IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

GLENN POPPENHEIMER — APPELLANT

V. — NO. 2011-IA-OO541-SCT

ESTATE OF JOE D. COYLE, DECEASED, et al — APPELLEES

INTERLOCUTORY APPEAL FROM THE COUNTY COURT
OF DESOTO COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANT, GLENN POPPENHEIMER

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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.

1. Honorable Allen Couch, County Court Judge, County Court of DeSoto County, Mississippi;
2. The Law Firm of Hickman, Goza & Spragins, PLLC, Oxford, Mississippi;
3. Glenn Poppenheimer;
4. Mississippi Farm Bureau Insurance Company;
5. Estate of Joe D. Coyle;
6. The Law Firm of Farese, Farese, & Farese, P.A., Ashland, Mississippi;
7. The Law Firm of Heaton & Moore, Memphis, Tennessee;
8. The Stroud Law Firm, PC, Southaven, Mississippi.

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I. STATEMENT OF THE ISSUES

1. The Bridgetown Volunteer Fire Department and its employees receive the protection of the Mississippi Tort Claims Act.

2. The County Court of DeSoto County erred by failing to dismiss the claims of the estate.

II. STATEMENT OF THE CASE

A. The Nature of the Case

The instant matter is before the Supreme Court pursuant to a successful petition for interlocutory appeal filed by Glenn Poppenheimer, the appellant here and plaintiff in the proceedings below. The matter is an action for personal injury pending in the County Court of DeSoto County, Mississippi. The case arises from an automobile collision that occurred around 3:30 a.m. on January 27, 2007, in DeSoto County, Mississippi, while Mr. Poppenheimer, a volunteer firefighter, responded to a fire call.

B. The Course of the Proceedings Below

The procedural history is complicated by the fact that there existed two separate civil actions involving the same parties and the same collision, one pending in the County Court of DeSoto County and the other in the Circuit Court of DeSoto County.

1. Proceedings in the County Court of DeSoto County

Mr. Poppenheimer filed his complaint against the Estate of Joe D. Coyle, deceased, and Mississippi Farm Bureau Casualty Company on January 14, 2010. Mr. Poppenheimer alleged therein that the late Mr. Coyle failed to yield the right of way and caused the collision, and he sought judgment against Mr. Coyle's estate. (R. at 9-12). Mr. Poppenheimer sued Mississippi Farm Bureau for uninsured or underinsured motorists benefits. (R. at 12).

Mr. Coyle's estate filed an ultimately unsuccessful motion to transfer the civil action to Circuit Court.[1] (R. at 15-16). The Estate also answered and filed a counter-complaint on the

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[1] The County Court of DeSoto County denied the motion to transfer the case to Circuit Court via order dated March 5, 2010, (R. at 34-36), after a hearing held on March 5, 2010. (T. at 2).

same day, January 25, 2010. (R. at 18-26). In response to the Estate's counterclaim, Mr. Poppenheimer filed a motion to dismiss or, in the alternative, for summary judgment on March 3, 2010. (R. at 28-31). Mr. Poppenheimer argued the issue now on appeal – that the Mississippi Tort Claims Act applied to him as a volunteer firefighter in the course and scope of his employment. Mr. Poppenheimer also argued that the Estate never produced evidence of negligence on the part of Mr. Poppenheimer. The Estate responded to the motion on November 23, 2010. (R. at 37-57).

Also on November 23, 2010, the County Court held a hearing on Mr. Poppenheimer's dispositive motion. (T. at 10-22).[2] Following the hearing, on December 2, 2010, the County Court entered an order allowing the parties to further supplement the record. (R. at 63). Mr. Poppenheimer filed a supplemental brief on January 18, 2011, (R. at 64-71), and the Estate followed suit on January 19, 2011. (R. at 72-100).[3]

The County Court denied Mr. Poppenheimer's dispositive motion by order entered March 23, 2011. (R. at 130-138, R.E. at 6-14)). Following the order, Mr. Poppenheimer successfully petitioned the Supreme Court for leave to file an interlocutory appeal. (R. at 367).

