IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2010-CA-01380

LORRI L. WRIGHT, INDIVIDUALLY AND ON BEHALF OF NICHOLAS SEIDL AND JOHN SEIDL, AND NICHOLAS SEIDL, INDIVIDUALLY
Plaintiffs-Appellants

VERSUS

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

On Appeal from the Circuit Court of Lee County, Mississippi
No. Cv06-171-GL

BRIEF OF APPELLANTS LORRI L. WRIGHT, INDIVIDUALLY AND ON BEHALF OF NICHOLAS SEIDL AND JOHN SEIDL, AND NICHOLAS SEIDL, INDIVIDUALLY

Submitted by:

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ORAL ARGUMENT REQUESTED

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2010-TS-01380

LORRI L. WRIGHT, INDIVIDUALLY AND ON BEHALF OF NICHOLAS SEIDL AND JOHN SEIDL, AND NICHOLAS SEIDL, INDIVIDUALLY **PLAINTIFFS/APPELLANTS**

VERSUS

LEE COUNTY, MISSISSIPPI, BY AND THROUGH ITS BOARD OF SUPERVISORS **DEFENDANTS/APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that in addition to the named parties the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or recusal.

1. The Honorable Thomas J. Gardner, III
2. William C. Murphree, Esq.
3. J. Harland Webster, Esq.

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STATEMENT OF POSITION REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument. This appeal presents complicated facts and legal issues as well as novel arguments with regard to the interpretation of the Tort Claims Act. The injuries involved are significant, they involve a chest level permanent paralysis of a young man. It is believed that it would be beneficial to the understanding and decision of this Court to hear from the parties through counsel by way of oral arguments.

BRIEF OF APPELLANTS

COME NOW Appellants, by and through counsel, and for this their Brief hereby state that there remain factual issues to be determined by the trier of fact, and the trial court's granting of a judgment in favor of Appellee as a matter of law, was error and should be reversed.

STATEMENT OF ISSUES

The First issue is whether the trial court erred in finding and holding that the maintenance and or creation of a shoulder on county road 100 was discretionary. The Second issue is whether, pursuant to the Mississippi Tort Claims Act, a governmental entity can ever exercise its discretion in such away as to create or allow a dangerous condition to exist.

STATEMENT OF THE CASE

Appellants' complaint was filed on September 20, 2006, against Daimlerchrysler Corp. and Lee County. (Record on Appeal "RA", page 6) On October 20, 2008, defendant Daimlerchrysler Corp. was dismissed with prejudice. (RA, p.3) On July 12, 2010, this matter was tried to the Circuit Court without a jury as to Appellee, Lee County. On August 4, 2010, the trial court entered a final judgment in favor of Appellee, Lee County, and against Appellants, in which the trial court granted Appellee's motion for directed verdict. (RA, p.18) Appellants timely filed a notice of appeal on August 24, 2010. (RA, p.30) This matter is now timely and properly before this Court.

STATEMENT OF THE FACTS

This cause came on for trial before the Court sitting without a jury on July 12, 2010, pursuant to the provisions of the Mississippi Tort Claims Act (MTCA) §11-46-1 et. seq. Mississippi Code of 1972 (Annot.).

The Plaintiff Lorri Wright initiated this action on behalf of her sons Nicholas Seidl and John

Seidl, both of whom have now reached the age of majority. Appellants initially also sued Daimlerchrysler Corp and subsequently settled with Daimlerchrysler Corp, which the trial court then dismissed with prejudice from the suit.

On June 26, 2005, Nicholas Seidl drove a Jeep vehicle on County Road 100 (also called Airline Road) near Nettleton, Mississippi. Nicholas's brother, John, rode as a passenger. The vehicle's right front tire dropped off the right edge of the paved surface. Deputy Ricky Payne investigated the accident and wrote the report. (Trial Transcript "TT", pages 8-9). According to Deputy Payne[1], the two right tires of Appellants' vehicle went off the right side of County Road 100, the vehicle traveled 50 to 75 feet up the ditch off the road, then rolled over twice as it re-entered the road. (TT, p.13) Where the vehicle left the road, there was no shoulder, such that when the wheel left the road, the undercarriage of the vehicle then struck the pavement. (TT, p. 18) The speed limit on this road was 55 mile per hour. (TT, p.16) Officer Payne testified that at the time of the accident, there was no shoulder on this 55 mph County Road. (TT, p. 23) Based on the condition of the road at the time of the accident, Deputy Payne who responds to calls in that area testified it would be unsafe to travel over 55 mph on County Road 100. (TT, p. 25) Deputy Payne himself has been driving and had the wheels of his vehicle leave the roadway and onto a shoulder, in such circumstances, he believes the safest thing to do is to let off the gas and try and regain the road. (TT, p. 36)

