTORY DUTY TO A THIRD PARTY UNDER §11-46-11(3) - TO DENY A CLAIM

The only issue raised by Defendant's Motion is whether or not the adjuster, Zurich, has the authority to deny a claim instead of the County. In other words can §11-46-11(3) be interpreted to mean that the County can delegate a statutory duty to a third person . The answer by this Court, though not directly addressed as presented here, is no.

The Supreme Court had made it clear its interpretation of the Tort Claim's act as being that the Code will be construed as written. "Today, we do no more than accept that this specific statutory language means what it says, and we simply apply it" Caves vs. Yarbough, 2007 MSSC 6006-CA-01857, (Miss, 2007). In University Medical Center v. Easterling, 928 so.2d 815 (Miss. 2006), this court in addressing the 90 day notice rule stated:

> Page 819, "In order to make it perfectly clear to all that strict compliance is required * * *"and (page 820) "We do so today because of our constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation. We also note that our decision today provides consistency." " * * *". The result here, as in *Ivy*, is that the ninety-day notice requirement under section 11-46-11(1) is a "hard-edged , mandatory rule which the Court strictly enforces." * * *."

Since the ruling in the Easterling case, this Court has made it clear that strict compliance is required and the statute will be construed as written, which is exactly what the Trial Court did in this instance.

George County set out §11-46-11(3) in its breif and completely ignored the mandates of

said section regarding who may deny a claim and the language as to who has the authority of denial of a claim is sated, to-wit:

> "* * *"..**should the governmental entity deny any such claim,** then the additional ninety (90) days during which the claimant may file an action shall begin to run upon the claimant's **receipt of notice of denial of claim from the governmental entity.** ***All notices of denial of claim shall be served by the governmental entity upon claimant by certified mail, return receipt requested, only.***"

No where in §11-46-11(3) is there any provision authorizing the "governmental entity" to delegate its power to a third person to deny a claim. The mandate of the statute is clear, unequivocal and precise...**All notices of denial of claim shall be served by the governmental entity upon claimant by certified mail, return receipt requested, only!** "Only" is defined "(a) as a single fact or instance and nothing more or differently, (b) exclusively, solely." Websters Seventh New Collegiate Dictionary. Zurich had absolutely no authority to act for and on behalf of George County as it related to the denial of a claim.

The converse of George County's argument is to be found in Williams vs. Clay County, 861 So.2d 953, (Miss. 2003). Williams fell down at the County Courthouse and injured her knee. On the very day of the injury she contacted the chancery clerk, talked with supervisors and was told by the chancery clerk that her valid medical bills would be paid. This information was confirmed in a letter to her attorney and in spite of all this notice the legal effect was that if the notice of claim was not filed, then the claim was time barred..Meaning, that the statute had to be interpreted as written.

In Soileau vs. Ms. Coast coliseum Commission, 730 So.2d 101, (Miss. 1998), the claimant fell at the coliseum and immediately sought medical treatment from the emergency medical technician on duty at the coliseum, filled out an incident report which was signed by the Coliseum's chief executive director. Later claimant was interviewed by counsel for the Coliseum who wrote a narrative of the incident. Soileau's attorney corresponded with the attorney for the

Coliseum and the Coliseum's insurance adjuster, submitted copies of medical records and bills to the adjuster and tried to settle the claim...all of this without filing the statutory notice. The trial judge dismissed the claim for failure to comply with § 11-46-11(3) and this Court affirmed the dismissal.

Neither the Claimant, or the Chief executive officer, Attorney or Insurance Adjuster for the governmental entity had any authority to alter or change the mandates of the statute and in Soileau's case this Court stated:

"The formality of the notice is explicit in the statute" "* * *." "A legislative decision was made to require the notice. The judicial decision has been to enforce it as written.." (* * * .)".

In a similar case, South Central Regional Medical Center v. Guffy, 930 So.2d 1252. (Miss. 2006), a case similar to *Soileau and Williams vs. Clay County*, where settlement was attempted with the hospital director and insurance company, the fact the 90 day notice was not complied with, the case was dismissed. The back side of these cases clearly show two things (1) the insurance adjusters and attorney, etc., do not have authority to bind the governmental entity to notice and (2) unless the statute is complied with (Zurich) the carrier can not deny a claim that the statute clearly provides that **only** the governmental entity can deny a claim.

Had Zurich wanted to avail itself of the denial letter as provided in the 90 day notice provision of §11-46-11(3) it only had to request the supervisors to deny the claim and send the certified letter to claimants. This was not done. An examination of the minutes of the Board of supervisors clearly revealed that not only did Zurich fail to have the governmental entity deny the claim, Zurich never requested such action. An abstract of the George County Supervisors Minute Books revealed that the Board of supervisors did not deny the claim and further, Zurich never made a request to have the claim denied in accordance with §11-46-11(3). The Claim was never at any time denied by the government entity - George County, Mississippi. A copy of the Abstract

is attached to Plaintiff's Response to Defendant's Summary Judgment which is attached hereto as Exhibit " B ".

