IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2010-CA-01380

LORRI L. WRIGHT, INDIVIDUALLY AND ON BEHALF OF NICHOLS SEIDL AND JOHN SEIDL, AND NICHOLS SEIDL, INDIVIDUALLY — APPELLANTS

V.

LEE COUNTY, MISSISSIPPI, BY AND THROUGH ITS BOARD OF SUPERVISORS — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI
No. CV06-171-GL

APPELEE'S BRIEF

WILLIAM C. MURPHREE
Mitchell, McNutt & Sams, P.A.
105 South Front Street
Post Office Box 7120
Tupelo, Mississippi 38802-7120
(662) 842-3871
(662) 842-8450 Fax
MSB [redacted]

GARY L. CARNATHAN
Carnathan & McAuley
P.O. Drawer 70
Tupelo, Mississippi 38802
(662) 842-3321
(662) 842-8450 Fax
MSB # [redacted]

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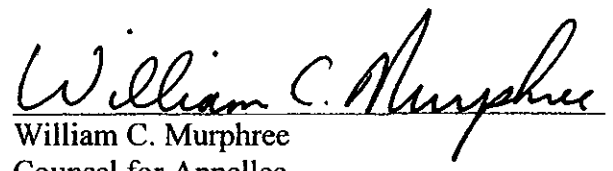
CERTIFICATE OF INTERESTED PERSONS

The undersigned 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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. The Plaintiff and Appellant Lorri L. Wright, Nettleton, Mississippi.
2. The Plaintiff and Appellant Nicholas Seidl, Nettleton, Mississippi.
3. The Plaintiff and Appellant John Seidl, Nettleton, Mississippi.
4. Daniel M. Czamanske, Jr. and Chapman, Lewis & Sawn, Clarksdale, Mississippi.
5. William C. Murphree, Esq., and Mitchell, McNutt & Sams, P.A., Tupelo, Mississippi.
6. The Defendant and Appellee body politic, Lee County, by and through its Board of Supervisors.
7. Gary L. Carnathan, Esq., and Carnathan & McAuley, Tupelo, Mississippi.
8. Trident Insurance Company, San Antonio, Texas.

Respectfully submitted,



William C. Murphree
Counsel for Appellee

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Statement of Position Regarding Oral Argument

Appellee does not request oral argument. This appeal presents neither complicated facts nor complicated legal issues with regard to interpretation of the Mississippi Tort Claims Act. Appellee summits that the Court would not benefit from oral argument in understanding and deciding this appeal.

Statement of Issues

Appellee Lee County agrees with the Statement of Issues set out by Lorri L. Wright, Nicholas Seidle, and John Seidl.

Statement of the Case

(A) Procedural History

The Honorable Thomas J. Gardner tried this case without a jury under the Mississippi Tort Claims Act on July 12, 2010. Judge Gardner dismissed the action and entered judgment for Lee County August 4, 2010. Neither Wright nor either Seidl filed any post-trial motions, and they perfected an appeal on August 24, 2010.

(B) Facts

On the morning of June 26, 2005 Nicholas Seidle drove a Jeep vehicle in which his brother John rode as a passenger. For whatever reason Nicholas Sidl failed to keep the vehicle on CR 100. The right tires of the vehicle dropped off the paved surface. The vehicle continued to travel west with two tires off the roadway until the vehicle hit a washed out area in the ditch and overturned. (Trial Transcript, Vol. II, pp. 13-14, 30-33).

The rollover ejected Nicholas from the vehicle (Trial Transcript, p. 12), but John was not ejected (Trial Transcript, p. 11). Nicholas's injuries left him a paraplegic. John sustained a broken leg but recovered.

Lorri Wright brought suit on September 20, 2006 against both Daimlerchrysler and Lee County. (RA, p. 6). At the time Lorri Wright filed suit, both her sons were still minors. On October 20, 2008 Wright dismissed Daimlerchrysler with prejudice after reaching a settlement with that Defendant. (RA. p. 3). The case against Lee County proceeded to trial on July 12, 2010 under the Mississippi Tort Claims Act before Honorable Thomas J. Gardner, III, sitting without a jury.