2. Proceedings in the Circuit Court of DeSoto County

While Mr. Poppenheimer's complaint was pending against Mr. Coyle's estate in the County Court, the estate had filed a complaint against Mr. Poppenheimer in the Circuit Court of

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[2] Pursuant to MISS. R. APP. P. 28(e), Mr. Poppenheimer will herein refer to pages from the record on appeal as (R. at #) and to pages found in the transcript of the hearings as (T. at #).

[3] The estate filed a motion for additional briefing on March 2, 2011, (R. at 101), which was denied by order entered March 10, 2011. (R. at 117).

DeSoto County. The civil action there had the Civil Action Number CV2010-0013CD. (R. at 143). The estate also filed a Notice of Removal in the Circuit Court, whereby it sought removal of the County Court action to the Circuit Court. (R. at 139).

In response to the estate's complaint, Mr. Poppenheimer filed a similar motion to dismiss, citing the Mississippi Tort Claims Act. (R. at 118-129). As was the case in the County Court, several rounds of responses and rebuttals followed.

Matters in the Circuit Court drew to a close when the Circuit Court entered an agreed order transferring the case to County Court on March 24, 2011. (R. at 328-337). As an aside, the Circuit Court's order contains a detailed history of the filings of the parties.

C. Facts Necessary for Review

The underlying collision occurred at 3:30 a.m. on January 27, 2007, in DeSoto County, Mississippi. (R. at 32). Mr. Poppenheimer drove his 1998 Dodge pickup, (R. at 46), and Joe D. Coyle the other vehicle. (R. at 32). At the time of the collision, Mr. Poppenheimer – a member of the Bridgetown Volunteer Fire Department – was responding to a fire call. He was driving with his red emergency light and hazard lights operating, and he was driving to the fire department. He testified via affidavit that he was driving approximately forty miles per hour. Mr. Poppenheimer proceeded through an intersection where he had no stop sign, but cross-traffic, *i.e.* Mr. Coyle, did. Mr. Coyle pulled out in front of him. Mr. Poppenheimer unsuccessfully attempted to avoid the collision by applying his brakes and swerving. (R. at 32).

From the above-described facts, what is relevant is that Mr. Poppenheimer was a volunteer firefighter with the Bridgetown Fire Department and that he was in the act of responding to a fire call when the collision occurred. (R. at 32). Neither the volunteer fire

department, DeSoto County, nor the State of Mississippi paid Mr. Poppenheimer to be a volunteer firefighter. (R. at 44-45, 47). The fire department did provided Mr. Poppenheimer with firefighting equipment and a uniform. (R. at 37).

The Bridgetown Volunteer Fire Department received funding from citizens, the county, and the state. (R. at 42). Although Mr. Poppenheimer did not know amounts, he understood that the department received money from the state. (R. at 43). DeSoto County provides training to new volunteer firefighters, although Mr. Poppenheimer himself did not undergo the training because he was already certified. (R. at 220-221). Mr. Poppenheimer has been trained to obey the law when responding to a fire, and he understands that when responding firefighters may not break the speed limit or other traffic laws. (R. at 46, 47).

The Mississippi Tort Claims Board reviews insurance coverage obtained by the Bridgetown Volunteer Fire Department pursuant to MISS. CODE. ANN. § 11-46-17(3). (R. at 342). The Tort Claims Board considers the fire department to be a political subdivision, and it addresses the department as such in correspondence. (R. at 342). The Tort Claims Board reviewed and approved the fire department's year 2010 coverage under MISS. CODE. ANN. § 11-46-17(3), which requires political subdivisions to submit their coverages for approval by the Board. (R. at 342-343). The Tort Claim Board's governmental records show that at the time of the collision in January 2007, the Bridgetown Volunteer Fire Department had coverage in place. (R. at 149-150). Moreover, pursuant to MISS. CODE. ANN. § 11-46-17(3), the Tort Claims Board approved that coverage as it must do for political subdivisions such as the volunteer fire department. (R. at 150, 151).

III. SUMMARY OF THE ARGUMENT

The Bridgetown Volunteer Fire Department is a political subdivision of the State of Mississippi as the term is defined by the Mississippi Tort Claims Act. Because it meets the definitional requirements of a political subdivision, it also meets the definition of a governmental entity. Accordingly, in order to successfully sue the department or any of its employees, a plaintiff must meet the requirements of the Tort Claims Act.