§19-3-27 is the code section that provides that the authority of the Board of Supervisors may be exercised only through its minutes. The cases are legion that the Supervisors may speak and act only through their minutes. In Rawls Springs Utility District v. Novak, 765 So.2d 1288 (Miss. 2000), the following language is to be found, to-wit:

"[A]lways it has been the positive rule in this state, both by statute and by a long line of judicial decisions strictly enforcing those statutes, that **boards of supervisors [sic] can bind counties, or district therein, only when acting within their authority and in the mode and manner by which this authority is to be exercised under the statutes,** and that their contracts, and ***every other substantial action taken by them*** **must be evidenced by entries on their minutes, AND CAN BE EVIDENCED IN NO OTHER WAY.**(EMPHASIS ADDED)

See also Board of Supervisors of Tishomingo County vs. Dawson, 45 So.2d 253 (Miss. 1950), which authority support the Dawson case.

This Court has always maintained that the MTCA will be interpreted and enforced as written. In that respect, the Plaintiffs would respectfully request that this Court take its ruling in *Delta Regional Medical Center v. Green,* 43 So.2d 1099 (Miss 2010) one step further and provide that **only the governing authorities"** have the authority to deny a claim, that such denial can not be delegated to third parties. All actions of the Board of Supervisors must be spread upon its minutes to be official. It would not be right of this Court to hold a hard-edged mandatory rule against the citizens when interpreting §11-46-11 and in the same statute permit a delegation not provided. §11-46-11 is a doubled edged sword that cuts both ways!

CONCLUSION

Once the record is consulted by this Court, the exhibits examined and the prevailing law is applied there can be but one inescapable result and that is, the Trial Judge completely abused his discretion in disregarding the overwhelming weight of the evidence and entering Judgment for George County. Second, the matter of delegating a statutory duty to a third party by the

County, a duty that is to be performed only by the County, is prohibited by law especially when the statute is clear and unambiguous and is to be enforced as written.

This cause should be reversed and remanded for assessment of damages, or judgment entered here for Plaintiffs. On cross appeal the matter should be affirmed regarding the denial of George County's Motion for Summary Judgment.

RESPECTFULLY SUBMITTED, this the 22nd day of August, 2011.

CARL KEITH BLACKSTON and
JOSHUA M. STAPLETON,

BY: _____
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REQUEST FOR ORAL ARGUMENT

The Appellant/Cross Apellees, Carl K. Blackston and Joshua Stapleton, would request oral argument on all issues presented in this appeal, especially the matter concerning the ability of the Governing Authority to delegate the denial of a claim through its insurance carrier. The clear mandate of §11-46-11(3) clearly mandates denial of a claim to be that of the Governing Authorities **only.** The implications of this pending issue are of great magnitude to the citizens of this State and to the Bar.

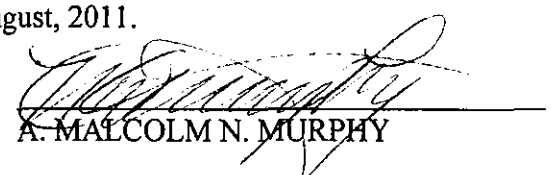
CERTIFICATE OF SERVICE

I, A. M. MURPHY, do hereby certify that I have this date mailed, U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellants to:

KIMBERLY S. ROSETTI, ESQ.
BRYANT, DUKES & BLAKESLEE
POST OFFICE BOX 10
GULFPORT, MISSISSIPPI 39502

HON. ROBERT P. KREBS
CIRCUIT JUDGE
P. O. BOX 998
PASCAGOULA, MS 39568-0998

THIS, the 22nd day of August, 2011.



A. MALCOLM N. MURPHY

IN THE CIRCUIT COURT OF GEORGE COUNTY, MISSISSIPPI

CARL KEITH BLACKSTON AND
JOSHUA M. STAPLETON — PLAINTIFFS

VS. — CAUSE NO: 2007-0165(2)

GEORGE COUNTY, MISSISSIPPI — DEFENDANT

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, CARL KEITH BLACKSTON and JOSHUA M. STAPLETON, Plaintiffs in above styled and numbered cause, by and through their Attorneys of record, and for response to Defendant's Motion to Dismiss and/or for Summary Judgment against the Plaintiffs would respond and show unto the Court the following, to-wit:

1.

Responding to paragraphs No. 1 and 2 of the Motions of George County, Plaintiffs admit that they filed suit under the Mississippi Tort Claim Act (MTCA) on August 30, 2007, and admit that the cause of the accident was caused by the negligent acts of George County in extending private drives out approximately two feet into the travel portion of the county road to a height of five inches. The complaint also cited the County's violations of the mandates of § 65-7-3, § 5-7-7 and § 65-7-117.

2.

Plaintiff's admit that this is a cause of action pursuant to the Mississippi Torts Claim Act §11-46-1 et. seq. Mississippi Code Ann, and the Notice of Claim was filed on February 21, 2007,

and amended on February 23, 2007. Exhibit "B" to the Motion is a correct copy of the Notice and Amended Notice.

3.