When Wright and the Seidl brothers rested on July 12, 2010, Lee County moved the trial

court to dismiss the action. (TT 121). The following day the trial judge held that the County had engaged in a discretionary function and had immunity under §11-46-9(d). (TT 132-141). Subsequently, on August 2, 2010, the trial court entered final judgment pursuant to its ruling on July 23, 2010 (R.A. Vol. 1, pp. 00018-00019).

Summary of the Argument

The trial court properly found that in maintaining the shoulders on CR 100 Lee County discharged a discretionary function and had immunity from liability as provided in §11-46-9(d) Miss. Code of 1972 (Annot.).

Argument

I. The Trial Court Erred in Finding and Holding that the Maintenance and/or Creation of a Shoulder on County Road 100 was Discretionary

(A) Standard of Review

Because the trial court entered summary judgment for Lee County, this Court reviews that decision de novo. Miller v. Meeks, 767 So.2d 302 (Miss. 2000); Smith v. Wesley Health System, 47 So.3d 742 (Miss.App. 2010).

(B) Ministerial and Discretionary Functions

Prior to the enactment of the MTCA counties in Mississippi had immunity from suits for personal injuries under the doctrine of sovereign immunity unless the particular case came within an exception to Mississippi's judicially created sovereign immunity. Mohundro v. Alcorn County, 675 So. 2d 848, 853 (Miss. 1996). However, under judicial sovereign immunity an aggrieved party could still hold the individual county employee liable for torts committed while the employee performed a ministerial duty. Mohundro, *supra*. In Grantham v. Miss. Dept. of Corrections, the Supreme Court explained that a duty is ministerial when:

> The duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion . . .

Under Mississippi's judicially created sovereign immunity the Supreme Court had declared road maintenance a discretionary function, Mohundro, *supra.* Subsequently, the Supreme Court abolished judicially created sovereign immunity, Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982) and later declared portions of the originally enacted MTCA unconstitutional. Presley v. Miss. State Hwy. Com'n, 608 So. 2d 1288 (Miss. 1992). In reaction to the Supreme Court's decision in Presley the Legislature enacted the MTCA in its present form which established legislatively-created sovereign immunity as the law of the state.

Under the MTCA any governmental entity enjoys sovereign immunity, and no aggrieved party can sue an employee in his individual capacity unless the employee acted outside the scope of his employment. The Legislature in the MTCA while enacting mandatory sovereign immunity also provided that under certain circumstances a person damaged because of a governmental employee's act could sue the governmental entity for money damages. Essentially the state (and its governmental entities) has waived sovereign immunity for torts committed by government employees up to a certain monetary amount. However, the Legislature in § 11-46-9 provided that for certain acts it had not waived its sovereign immunity. Specifically, the Legislature declared that the state has not waived its immunity for any act:

> (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;

§ 11-46-9(d) leaves no doubt that a governmental has immunity for any claim arising out of the performance or non-performance of a discretionary function. In pre-MTCA cases the

Supreme Court had ruled that road maintenance is a discretionary function. Brazeale v. Lewis, 498 So. 2d 321, 323 (Miss. 1986). In post-MTCA decisions the Court of Appeals and a federal court construing Mississippi law have followed the Supreme Court's pre-MTCA rulings holding that road maintenance is a discretionary function. Barrentine v. MDOT, 913 So. 2d 391 (Miss. App. 2005); Jones v. MTC, 920 So. 2d 516 (Miss. App. 2006); Dozier v. Hinds County, 379 F. Supp. 2d 834 (S.D. Miss. 2005).

In MDOT v. Cargile, 847 So. 2d 258 (Miss. 2003) the Supreme Court held that a governmental entity enjoyed immunity for discretionary acts only if the government used ordinary care, citing Brewer v. Gurdette, 768 So. 2d 920 (Miss. 2003) and L.W. v. McComb Separate School District.