The fire department is a body politic, in that it is an organization of citizens organized to perform a governmental function or activity. In fact, the Bridgetown Volunteer Fire Department and its firefighters such as Mr. Poppenheimer perform a *quintessential* governmental activity – fire suppression and protection. Mississippi's Legislature, via the Tort Claims Act, and its Supreme Court have recognized the dangerous nature of fire suppression and protection activities and noted that due to that dangerous nature those who perform them should fall within the scope of the Tort Claims Act.

Because the fire department is a governmental entity and Mr. Poppenheimer was its employee acting within the course and scope of his employment at the time of the underlying collision, the estate was required to meet the procedural requirements of the Tort Claims Act, including the notice and limitations of actions requirements. The estate, however, wholly failed to give the required notice and file its complaint well after the one-year statute of limitations ran. For this reason, Mr. Poppenheimer asks the Supreme Court to reverse the County Court's denial of his dispositive motion and render a verdict in his favor as to the estate's claims against him.

Alternatively, in order to prevail on its claims of negligence against Mr. Poppenheimer, it must prove that he committed some act of negligence, and that such act was a proximate

contributing cause of the accident in question. Here, the County Court relied on only one potential act of negligence on the part of Mr. Poppenheimer: his possible failure to "decrease speed" as he approached the intersection in question. This argument is based upon an antiquated and somewhat discredited statute, Miss. Code Ann. § 63-3-505. Nonetheless, there is no proof whatsoever that any speed on the part of Mr. Poppenheimer had anything to do with the accident, and the uncontradicted proof in this case is that Mr. Coyle simply failed to yield to the right of way and pulled out in front of Mr. Poppenheimer, giving him no chance to avoid the accident no matter the speed he was traveling.

IV. ARGUMENT

A. Standard of Review and Summary Judgment Standard

The Mississippi Supreme Court reviews questions regarding the Tort Claims Act *de novo*. *Mississippi Dept. of Public Safety v. Durn*, 861 So.2d 990, 994 (¶ 7) (Miss. 2003).

Appellate courts also apply a *de novo* standard when reviewing the granting of a motion for summary judgment. *Whitaker v. Limeco*, 32 So. 3d 429, 433-34 (¶ 10) (Miss. 2010). The summary judgment standard has been articulated as follows:

> In evaluating a grant of summary judgment, this Court views all evidentiary matters, including admissions in pleadings, answers to interrogatories, depositions, admissions, and affidavits. *Glover v. Jackson State Univ.*, 968 So.2d 1267, 1275 (Miss. 2007) (citing MISS. R. CIV. P. 56(c)). The evidence must be viewed in the light most favorable to the non moving party. *Simpson v. Boyd*, 880 So.2d 1047, 1050 (Miss.2004) (quoting *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So.2d 790, 794 (Miss. 1995)). The existence of a genuine issue of material fact will preclude summary judgment. *Massey v. Tingle*, 867 So.2d 235, 238 (Miss. 2004). A fact is material if it "tends to resolve any of the issues properly raised by the parties." *Simpson*, 880 So.2d at 1050 (quoting *Palmer*, 656 So.2d at 794). The motion "should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim." *Simpson*, 880 So.2d at 1050 (quoting *Palmer*, 656 So.2d at 796).

Spann v. Shuqualak Lumber Co., 990 So. 2d 186, 189 (¶ 6) (Miss. 2008).

The non moving party is not always given the benefit of every doubt as to the existence of a material fact. On the contrary, "[t]he non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *Rowan v. Kia Motors America, Inc.*, 16 So. 3d 62, 66 (¶ 12) (Miss. App. 2009). The Court must draw all *reasonable* inferences in favor of the plaintiffs, *Partin v. North Miss. Med. Ctr., Inc.*, 929 So. 2d 924, 929 (¶ 16) (Miss. App. 2005), not all

possible or imaginable inferences.

B. The Bridgetown Volunteer Fire Department and its employees receive the protection of the Mississippi Tort Claims Act, MISS. CODE. ANN. § 11-46-9

The Bridgetown Volunteer Fire Department is a political subdivision as the term is defined in MISS. CODE. ANN. § 11-46-1(i). Mr. Poppenheimer is its employee and was acting within the course and scope of his employment at the time of the underlying collision. Accordingly, Mr. Poppenheimer receives the protections and benefits set forth in the Mississippi Tort Claims Act.