Plaintiffs deny that George County denied the claim at any time and the allegations of paragraph IV of the motion are not correct. Under § 11-46-11(3) only governmental entities can deny a claim - not the carrier or representatives. The allegations regarding the denial letter are to this effect - Zurich North America, carrier for George County, Mississippi, sent a registered letter to one of counsel for Plaintiffs and a copy of that letter is attached to the Motion to Dismiss or for Summary Judgment as Exhibit "C". Zurich's letter, pertinent paragraph, provides:

> "We wish to make a fair and prompt adjustment on the merits of all our claims, but in this instance, we do not feel that our insured is responsible for your client's damages. Under these circumstances, we regret to inform you that we are unable to pay your client's claim."

Plaintiff's claim was not denied by George County and the Zurich letter does not specifically say the claim is denied, it simply provided that Zurich was not going to pay the claim - the letter, even if legal, did not conform to § 11-46-11(3).

4.

Attached, as Exhibit 1 hereof, is a certified copy of an Abstract of Records from the Chancery Clerk's Office of George County, Mississippi, which provides that after a diligent search of the Official Minutes of the George County Board of Supervisors, no reference or motion was found denying the claim of Plaintiff's. The Certificate also provides that Zurich never requested the Board of Supervisors to deny the claim. Since the Board of Supervisors can only speak through their minutes, or the lack thereof, there has been no Governmental denial of

Plaintiff's claim. § 11-46-11(3), which is to be found on page 3 of Defendant's Brief, also provides:

> "* * *. However, should **the governmental entity** deny any such claim, then the additional ninety (90) days during which the claimant may file an action shall begin to run upon the claimant's receipt of **notice of denial of claim from the governmental entity.** All notice of denial of claim shall be **served by governmental entities** upon claimants by certified mail, return receipt requested. * * *.

The matter of denial of a claim under MTCA is with the governmental entity and not with its representatives. Defendant cites Page v. University of Southern Mississippi 878 So.2d 1003. (Miss. 2004) and the Page case constantly provides (page 3) "The Claimant would not receive the full 95 day or 120 day tolling period **if the agency denies the claim** prior to the tolling period." While discussing the statute of limitations in Caves v. Yarbough, 2007 MSSC, 2006-CA-01857, §11-46-11(3), the Court actually cleared the air and in applying the statute said "*Today, we do no more than accept that this specific statutory language means what it says, and we simply apply it.*".

5.

§ 19-3-27 is the code section that provides that the authority of the Board of Supervisors may be exercised only through its minutes. The cases are legion that the Supervisors may speak and act only through their minutes. In Rawls Springs Utility District v. Novak, 765 So.2d 1288 (Miss. 2000), the following language is to be found, to-wit:

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See also Board of Supervisors of Tishomingo County vs. Dawson, 45 So.2d 253 (Miss. 1950), which authority support the Dawson case.

CONCLUSION

The County never denied the Claim of Plaintiffs, Stapleton and Blackston. Under the MTCA only the Board of Supervisors could deny the claim and this duty is not one to be delegated under the act and thus the claim was timely filed. Had Zurich wanted to avail itself of this limitation period it needed only to have the County deny the claim and this was not done. The Motion to Dismiss and/or Summary Judgment should be denied by this Court.

Respectfully submitted,

CARL KEITH BLACKSTON and
JOSHUA M. STAPLETON, PLAINTIFFS

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CERTIFICATE OF SERVICE

I, A. M. Murphy, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the above and foregoing Plaintiff's Response to Summary Judgment to the following:

KIMBERLY S. ROSETTI, ESQ
BRYANT, DUKES & BLAKESLEE, P.L.L.C.
POST OFFICE BOX 10
GULFPORT, MS 39502-0010

SO CERTIFIED this the 14th day of April, 2008.

A. M. MURPHY

IN THE CIRCUIT COURT OF GEORGE COUNTY, MISSISSIPPI

CARL KEITH BLACKSTON AND
JOSHUA M. STAPLETON — PLAINTIFFS

VS. — CAUSE NO: 2007-0165(2)

GEORGE COUNTY, MISSISSIPPI — DEFENDANT

CERTIFICATE

The undersigned Deputy Clerk of the Chancery Clerk's Office of George County, Mississippi, hereby certifies to the following information that is of record in the Official Minute Books of the Board of Supervisors of George County, Mississippi, to-wit:

Minute Book No. 111, commencing with page 57, with date of February 16, 2007, which date is just prior to the date of filing of the Notice of Claim of Carl Keith Blackston and Joshua M. Stapleton, and continuing to Book 113, page 549, with ending date of May 16, 2007. My examination revealed that the Board of Supervisors of George County, Mississippi, did not deny the Claim of Carl Keith Blackston and Joshua M. Stapleton.

My examination also revealed that Zurich North America did not file any request for the Board of Supervisors to deny the claim of Carl Keith Blackston and Joshua M. Stapleton.

Further Affiant sayeth nothing.

(SEAL)

CAMMIE B. BYRD, CHANCERY CLERK
OF GEORGE COUNTY, MISSISSIPPI

BY Mona Jones to the best of my knowledge
DEPUTY CLERK