

IN THE SUPREME COURT OF MISSISSIPPI

No. 2010-CA-01675

STEPHEN NEWTON

Appellant

v.

**LINCOLN COUNTY, MISSISSIPPI AND
JOHN BRANTON**

Appellees

**BRIEF OF APPELLANT
ORAL ARGUMENT NOT REQUESTED**

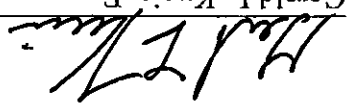
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CERTIFICATE OF INTERESTED PERSONS

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 the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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TABLE OF AUTHORTIES

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STATEMENT OF ISSUES

- I. Whether the Circuit Court of Lincoln County, Mississippi erred when it granted Lincoln County, Mississippi's and John Branton's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment and found that Lincoln County, Mississippi and John Branton had not waived the procedural protections of the Mississippi Tort Claims Act.
- II. Whether the Circuit Court of Lincoln County, Mississippi erred when it granted Lincoln County, Mississippi's and John Branton's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment and found that Stephen Newton had not complied with the notice requirements of the Mississippi Tort Claims Act.

STATEMENT OF THE CASE

The case now before this Court arises from an automobile accident that took place on July 25, 2008 (R: 8 – 11). On that date, Mr. Newton was involved in a motor vehicle collision with a vehicle that was being operated by John Branton, a deputy of the Lincoln County Sheriff's Department (R: 8 – 11).

Mr. Newton filed his Complaint before the Circuit Court of Lincoln County, Mississippi on August 17, 2009 (R: 8 – 11). He brought his lawsuit pursuant to the Mississippi Tort Claims Act (R: 8 – 11). After completing written discovery and depositions, Lincoln County, Mississippi and John Branton filed their Motion to Dismiss or, in the alternative, Motion for Summary Judgment (R: 43 – 86). They argued that their motion was proper because Mr. Newton had failed to comply with the notice requirements of the Mississippi Tort Claims Act (R: 43 – 86).

The Circuit Court of Lincoln County, Mississippi granted Lincoln County, Mississippi's and John Branton's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (R: 137). This appeal followed (R: 139).

STATEMENT OF THE FACTS

The matter now before this Court arises from an automobile accident that took place on July 25, 2008 (R: 8 – 11). On that date, Mr. Newton was driving southbound on South First Street in Brookhaven, Lincoln County, Mississippi (R: 8 – 11, 112 – 113). Defendant John Branton, in the course and scope of his employment with the Defendant, Lincoln County, Mississippi, was driving behind Mr. Newton (R: 8 – 11, 112 – 113). Mr. Newton approached the intersection of South First Street and Booker Street (R: 8 – 11, 112 – 113). He activated his left turn signal and slowed his vehicle in preparation of making a left turn (R: 8 – 11, 112 – 113). At that instant, John Branton entered the northbound lane of South First Street and began to pass Mr. Newton (R: 8 – 11, 112 – 113). John Branton attempted the passing maneuver despite the fact that South First Street was clearly designated a “No Passing” zone in the area near Booker Street (R: 8 – 11, 117). Additionally, John Branton attempted his passing move almost directly within the Booker Street/South First Street intersection (R: 8 – 11, 117). A collision resulted between Mr. Newton’s car and John Branton’s vehicle (R: 8 – 11, 112 – 113).

As the Court is aware, the Mississippi Tort Claims Act requires the submission of a notice of claim to a governmental entity before suit can be commenced. Mississippi Code Ann. §11-46-11 (1972, as amended). On September 23, 2008, Mr. Newton, through counsel, wrote Tina Tracy at Zurich North America, Defendant Lincoln County, Mississippi’s insurer and informed Zurich North America that Mr. Newton planned to pursue a claim against the Defendant (R: 81 – 82). Thereafter, on October 13, 2008, Tim Nelms, a Claims Case Manager with Zurich North America, wrote Mr. Newton’s Counsel and informed him that Mr. Newton’s claim had been denied (R: 80). Mr. Newton filed a Complaint against the Defendants before the Circuit Court of Lincoln County, Mississippi on August 17, 2009 (R: 8 – 11).