At the time of the accident, Tim Allred was the Lee County Road Manager. (Exhibit 9, page 48) Mr. Allred testified by way of deposition that at the time of the accident, there were no written

[1]At the time of trial, Deputy Payne was the Chief of Police in Nettleton, Mississippi.

policies or procedures for maintaining county roadways. (Ex. 9, p.46) Pavement edge drop or pavement edge height would be the distance from the pavement edge to the shoulder or ground next to the pavement. Mr. Allred testified that for Lee County the "maximum acceptable distance from the shoulder to the pavement edge..." was three to four inches, and that would just be temporary until they (Lee County) could come back and work on it. (Ex. 9, p. 48) Further, the Lee County Board of Supervisors requires all roads, including County Road 100, to have shoulders (Ex. 9, p. 50) Lee County does keep records of the road shoulders they pull and grade, these records are only from 2001 forward because of a computer crash. Between 2001 and the time of the accident, the records do not show the pulling or grading of any shoulders on Country Road 100. (Ex. 9, p. 26-27) Tim Allred would expect the subject road to be inspected at least monthly. (Ex. 9, pp. 43-44) The Lee County Board of Supervisors authorized re-paving of County Road 100 on 6-17-2005 (Ex. 9, p.8) and the deterioration or condition of that road undoubtedly was the reason for the re-paving authorization. (Ex.9, p.11)

Michael Derek Barrentine is a civil engineer with experience in road design, construction and maintenance. (TR, pp. 41-45) The ability of a vehicle to regain the roadway if a tire slips off for any reason is directly related to the speed of the vehicle and the height of the pavement edge, or pavement differential, that must be overcome. (TR, pp. 58-60) Under the conditions of County Road 100, that is a 55 mph road, to be reasonably safe one would not want a pavement edge height of more than two inches (TR, p. 60) Mr. Barrentine testified that whether one uses National Standards or the County's own standard with regard to allowable pavement heights at the scene of the accident, it did not matter, because that road violated both standards. (TR, p. 55) The various measurements taken along the pavement edge where the incident occurred show a lack of shoulder (TR, p.63), a pavement

edge height of 5 inches (TR, p. 63); 8 ½ inches (TR, p. 65); 5 plus inches (TR, p. 66); and six inches (TR, p. 66).

As a result of the accident, Appellant Nicholas Seidl sustained a thoracic burst out fracture leaving him a paraplegic and wheelchair bound for the rest of his life. Appellant John Seidl, the passenger and brother of Nicholas, broke a femur, and has since recovered.

SUMMARY OF ARGUMENT

It is foreseeable that vehicles will leave the roadway for various reasons, and that roads are built with such a consideration in mind. County Road 100 where the accident happened was defective and dangerous in that the roadway did not have a shoulder to allow a vehicle to recover from such a foreseeable occurrence. Further, the Appellee must have known of the existence of this condition as it is one that occurred over time gradually on a road that was regularly inspected and traveled by the County representatives, in particular the road department. Further, based upon the County Board's approval for the road to be re-surfaced on 6-17-2005, the Appellee was on notice of the condition of the road, specifically the lack of a shoulder and a pavement edge differential exceeding the maximum allowed by the County.

Although the trial court found that road maintenance was discretionary and therefore immune from suit pursuant to §11-46-9(1)(d) of the Mississippi Code, Appellee's own road manager testified that the Board of Supervisors required all roads to have a shoulder. Therefore, the specific defect which was lack of a shoulder alleged by Appellants was not discretionary. Further, Appellee's road manager testified that the maximum allowable pavement edge differential was 3 to 4 inches. Since the evidence showed the pavement edge differential at the accident scene to be over 5 inches, the Appellee did not have discretion to allow the deferential to exceed the maximum. For these reasons,

the trial court erred in finding that the specific defects and dangers alleged by Appellants were discretionary.