The Mississippi legislature enacted the Tort Claims Act, electing to waive sovereign immunity as to political subdivisions and public employees, but only when certain procedural requirements were fulfilled. *Suddith v. University of Southern Mississippi*, 977 So.2d 1158, 1177-1178 (¶ 45) (Miss. 2007). It is only by meeting the requirements of the Act that a plaintiff may successfully pursue a civil action against a political subdivision or its employee.

1. Mississippi Law Exempts Firefighters Engaged in the Performance of Their Duties from Liability for Negligence

The Mississippi Tort Claims Act applies, by its very terms, to firefighters. MISSISSIPPI CODE ANNOTATED Section 11-46-9(1)(c) provides as follows:

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . [a]rising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities *relating to police or fire protection* unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury.

(Emphasis added). Clearly, the legislature considers firefighters to be of a kind with police officers for purposes of applying the provisions of the Tort Claims Act and extending its

protections.

Mississippi's Supreme Court acknowledged the protection of the Tort Claims Act, specifically MISS. CODE. ANN. § 11-46-9, to firefighters. In *Maldonado v. Kelly*, 768 So. 2d 906 (Miss. 2000), it wrote as follows:

> The purpose of Miss. Code Ann. § 11-46-9 is to "protect law enforcement personnel from lawsuits arising out of the performance of their duties in law enforcement, with respect to the alleged victim." *[City of Jackson v. Perry*, 764 So.2d 373, 379 (Miss. 2000)]. Police officers *and fire fighters* are more likely to be exposed to dangerous situations and to liability, and therefore, public policy requires that they not be liable for mere negligence. Entities engaged in police and fire protection activities will be liable for reckless acts only. *Maye v. Pearl River County*, 758 So.2d 391 (Miss.1999); *Turner v. City of Ruleville*, 735 So.2d 226 (Miss.1999).

Id. at 909 (¶ 6) (emphasis added).

At least one other jurisdiction has applied sovereign immunity to a volunteer firefighter on his way to a fire. In *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co., Inc.*, 404 S.E. 2d 216 (Va. 1991), the Virginia Supreme Court held that a volunteer firefighter who violated state law by failing to stop a fire truck at a railway crossing was nevertheless protected by Virginia's sovereign immunity. *Id.* at 222.

As will be shown below, the statutes comprising the Mississippi Tort Claims Act show that, without question, the Act recognizes volunteer fire departments and volunteer firefighters as falling within the scope of the Act.

2. The Bridgetown Volunteer Fire Department Meets the Statutory Definition of a Governmental Entity

A governmental entity is defined as the state itself and political subdivisions as defined by statute. MISS. CODE. ANN. § 11-46-1(g). In turn, the definition of a political subdivision may

also be found in MISS. CODE. ANN. § 11-46-1, which states in pertinent part as follows:

> "Political subdivision" means any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including, but not limited to, any county, municipality, school district, community hospital as defined in Section 41-13-10, Mississippi Code of 1972, airport authority or other instrumentality thereof, whether or not such body or instrumentality thereof has the authority to levy taxes or to sue or be sued in its own name.

MISS. CODE. ANN. § 11-46-1(i). Accordingly, for the Bridgetown Volunteer Fire Department to meet the definition of a political subdivision and, therefore, a governmental entity, it must (1) be a body politic or a body corporate other than the state and (2) be responsible for governmental activities in a geographic region smaller than the state. *Id.* The undisputed facts of the record show that the Bridgetown Volunteer Fire Department easily meets both.

a. The Bridgetown Volunteer Fire Department is a Body Politic

A volunteer fire department, such as the Bridgetown Volunteer Fire Department, is a quintessential body politic. The Mississippi Supreme Court previously adopted the following definition of a body politic:

> It has been said that the phrase connotes simply a group or body of citizens organized for the purpose of exercising governmental functions; that such a group may be large or small, and that it may be a group within a group, including counties even though they are but agencies of the state. It may be formed by a voluntary association of individuals, and is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. Where the term is used as referring to the state, it signifies the state in its sovereign, corporate capacity, and applies to a body incorporated by the state and charged with the performance of a public duty, such as an institution of learning for the benefit of the people of a particular parish, or a corporate body created for the sole purpose of performing one or more municipal functions, or an incorporated board of trustees of a levee district, or a township declared by statute to be a body politic and incorporate.

