

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-01675

E

STEPHEN NEWTON

PLAINTIFF-APPELLANT

V.

CIVIL ACTION NO. 2009-333-LS

LINCOLN COUNTY, MISSISSIPPI

DEFENDANT-APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Stephen Newton, the Plaintiff/ Appellant
2. Gerald L. Kucia, Esq., counsel of record for the Plaintiff/ Appellant
3. Lincoln County, Mississippi, Defendant/ Appellee
4. John Branton, Defendant/ Appellee
5. Robert O. Allen, Esq., counsel of record for Lincoln County, Mississippi
6. William R. Allen, Esq., counsel of record for Lincoln County, Mississippi
7. J. Chadwick Williams, Esq., counsel of record for Lincoln County, Mississippi
8. The Honorable David Strong, Trial Court Judge

Robert O. Allen

ATTORNEY OF RECORD FOR APPELLEES

ROBERT O. ALLEN (MSB [REDACTED])

WILLIAM R. ALLEN (MSB # [REDACTED])

J. CHADWICK WILLIAMS (MSB # [REDACTED])

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STATEMENT OF THE ISSUES

1. Whether the trial court was correct in determining that the notice requirement of the Mississippi Tort Claims Act is not met when notice is sent to the insurance carrier for the governmental entity instead of the chief executive officer of the governmental entity.

2. Whether the trial court properly found the Plaintiff did not substantially comply with the notice requirements of the Mississippi Tort Claims Act.

STATEMENT OF THE CASE

a. Nature of the Case

This case arises out of a two car automobile accident that occurred on July 25, 2008, in Brookhaven, Lincoln County, Mississippi, between Plaintiff Stephen Newton and Lincoln County Sheriff's Deputy John Branton in his official capacity. [R. 12 - 18]. Plaintiff filed suit against Lincoln County and John Branton alleging they were responsible for physical injuries he suffered. [R. 12 - 18].

Lincoln County and John Branton responded to Plaintiff's Complaint by answering and asserting, inter alia, affirmative defenses under the Mississippi Tort Claims Act. [R. 12 - 18].

b. Course of Proceedings Below

After completing some discovery, on April 7, 2010, Lincoln County and John Branton filed their Motion to Dismiss or in the Alternative Motion for Summary Judgment, and Memorandum of Authorities in support of their Motion to Dismiss or in the Alternative Motion for Summary Judgment. [R. 19 - 58]. On June 14, 2010, a hearing was held on the Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgment, and after listening to oral argument, the trial court dismissed the case. [T. 1-11; R.E. Tab 2]. The Plaintiff filed his response to the Defendants' Motion on June 16, 2010. [R. 59 - 108]. On September 16, 2010, an Order was entered dismissing the Plaintiff's case. [R. 109 - 110].

On October 14, 2010, Plaintiff filed a Notice of Appeal. [R. 111].

c. Statement of Relevant Facts

On July 25, 2008, the Plaintiff was driving his vehicle southbound on South First Street in Brookhaven, Lincoln County, Mississippi. [R. 9]. Deputy John Branton, while in the course and scope of his employment with the Lincoln County Sheriff's Department was also traveling south on South First Street. [R. 9 - 10]. Plaintiff attempted to make a turn while Deputy Branton was passing him and a collision occurred between the two vehicles [R. 91].

On September 23, 2008, Ramel L. Cotton with the law firm of Morgan & Morgan sent a letter to Tina Tracy with Zurich North America. [R. 57 - 58; R.E. Tab 1]. Mr. Cotton indicated in his correspondence that his firm represented the Plaintiff in a claim for damages that occurred on July 25, 2008. [R. 57 - 58; R.E. Tab 1]. Additionally, Mr. Cotton requested any statements made by his client, information regarding any insurance policies, and indicated that any prior medical authorizations executed by his client were void. [R. 57 - 58; R.E. Tab 1].

On August 17, 2009, the Plaintiff filed a Complaint in the Circuit Court of Lincoln County, Mississippi against Lincoln County and John Branton, pursuant to the Mississippi Tort Claims Act. [R. 8 - 11].

SUMMARY OF THE ARGUMENT

The trial court properly granted Lincoln County's Motion to Dismiss or in the Alternative Motion for Summary Judgment based on Plaintiff's failure to comply with the notice requirement of the Mississippi Tort Claims Act, Miss. Code Ann., § 11-46-11(1) (Rev. 2011). More specifically, the trial court was correct in determining that the notice requirement of the MTCA is not met when the notice is sent to the insurance carrier for the governmental entity instead of the chief executive officer of the governmental entity.

Furthermore, the trial court properly granted Lincoln County's Motion to Dismiss or in the Alternative Motion for Summary Judgment based on Plaintiff's failure to comply with the notice requirement of the Mississippi Tort Claims Act, in that the court specifically found that the notice sent to Lincoln County's insurance carrier did not substantially comply with the requirements of the statute in that it only included the Plaintiff's name and the date of the alleged accident. Miss. Code Ann., § 11-46-11(1) and § 11-46-11(2) (Rev. 2011).