In Collins v. Tallahatchie County, 876 So. 2d 284 (Miss. 2004), the Supreme Court again considered the issue of immunity for discretionary acts and held:

> Here, both parties cite (directly or parenthetically) *Brewer v. Burdette*, 768 So.2d 920, 923 (Miss. 2000), for the erroneous proposition that one must use ordinary care in performing a discretionary function to retain immunity. Unfortunately, *Brewer* cited *L.W. v. McComb Separate School District*, 754 So.2d 1136 (Miss. 1999), for the proposition that an ordinary care standard applies to discretionary function immunity. This Court recognized in *L.W.* that the school's conduct was of a discretionary *nature*. *L.W.*, 754 So.2d at 1139-43 (emphasis added). However, this Court never found that the school officials were *performing* a discretionary *function*. *Id.* (emphasis added). Indeed, this Court actually found that the school officials in *L.W.* were performing a function *required by statute* and, therefore, properly analyzed the school's actions under subsection (b) (which addresses acts or omissions while performing statutory duties), rather than subsection (d) (which addresses discretionary duties). *Id.* Subsection (b) clearly carries an ordinary care standard; subsection (d) does not. See *id.*
>
> In *Brewer*, this Court misapplied the wording in L.W. by incorrectly applying the ordinary care standard to discretionary duties. In *Harris*, this Court held: "When an official is required to use his own judgment or discretion in performing a duty, that duty

> is discretionary." *Harris*, 867 So.2d at 191. Miss. Code Ann. § 11-46-9(1)(d) exempts governmental entities from liability of a discretionary function or duty "whether or not the discretion be abused". Therefore, ordinary care standard is not applicable to Miss. Code Ann. § 11-46-9(1)(d).

Wright and the Seidls seem to grudgingly acknowledge that road maintenance is a discretionary function and that this case does involve road maintenance. However, Wright and the Seidls seek to overcome the immunity for "road maintenance" by making the argument that:

> Perhaps the June 17 decision by the Board of Supervisors to re-pave CR 100 was discretionary, they have to make a dicsion to allocate funds and consider the budget, etc., but the allegations by the Appellants were not directed at the re-paving or any other activity that would require board approval or a decision based on social and economic needs. Appellants' allegations were directed at the lack of a shoulder and the large pavement edge differential, work done by the County Road Department routinely and mandatorily, albeit not on CR 100 for no apparent reason.
>
> Tim Alred testified about the record from the County Road Department reflecting things such as grading and pulling shoulders. He testified that all roads were required to have a shoulder and that the maximum pavement differential was three to four inches. Therefore, if one steps back from lumping everything into the category of "road maintenance: and instead looks at the specific acts of negligence being alleged, it becomes clear that maintaining a shoulder and keeping that shoulder within 3-4 inches is not discretionary, but rather mandatory for the Appellee's road department. – Appellant's Brief, p. 7.

First, neither Wright nor the Seidls offer any support for this argument that road maintenance becomes a ministerial function because the Board of Supervisors says that it requires all County roads to have shoulders. Second, Road Manager Tim Allred made it plain in his testimony that while the Board states that it will do certain things regarding road maintenance, it always reserves the right to change its plans at any time (Exhibit 9, Tim Allred deposition, pp. 14, 30, 36, 40, and 48). Allred made it plain that the County tries to install

shoulders on all roads and that only a 3"-4" drop is acceptable but added, "It's a constant battle." (Ex. 9, Tim Allred deposition, p. 48).

Wright and the Seidls argue that because the County failed to meet its expectations that a discretionary act became a ministerial act. As noted above, a ministerial act is one imposed by law. Failure to properly carry out a discretionary function is an abuse of discretion, and the Supreme Court recently again reiterated that because a governmental entity abuses its discretion does not somehow defeat the immunity for discretionary functions.