Appellants asserted liability pursuant to Mississippi Code section 11-46-9(1)(v). The Appellee asserted that it has immunity pursuant to §11-46-9(1)(d), which provides immunity for discretionary functions. The trial court held that immunity under any section of the MTCA trumps all other provisions including section 1(v) (this is sometimes referred to as the Frasier's Octopus[2]). Appellants, however, would argue that such an interpretation cannot statutorily apply for these two particular sections of the MTCA, that is a governmental entity cannot have the discretion to create a dangerous condition and to hold such is an incorrect application of the statute.

ARGUMENT

1. Standard of Review

The trial court's findings of fact are entitled to deference from the Appellate court and therefore the standard is abuse of discretion. The trial court's determination or interpretation of the law or statutes are not entitled to deference from the Appellate court and therefore the standard of review is *de novo*. *Brown v. State*, 731 So. 2d 595, 598 (Miss. 1999). In this matter the Appellants contend that the trial court erred in finding that the conduct of the Appellee was discretionary under the tort claims act, and that such findings such be reviewed denovo.

2. Road Condition

County Road 100 was a 55 mph road which was maintained by Appellee. At the time of the accident it was in poor condition and in need of re-paving. 55 mph was not only the speed limit, but

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[2] *68 Miss. L.J. 703 (1999); See also Pearl River Valley Water Supply Dist. v. Bridges, 878 So. 2d, 1013 (Miss. Ct. App. 2004).*

according to Deputy Payne who drove the area, the road was in such bad shape that he felt unsafe to travel at any speed above 55. And though the condition of the roadway itself is not the basis of Appellants' claim, there can be no doubt but that Lee County was aware of the poor condition of the road, the lack of shoulder and the pavement edge drop off because on June 17, 2005, the Board of Supervisors authorized the re-paving of this particular road. (Ex.9, p. 8) The subject accident happened on June 26, 2005.

It is common among drivers to experience the tire or tires on one side of the vehicle leaving the pavement. If there is a shoulder and it is level with the pavement, then re-entering the road is easily accomplished. On the other hand, if the pavement edge is not level with the shoulder, then the difficulty involved in getting back on the road way correlates to the distance between the pavement edge and the shoulder, or what may be called the differential. The greater the differential, the greater the difficulty in getting back on the road. As anyone who has driven on the highway knows, the faster one is going, the more difficult it is to re-enter the road if there is a differential. This common driving experience was explained and confirmed by Appellants' expert, Derrick Barrentine ("Barrentine"). In Barrentine's opinion, for a road with a speed limit of 55 mph, a pavement differential greater than two inches constitutes a dangerous condition. His opinion is backed up by standards such as the AASHTO. The pavement differential at the accident scene varied (the vehicle traveled 50 to 75 feet before over turning according to Deputy Payne) and was anywhere from 5 to 8 ½ inches depending on where the measurements were taken. Both Barrentine and Deputy Payne testified the 55 mph road had no shoulder. There was no evidence at trial to contradict the evidence from the Appellants that this roadway, without a shoulder and with a large pavement edge drop off, constituted a dangerous condition of which the Appellee had notice. The

MTCA then provides in 11-46-9(1)(v) that a governmental entity is liable for injury caused by such a dangerous condition. Therefore, the Plaintiff's proved their case.

3. Discretionary function

The MTCA section 11-46-9(1)(d) provides immunities for a governmental entity's performance, or failure to perform, discretionary functions or duties. The trial court held that the County in maintaining County Road 100 engaged in activity involving choice or judgment and that this choice or judgment involved social, economic or political activity, thereby making said conduct discretionary. Appellants respectfully disagree.

Perhaps the June 17 decision by the Board of Supervisors to re-pave CR 100 was discretionary, they have to make a decision 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.

4. Frasier's Octopus

"If one tentacle doesn't get you, any other one can." An interesting way to characterize a

statute, as a multi-tentacled octopus bound on destruction. Certainly the Courts have followed this characterization and refused to consider any other subsection once a single subsection of the MTCA relieves the government of liability for damages. These cases were cited at length by Appellee, see Record on Appeal, pages 21 through 29. Appellants would argue, however, that 11-46-9(1)(a-y) is not so easily categorized. For while there are, as the title implies, a number of exemptions from liability, there are likewise a number of descriptions for circumstances when liability does attach. In other words, "exceptions to the exemptions."

For example, subsection (x) provides an exemption from liability for corporal punishment, *unless* it is done in bad faith. If you assume that the entity has no policies or guidelines on corporal punishment and leaves it completely up to the discretion of the teacher, can the teacher under subsection (d) avoid liability for a bad faith punishment of a student which violates the exception to the exemption in subsection (x)?