Urban Renewal Agency of City of Aberdeen v. Tackett, 255 So. 2d 904, 905 (Miss. 1971) (citing 11 C.J.S. Body, 380 (1938)). That a volunteer fire department is "a group or body of citizens" is so self-evident that it somewhat defies proof, but a review of the record and Mississippi's statutory treatment of fire departments buttresses the point.

Mr. Poppenheimer presents the perfect example of one of the citizens comprising a "group or body of citizens" in a volunteer fire department. He is a retired professional firefighter. (R. at 190). He now works in real estate investment and for a restaurant. (R. at 195, 197). Mr. Poppenheimer is an unpaid citizen volunteer. (R. at 36). The fire department members include his neighbors and other members of his community, (R. at 37), and membership is open to all members of the community who wish to participate and complete the required training. (R. at 45-46, 49).

Mississippi law further recognizes the fact that volunteer fire departments are groups of citizens. Pursuant to MISS. CODE. ANN. § 83-1-39, the state returns insurance rebate moneys to the county boards of supervisors for purposes of, *inter alia*, providing training and equipment to those citizens. MISSISSIPPI CODE ANNOTATED Section 37-107-1 includes volunteer firefighters among the public servants whose children receive scholarships should they be killed in the line of duty.

That the Bridgetown Volunteer Fire Department is a group of citizens is clear. Equally clear is that the fire department engages in a governmental activity.

b. The Fire Protection Provided by the Bridgetown Volunteer Fire Department Constitutes a Governmental Activity

There truly should be no debate that fire protection and suppression fits squarely within

the realm of a governmental activity. That the fire department engages in governmental activity or exercises a governmental function is relevant to both its status as a body politic and a direct requirement of the definition of political subdivision found in MISS. CODE. ANN. § 11-46-1(i).

As an initial matter, MISS. CODE. ANN. § 11-46-9(1)(c) places firefighters in the same tier as policemen when it comes to execution of public duties. The statute by its very terms provides that both are protected equally in their separate governmental functions. The *Maldonado* Court affirms the idea, writing that public policy protects *both* police and firefighters because both are likely to be exposed to increased liability as a result of their governmental functions. *Maldonado*, 768 So. 2d at 909 (¶ 6).

Firefighting and fire suppression have been recognized again and again as governmental functions. *See Doe v. City of New York*, 67 A.D.3d 854, 890 N.Y.2d 548 (N.Y. App. Div. 2009) (stating that governmental functions such as police and fire protection are clear governmental functions); *City of Houston v. Petroleum Traders Corp.* 261 S.W. 3d 350, 356 (Tex. App. 2008) (recognizing Texas legislature's grouping of fire protection and police protection as governmental functions); *Landwehr v. Batavia*, 173 Ohio App. 3d 599; 879 N.E. 2d 824, 827 (¶ 21) (2007) (holding that fire hydrants are a component of fire service, which is in turn a governmental function subject to sovereign immunity). One court referred to fire protection as a "quintessential governmental function." *Ruiz v. City of New York*, 894 N.Y.2d 862, 864 (N.Y.Sup. Ct. 2010).

In *Spencer v. Greenwood LeFlore Airport Authority*, 834 So. 2d 707 (Miss. 2003), the Supreme Court of Mississippi wrote that governmental activities under the Tort Claims Act are those "which are performed pursuant to the act of statute or are a matter of public necessity." *Id.*

at 711 (¶ 12). In an earlier case, *City of Jackson v. Petitioners for Incorporation of City of Richland*, 318 So. 2d 843 (Miss. 1975), this Court recognized as much. Therein, it wrote of the public need for fire protection as a criteria for incorporation of a town. *Id.* at 845. *See also Hamilton v. Incorporation of Petal, Forrest County*, 291 So. 2d 190, 192 (Miss. 1974).