In Miss. Dept. of Mental Health v. Shaw, 45 So.3d 656 (Miss. 2010), the Ellisville school for persons suffering from mental retardation decided to raise funds by putting on a Halloween event called "Camp Fear" similar to a Halloween haunted house. Participants ran around a cabin in the dark, and strobe lights would come on robbing them of night vision. Then a character would emerge from the dark and send the participants fleeing from the cabin. Staffers with flashlights provided the only illumination. Shaw, a participant, fell off the cabin's porch and sustained injuries. Shaw sued for damages under the MTCA.

The Mississippi Department of Mental Health, which operated the school, moved for summary judgment asserting the immunity defense for discretionary acts. The trial court denied the motion, and MDMH petitioned for interlocutory appeal, which the Supreme Court granted.

The Court first found that MDMH had engaged in a discretionary function. The Court then went on to hold:

> [I]t is important to note that immunity under the MTCA applies even in cases where the agency is found to have abused its discretion. While this may seem harsh, the MTCA's intent is to "promote efficient and timely decision-making [by government officials] without fear of liability. This ... works to encourage free participation and hinder fear that goes with risk-taking situations and the exercise of sound judgment....

> The actions of the school administration in planning and staging Camp Fear were immune from tort liability. And under the MTCA, even if the school or its employees abused their discretion in the promotion and conduct of Camp Fear, the MDMH still enjoys immunity. therefore, we must reverse and render.
> Shaw, at 659, 660.

Likewise, the actions of Lee County in maintaining the shoulders of CR 100 are immune from tort liability. Even if Lee County and its employees abused their discretion in maintaining the shoulders of CR 100, Lee County still enjoys immunity.

II. Under the Mississippi Tort Claims Act Can a Governmental Entity Exercise Its Discretion in such a Way as to Create or Allow a Dangerous Condition to Exist

Plaintiffs in MTCA cases have sought to defeat the immunity provided for discretionary functions by arguing that despite §11-46-9(d) a governmental entity cannot have immunity if it caused the dangerous condition. However, Shaw discussed above, negates that argument. Shaw makes clear that even if the governmental entity abuses its discretion resulting in the creation of a dangerous condition, the governmental entity still has immunity.

Plaintiffs including Wright and the Seidls in these cases have also sought to defeat the immunity provided by §11-46-9(d) by looking to §11-46-9(v) which provides that a governmental entity has immunity for any claim:

> (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;

The Mississippi Court of Appeals in recent decisions has shown the absolute fallacy of the argument that one immunity can somehow be used to defeat another immunity.

> the MTC is exempt from liability because if one of the exemptions from liability found in section 11-46-9(1)(a-y) applies, it does not matter if the application of other exemptions in that section involve a question of material fact; summary judgment must be granted on the exemption established as a matter of law.
>
> In order to address the merits of the Appellants' and MTC's arguments, our discussion will cover three areas: (1) strict construction of the MTCA, (2) discretionary acts pursuant to 11-46-9(1)(d), and (3) "Frasier's Octopus."

The Court of Appeals reiterated that both trial courts and appellate courts must strictly construe the Mississippi Tort Claims Act and interpret it as expressly written or by necessary implication to carry out the legislature's "intent to strictly limit the state's waiver of sovereign immunity." Knight, at 967.

The Court then held that the MTC's actions regarding road maintenance and placement of warning signs came within the immunity provided by §11-46-9(1)(d).

The Court then discussed "Frasier's Octopus":

> Jim Frasier created the term "Frasier's Octopus" in his 1999 law review article entitled, "A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of Immunity, Non-jury Trial, and Limitation of Liability," 68 Miss. L.J. 703 (1999). In Frasier's 2007 article on the same subject matter, Frasier states that the exemptions [in section 11-46-9] "are disjunctive in nature, and thus, 'like an octupus's arms; even if one does not get you, another one may.'" Frasier, 76 Miss. L.J. at 982-83 (quoting Frasier, 68 Miss. L.J. at 743).
>
> We find that the concept behind "Frasier's Octupus" applies in this case. Because we have found summary judgment appropriate as to section 11-46-9(1)(d), we need not engage in any analysis regarding the Appellants' claim as to section 11-46-9(1)(v). In other words, "[as] established by precedent of both this Court and the supreme court, where any of the immunities enumerated in section 11-49-9(1) apply, the government is completely immune from the claims arising from the act or omission complained of." *Willing*, 958 So.2d at 1255; *see State v. Hinds County Bd. of Supervisors*, 635 So.2d 839, 842 (Miss.1994) (stating that "[w]hen the State is sued to determine whether a state statute or action is