Subsection (w) exempts the entity from liability for the removal of roadway median barrier, *unless* the entity fails to correct the removal with a reasonable time after notice of the removal. Is it a logical or fair way to read the MTCA exemptions in such a way that an entity which falls in the exception to the exemption is nevertheless not liable if such an action is discretionary under subsection (d)?

Subsection (v) provides immunity from liability for dangerous conditions, so long as the entity did not have notice. The corollary being that an entity which does have notice, is not immune. Can an entity, then with notice (and all the other requirements of this subsection) create a dangerous condition yet avoid liability for that condition because its discretionary under subsection (d)?

Appellants would argue that while the Frasier's octopus may operate in the context of

comparing and contrasting exemptions, it can not operate as to the exceptions to the exemptions, without defeating or negating the exception itself. Such an argument is not inconsistent with disjunctive nature of the exemptions, rather such an argument accounts for and recognizes each exemption. For example, as for the teacher who engages in corporal punishment so as to be excepted from the exemption in subsection (x), can such conduct ever be discretionary? Under the MTCA does a teacher ever have the discretion to, in bad faith, engage in corporal punishment? Appellants would argue no. Can the entity whose median barrier has been removed, then have the discretion not to replace it even after notice and a reasonable time has passed? Appellants would argue no. Can an entity which knows of a dangerous condition, then in its discretion ignore the condition? Appellants would argue no. Governmental entities are liable or immune pursuant to statute. An act or failure to act is either exempt, or it is excepted from the exemptions. By virtue of the MTCA, a violation of the exemptions can never be discretionary, the two are mutually exclusive. In other words, it is not within the discretion of an entity to create or maintain a dangerous condition. Frasier's octopus does not apply here.

CONCLUSION

It is undisputed that County Road 100, where the accident happened, lacked a shoulder and had a pavement edge differential in excess of the 3 to 4 inches as allowed by Appellee. As such it constituted a dangerous condition and was the cause of Appellant's accident, resulting in serious injuries to the Appellants. The trial court erred in finding that maintenance of not the road, but specifically the shoulder of the road constituted an activity involving choice or judgment that involved social, economic or political activity, thereby making said conduct discretionary. Because the pavement edge differential and existence of a shoulder were mandated to the Appellee's road

department, they were neither discretionary nor involved an decision with regard to the allocation of county funds, no Board action or approval was needed. Further, in the alternative, the conduct of the Appellee with regard to the pavement edge differential and lack of a shoulder cannot be discretionary because under MTCA §11-46-9(1)(v) the Appellee statutorily cannot create or allow a dangerous condition to go unattended.

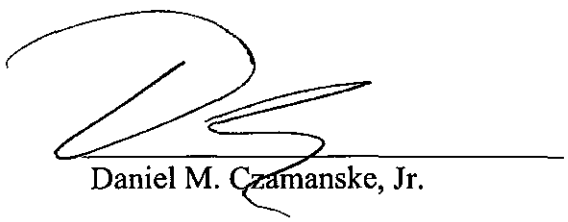
WHEREFORE, PREMISES CONSIDERED, Appellants request this Court to reverse and remand the above captioned cause to the trial court for a determination of damages, together with such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I, Daniel M. Czamanske, Jr., attorney for Appellants Lorri L. Wright, Nicholas Seidl, and John Seidl, certify that I have this day filed with the Clerk of this Court the original and three copies and have served a copy of this Brief by U.S. Postal Service with postage prepaid to the following:

William C. Murphree, Esq.
Mitchell, McNutt & Sams, P.A.
P.O. Box 7120
Tupelo, MS 38802

THIS the 6th day of January, 2011.



Daniel M. Czamanske, Jr.

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VERSUS

LEE COUNTY, MISSISSIPPI, BY AND
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CERTIFICATE OF SERVICE

I, Daniel M. Czamanske, Jr., attorney for Appellants Lorri L. Wright, Nicholas Seidl, and John Seidl, certify that I have this day served the Brief of Appellants and Appellants' Record Excerpts by U.S. Postal Service with postage prepaid to the following:

Hon. Thomas J. Gardner, III
Circuit Court Judge
P.O. Drawer 1100
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THIS the 10th day of January, 2011.

Daniel M. Czamanske, Jr.