ARGUMENT

- I. **The trial court was correct in determining that the notice requirement of the Mississippi Tort Claims Act is not met when notice is sent to the insurance carrier for the governmental entity instead of the chief executive officer of the governmental entity.**

The Mississippi Tort Claims Act (“MTCA”), Miss. Code Ann., § 11-46-1 *et seq.* (Rev. 2011), is the exclusive remedy for a party allegedly injured by the acts or omissions of a Mississippi governmental entity or its employee and, as such, governs Plaintiff’s claims against Lincoln County in this case. Miss. Code Ann., § 11-46-7(1) (Rev. 2011); *L.W. v. McComb Separate Municipal School Dist.*, 754 So. 2d 1136, 1138 (Miss. 1999).

Accordingly, the Plaintiff is subject to the notice requirements provided by the MTCA. Miss. Code Ann., § 11-46-11 (Rev. 2011). More specifically, after all procedures within a governmental entity have been exhausted and at least ninety (90) days prior to maintaining an action based on the MTCA, a claimant “shall file a notice of claim with the chief executive officer of the governmental entity.” Miss. Code Ann., § 11-46-11(1) (Rev. 2011). In this case, the chancery clerk of Lincoln County is designated by statute as the proper party to receive the notice on behalf of the county. *Id.* The use of the term “shall” by the Legislature connotes a mandatory requirement. See *Weiner v. Meredith*, 943 So. 2d 692, 695 (Miss. 2006).

This Court has repeatedly held that failure to comply with the notice provision of the MTCA by sending notice to someone other than the chief executive officer of the governmental entity is fatal to one’s claim. See *Tallahatchie General Hosp. v. Edwards*, 49 So. 3d 86, 92 (Miss. 2010) (proper service of notice would be on the CEO of Tallahatchie

General Hospital, not Tallahatchie County); *Parker v. Harrison County Bd. of Supervisors*, 987 So. 2d 435, 440-41 n. 7 (Miss. 2008) (Associated Adjusters was not the CEO of the governmental entity, therefore, Associated Adjusters was “not the proper party to receive notice under the [MTCA].”)

On September 23, 2008, Ramel L. Cotton of Morgan & Morgan law firm sent a letter to Tina Tracy with Zurich North America – not the chancery clerk of Lincoln County. Tina Tracy with Zurich North America was not the chief executive officer of Lincoln County. And, as such, the Plaintiff’s claim is barred for failure to comply with the MTCA.

II. The trial court was correct in finding the Plaintiff did not substantially comply with the requirements of the MTCA.

The Plaintiff also argues the circuit court erred by finding he had not strictly complied with the notice provisions of the MTCA. *Appellant’s Brief*, p. 11. This claim conflicts with the record.

The circuit court found the Plaintiff had not substantially complied with the requirements of the statute. To be precise, the court stated from the bench:

...The Court does not have a copy of 11-46-11 in front of it, but, obviously, I’ve dealt with this issue on a number of occasions and, obviously, 11-46-11 requires that a notice of claim be filed and the Court is well aware that at this point in Mississippi jurisprudence the test is substantial compliance rather than strict compliance. The Court finds that in this case there has not been substantial compliance with 11-46-11. The Court sees no proof that the chief executive officer of Lincoln County Board of Supervisors as defined in the statute received any notice and the notice that Plaintiff’s counsel points out was sent to Tina Tracy, admittedly by the Plaintiff does not contain some of the elements required under 11-46-11. The Court just can’t – again, I understand this is a fact-sensitive determination to be made, in this case, by me and the Court just can’t make the leap of faith that Plaintiff’s counsel is asking, and that is to take a letter written to the

insurance company and a deposition given by the Plaintiff in the litigation and infer that the requirements of 11-46-11 have been substantially complied with. You know, if this letter were cc'd to whoever the president of the Board of Supervisors was at that time, the Court might feel differently. If there were notice to the Chancery Clerk, but not to the president of the Board of Supervisors, the Court might feel differently. But in this case it's the Court's opinion that there is little, if any, compliance with 11-46-11...

[T. 10 - 11; R.E. Tab 2, p. 10 - 11].

The trial court's determination that the Plaintiff did not substantially comply with the notice requirement of the MTCA is well founded in this Court's case law and Plaintiff's assertions to the contrary are without merit.

CONCLUSION

As demonstrated above, the dismissal of the Plaintiff's claims in this matter were proper. The notice requirement of the Mississippi Tort Claims Act is not met where the notice is sent to the insurance carrier for the governmental entity instead of the chief executive officer of the governmental entity. Furthermore, the court was correct when it specifically found that the notice sent to Lincoln County's insurance carrier did not substantially comply with the requirements of the statute in that it only included the Plaintiff's name and the date of the alleged accident.

The trial court's decision is supported by the record evidence in this matter and should be upheld in favor of Lincoln County.

Respectfully submitted,
LINCOLN COUNTY, MISSISSIPPI

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CERTIFICATE

I, the undersigned of Allen, Allen, Breeland & Allen, PLLC, attorneys for the Appellees, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellees, to:

Honorable David H. Strong
Post Office Box 1387
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Circuit Court Judge

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This the 28th day of September, 2011.


OF COUNSEL