> unconstitutional, the State cannot be held liable for damages if the conduct falls within one of the exceptions found in [Mississippi] Code [Annotated] [s]ection 11-46-9"). For the above reasons, the Appellants' argument that section 11-46-9(1)(v) saves their case is without merit. Knight, at 971.

In a case involving similar facts the Court of Appeals held that the trial court properly granted summary judgment to the Mississippi Department of Transportation (MDOT):

> We recently stated that "where *any* of the immunities enumerated in section 11-46-9(1) apply, the government is completely immune from the claims arising from the act or omission complained of, *Knight*, 10 So.3d at 971 (emphasis added). We also stated that "even if we may not agree with the wisdom of the statutes regarding the waiver of state sovereign immunity passed by the Legislature, we are bound to follow a statute's clear, expressed mandate." *Id.* (citing *Wells ex rel. Wells v. Panola County Bd. of Educ.*, 645 So.2d 883, 889 (Miss.1994)). "Courts cannot pass judgment upon the wisdom, practicality or even folly of a statute. We must follow it unless it clearly impinges upon some Constitutional mandate....Lee v. Miss.. Dept. of Transp., 2009 W.L. 292 9827 (Miss.App.2009).

Conclusion

In maintaining the shoulders of CR 100 Lee County discharged a discretionary function. When the Legislature enacted the Mississippi Tort Claims Act it did not waive immunity for discretionary acts as codified in §11-46-9(d). As the appellate courts of this state have held in the cases discussed above, even if a governmental entity abuses its discretion resulting in an injury, the governmental entity still has immunity. Likewise, if a governmental entity has engaged in a discretionary function, it has immunity, and some other provision of §11-46-9 cannot somehow defeat that immunity.

As the Supreme Court remarked in Shaw, supra, the immunity provided by §11-46-9(d) may produce a harsh result; however, the state through the Legislature waives or retains immunity as it sees fit. Since the enactment of MTCA injured plaintiffs have sough to overcome

the immunity provided by §11-46-9(d). However, as the Court of Appeals noted in both Knight and Lee only the Legislature, not the courts, has the power to modify the Mississippi Tort Claims Act.

This, the 3rd day of February, 2011.

LEE COUNTY MISSISSIPPI, BY AND THROUGH ITS BOARD OF SUPERVISORS, Defendant

BY: William C. Murphree
WILLIAM C. MURPHREE, MSB [redacted]

BY:
GARY L. CARNATHAN, MSB [redacted]

OF COUNSEL:

MITCHELL, McNUTT & SAMS, P.A.
ATTORNEYS AT LAW
POST OFFICE BOX 7120
TUPELO, MISSISSIPPI 38802-7120
(662) 842-3871
(662) 842-8340

CARNATHAN, MALSKI & MCAULEY
P.O. DRAWER 70
TUPELO, MS 38802
(662) 842-3321
(662) 842-3324

CERTIFICATE OF SERVICE

I, William C. Murphree, one of the attorneys for the Defendant, Lee County Mississippi, By and Through Its Board of Supervisors, do hereby certify that I have this day served a true and correct copy of the above and foregoing Appellee's Brief, on the following by placing said copy in the United States Mail, postage prepaid, addressed as follows:

Daniel M. Czamanske, Jr., Esq.
Chapman, Lewis & Swan
P.O. Box 428
Clarksdale, MS 38614

Hon. Thomas J. Gardner, III
District One Circuit Court Judge
P.O. Drawer 1100
Tupelo, MS 38802-1100

DATED, this the 3rd day of February, 2011.

William C. Murphree
WILLIAM C. MURPHREE