Several other courts have recognized fire protection as a public necessity or discussed statutes that demonstrate its necessity. *See ADT Sec. Serv., Inc. v. Lisle-Woodridge Fire Prevention Dist.*, 799 F.Supp.2d 880 (N.D. Ill. 2011); *Vickery v. Minooka Volunteer Fire Dep't*, 990 F.Supp. 995, 1000 n.3 (N.D. Ill. 1997); *Kenner Firefighters Ass'n Local No. 1427 v. City of Kenner*, 685 So. 2d 265, 267 (La. App. 1996); *Commissioner, Dep't of Highways v. Louisville Water Co.*, 479 S.W.2d 626, 628-629 (Ky. App. 1972) (holding that a utility company must relocate facilities when required to do so by public necessity including assuring ample supply of water for fire protection); *Brightwell v. Kansas City*, 153 Mo.App. 519, 134 S.W. 87, 88 (1911).

Fire protection is also an activity largely performed pursuant to statutory requirements and therefore regulated by the state. Mississippi statutes provide for funding of volunteer fire departments, *see* MISS. CODE. ANN. § 83-1-39 (creating a County Volunteer Fire Department Fund to help fund training and equipment for volunteer fire departments); MISS. CODE. ANN. § 83-13-23 (providing for payments from insurance companies to volunteer fire departments for fire response); MISS. CODE. ANN. § 19-5-95 (authorizing funding of volunteer fire departments by counties), authorize the purchase of equipment, *see* MISS. CODE. ANN. § 19-5-97, to assign ratings to fire districts, *see* MISS. CODE. ANN. § 83-3-24, and provide authority to appoint and compensate a county fire coordinator, *see* MISS. CODE. ANN. § 19-3-71. Mississippi has even created a State Fire Academy for the training of firefighters. MISS. CODE. ANN. § 45-11-7.

Fire protection meets both prongs of the test to qualify as a governmental function even though it need meet only one. It is largely governed by statute and is a public necessity. Because the Bridgetown Volunteer Fire Department is a body politic that performs a quintessential government function, it meets the statutory definition of a political subdivision. MISS. CODE. ANN. § 11-46-1(i). As shown below, as its employee Mr. Poppenheimer received the benefits of the Tort Claims Act, including the one-year statute of limitations.

c. The Mississippi Tort Claims Board, Acting Under Direct Legislative Oversight, Recognizes and Treats the Bridgetown Volunteer Fire Department as a Governmental Entity

MISSISSIPPI CODE ANNOTATED Section 11-46-17(2) tasks the Tort Claims Board with oversight of governmental entities' insurance coverage. The statute provides that *"governmental entities* shall participate in a comprehensive plan of self-insurance and/or one or more policies of liability insurance administered by the Department of Finance and Administration." *Id.* (emphasis added). The statute continues with an description of plan requirements and provision for payments to the Tort Claims Board to provide coverage costs. *Id.* The statute clearly applies only to governmental entities.

Part of the record on appeal in the instant case are several memoranda from the Mississippi Tort Claims Board to the Bridgetown Volunteer Fire Department issued pursuant to the duties of the board set forth in MISS. CODE. ANN. § 11-46-17(2). (R. at 342-366). The Tort Claims Board addressed the Bridgetown Volunteer Fire Department as "State Political Subdivision." (R. at 342, 362). Contained within the collection are a total of seven Certificates

of Coverage issued to the Bridgetown Volunteer Fire Department by the Tort Claims Board.[4] The Certificates confirm coverage under a plan approved by the Board for the fire department as a governmental entity. The certificates approve the coverage in place beginning in the month issued continuing for one year. The certificates in the record are for the years 2006, (R. at 353, 348); 2007, (R. at 354); 2009, (R. at 363); and 2010,(R. at 365).

Also included are Certificate of Liability Insurance for varying coverage periods, including one that covers January 27, 2007, or the date of the underlying accident. (R. at 349). On its face, the certificate shows coverage was issued for the Bridgetown Volunteer Fire Department from June 2006 to June 2007. (R. at 349). Accordingly, the Tort Claims Board reviewed and approved the Bridgetown Volunteer Fire Department insurance coverage for the time period of the collision. The review and approve function is one the Board performs *only* for governmental entities as defined by the Act.