Lincoln County, Mississippi and John Branton filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment seeking the dismissal of this case (R: 43 – 82). They asserted that Mr. Newton's September 23, 2008 letter, sent to Defendant Lincoln County, Mississippi's insurer, did not satisfy the requirements of the Mississippi Torts Claim Act (R: 43 – 82). The Circuit Court granted Lincoln County, Mississippi's and John Branton's motion for summary judgment (R: 137). This appeal followed (R: 139).

SUMMARY OF THE ARGUMENT

The Circuit Court of Lincoln County, Mississippi should have ruled that Lincoln County, Mississippi and John Branton waived the defenses available to them pursuant to the Mississippi Tort Claims Act. When a claimant communicates with a governmental entity's representative and states that he intends to pursue a claim under the Mississippi Tort Claims Act and the governmental entity's representative investigates, reviews and denies the claimant's claim, any further notice would be futile. Under such circumstances, a formal notice of claim would serve no useful purpose. The acts of a governmental entity's representative in investigating, reviewing and denying a claim under the Mississippi Tort Claims Act waives the requirement to provide formal notice to the governmental entity.

The Circuit Court of Lincoln County, Mississippi incorrectly found that Mr. Newton's letter dated September 23, 2008 did not satisfy the notice provisions of the Mississippi Tort Claims Act. Where a party communicates with a governmental entity and/or its representatives and states that he intends to pursue a claim under the Mississippi Tort Claims Act and provides sufficient information in order for the governmental entity and/or its representatives to conduct an investigation, the purposes of the notice provisions of the Mississippi Tort Claims Act are satisfied. The Circuit Court of Lincoln County, Mississippi should have found that Mr. Newton's September 23, 2008 letter substantially complied with the notice provisions of the Mississippi Tort Claims Act.

ARGUMENT

I. Whether the Circuit Court of Lincoln County, Mississippi erred when it granted Lincoln County, Mississippi's and John Branton's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment and found that Lincoln County, Mississippi and John Branton had not waived the procedural protections of the Mississippi Tort Claims Act.

The Circuit Court of Lincoln County, Mississippi incorrectly granted Lincoln County, Mississippi's and John Branton's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment and incorrectly found that Lincoln County, Mississippi and John Branton had not waived the procedural protections of the Mississippi Tort Claims Act. The Mississippi Supreme Court has recognized that the notice of claim requirements of the Tort Claims Act are substantive requirements, which are no more or no less important than the statute of limitations. *Stuart v. University of Mississippi Medical Center*, 21 So. 3d 544, 550 (Miss. 2009). The notice of claim requirements are not jurisdictional in nature and are therefore waivable. *Stuart*, 21 So. 3d at 550.

In *Carr v. Town of Shubuta*, 733 So. 2d 261 (Miss. 1999), the Mississippi Supreme Court examined decisions from other states and considered the purposes of the notice provisions of the Mississippi Tort Claims Act. The Court found:

The purpose of the notice statute being to advise the city of the accident so that it may promptly investigate the surrounding circumstances, we see no need to endorse a policy which renders the statute a trap for the unwary *where such purpose has in fact been satisfied*.

Carr, 733 So. 2d at 263 (Emphasis added).

In the case now before this Court, Mr. Newton's letter of September 23, 2008 satisfied the purposes of the notice requirements of the Mississippi Tort Claims Act. When Mr. Newton initially contacted Lincoln County, Mississippi's and John Branton's insurance carrier on September 23, 2008, he informed the insurance carrier that he planned to pursue a claim against Lincoln County, Mississippi and John Branton. An investigation was apparently conducted because Mr. Newton's claim was denied on October 13, 2008. In this situation, where Mr.

Newton's claim had *already been denied*, what conceivable purpose would the submission of the notice of claim have fulfilled? The purposes of the notice of claim were fulfilled, Mr. Newton's claim was investigated, and denied. Under these circumstances, this Court should find that Lincoln County, Mississippi and John Branton waived the requirements of a formal notice of claim.

Similarly, the Mississippi Supreme Court has found that governmental entities can be equitably estopped from asserting the notice requirements of the Mississippi Tort Claims Act. In *Trosclair v. Mississippi Department of Transportation*, 757 So. 2d 178, 181 (Miss. 2000), the Mississippi Supreme Court ruled that where there is inequitable misconduct, equitable estoppel should be applied to the notice of claims requirements of the Mississippi Tort Claims act in order to avoid a serious injustice.

The case now before this Court represents a case where the statute should not be used as a procedural trap. The purpose of the Mississippi Tort Claims Act is to advise a governmental body of an incident in order allow a prompt investigation of the surrounding circumstances. This purpose was satisfied in this case as evidenced by a denial of Mr. Newton's claim. Lincoln County, Mississippi and John Branton should not be allowed to take advantage of a procedural deficiency that serves no purpose in this matter.

II. Whether the Circuit Court of Lincoln County, Mississippi erred when it granted Lincoln County, Mississippi's and John Branton's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment and found that Stephen Newton had not complied with the notice requirements of the Mississippi Tort Claims Act.

The Circuit Court of Lincoln County erred when it ruled that Mr. Newton's letter dated September 23, 2008 did not comply with the notice provisions of Mississippi Code Ann. §11-46-11. Examining the circuit court's ruling, the court based its decision that Mr. Newton had not satisfied the notice requirements of the Mississippi Tort Claims Act because the court applied the

incorrect standard. Specifically, the trial court found that Mr. Newton had not strictly complied with the notice provisions of the Mississippi Tort Claims Act.

The Supreme Court revisited the question of strict compliance with the Mississippi Tort Claims Act in *Price v. Clark*, 21 So. 3d 509 (Miss. 2009). In *Price*, the Supreme Court reaffirmed its prior holdings that **substantial compliance**, not strict compliance, is all that is required to comply with Mississippi Code Ann. §11-46-11(2). *Price*, 21 So. 3d at 520. The Supreme Court also emphasized that what constitutes substantial compliance is a fact-sensitive determination. *Id.*

The *Price* decision specifically relied upon the Mississippi Supreme Court's decision in *Carr v. Town of Shubuta*, 733 So. 2d 261 (Miss. 1999). In *Carr*, the Supreme Court set forth the definition of "substantial compliance" insofar as the contents of a notice of claim under the Mississippi Tort Claims Act are concerned. The Supreme Court held:

... a notice is sufficient if it substantially complies with the content requirements of the statute. What constitutes substantial compliance, while not a question of fact but one of law, is a fact-sensitive determination. In general, a notice that is filed within the [requisite] period, informs the municipality of the claimant's intent to make a claim and contains sufficient information which reasonably affords the municipality an opportunity to promptly investigate the claim satisfies the purpose of the statute and will be held to substantially comply with it.

Carr, 733 So. 2d at 263.

Examining the facts of the case now before this Court, Mr. Newton clearly set forth that he intended to pursue a claim against Lincoln County, Mississippi and John Branton in his September 23, 2008 letter. The letter clearly stated the date of the subject incident and the parties involved in the subject incident. By providing this information, Mr. Newton gave Lincoln County, Mississippi's and John Branton's insurance carrier sufficient information to reasonably investigate his claim. Lincoln County, Mississippi's and John Branton's insurance carrier obviously had sufficient information to investigate Mr. Newton's claim because it issued

a denial letter on October 13, 2008. Under *Carr*'s definition of "substantial compliance", the Circuit Court of Lincoln County, Mississippi incorrectly ruled that Mr. Newton's September 23, 2008 letter substantially complied with the provisions of the Mississippi Torts Claim Act.

The purpose of the Mississippi Tort Claims Act is to ensure that governmental boards, commissioners, and agencies are informed of claims against them. *Tennessee Valley Regional Housing Authority v. Bailey*, 740 So. 2d 869, 872 (Miss. 1999). As evidenced by Mr. Nelms' October 13, 2008 denial letter, Mr. Newton's September 23, 2008 letter satisfied this purpose.

CONCLUSION

This Court should reverse the Circuit Court of Lincoln County, Mississippi's order granting Lincoln County, Mississippi's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. This Court should also remand this matter for further proceedings before the Circuit Court of Lincoln County, Mississippi so that Mr. Newton's case can proceed to trial.

Respectfully submitted,

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By: 
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CERTIFICATE OF SERVICE


I, Gerald L. Kucia, do hereby certify that I have this day mailed via U.S. Mail a true and correct copy of the above and foregoing document to:

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This the 27th day of July, 2011.

By: 
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