In short, the Mississippi Tort Claims Board, created by the Mississippi legislature for the purpose of overseeing coverage of governmental entities, MISS. CODE. ANN. § 11-46-20(1), recognizes the Bridgetown Volunteer Fire Department as a governmental entity. Moreover, it does so while acting under direct legislative oversight. MISS. CODE. ANN. § 11-46-18; *See also* 1994 MISS. LAWS Ch. 568 (H.B. 659).

That the Board has been created with legislative oversight, and under that oversight it has been issuing certificates of compliance with MISS. CODE. ANN. § 11-46-17 for years to Bridgetown Volunteer Fire Department as a governmental entity demands the conclusion that the

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[4] The certificates found at Page 351 and Page 354 appear to be duplicates, as do those found on Page 343 and 365)..

legislature intended for volunteer fire departments to in fact be governmental entities. Otherwise, the legislature, pursuant to its direct oversight of the Board, would have changed the law to exclude volunteer fire departments. In the nearly eighteen years since passage of the oversight provision, 1994 MISS. LAWS Ch. 568 (H.B. 659), it has not done so.

3. If Not a Political Subdivision In and Of Itself, the Bridgetown Volunteer Fire Department is an Instrumentality of a Political Subdivision

Bridgetown Volunteer Fire Department is itself a governmental entity, and the Court should so hold. However, in the alternative, DeSoto County is without question a political subdivision of the State of Mississippi and, as a volunteer fire department operating within the boundaries of DeSoto County, Bridgetown Volunteer Fire Department is an "instrumentality thereof."

An "instrumentality" of a political subdivision such as DeSoto County, within the meaning of the Tort Claims Act, is an entity that "serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body." *Bolivar Leflore Med. Alliance, LLP v. Williams*, 938 So.2d 1222, 1228 (Miss.2006) (quoting Webster's Third New International Dictionary, 1172 (3rd ed.1986)). Bridgetown Volunteer Fire Department is an instrumentality of DeSoto County because it is responsible for providing certain governmental services within certain designated areas. Specifically, Bridgetown Volunteer Fire Department provides "fire protection services and other services normally provided through fire service organizations such as training, equipment, etc. to certain designated areas of DeSoto County, Mississippi . . . ." (R. at 296).

Bridgetown Volunteer Fire Department and its firefighters are an instrumentality of DeSoto County, a political subdivision of the State of Mississippi, and are therefore entitled to the

protections of the Tort Claims Act while acting in the course and scope of their duties.

4. The Arguments Presented by the Estate to the Trial Court Fail.

Below, the Estate responded to Mr. Poppenheimer's motion with several arguments. As shown below, those arguments fail.

a. Nothing in the Tort Claims Act Requires the Existence of a Contract for a Fire Department to be Considered a Governmental Entity

Below, the Estate contended that a contract between DeSoto County and the Bridgetown Volunteer Fire Department must exist for the fire department to meet the definition of a political subdivision. (R. at 39). As an initial matter, a contract between DeSoto County and the Bridgetown Volunteer Fire Department existed and was made part of the record. (R. at 58-62).

Even without the contract, there is nothing in the Tort Claims Act's definitions that contains such a requirement for a volunteer fire department to meet the definition of a political subdivision and, therefore, a governmental entity. *See* MISS. CODE ANN. § 11-46-1. As discussed above, Mr. Poppenheimer meets the statute's definitional requirements by demonstrating that the Bridgetown Volunteer Fire Department is a body politic organized to conduct a governmental activity.

The Estate relied upon MISS. CODE ANN. § 83-1-39(6)(a) for its lack-of-contract argument. Section 83-1-39(6)(a) is not part of the Mississippi Tort Claims Act and has no bearing on its definitions. While it is relevant to the State's statutory treatment of fire departments and consideration of them as performing a governmental function, it does not otherwise add to or take away from the definitional requirements of the Act. Section 83-1-39(6)(a) makes a contract a requirement for distribution of funds – not for meeting the definition of a political subdivision.

b. It Does Not Matter That Mr. Poppenheimer Had Not Yet Reached the Fire

Station at the Time of the Collision

With a two sentence argument and without citation to authority, the Estate argued to the trial court that because Mr. Poppenheimer was en route to the fire station, and not yet en route to the fire itself, he cannot be considered to have been acting within the course and scope of his employment as a firefighter. (R. at 40). However, earlier in its response to Mr. Poppenheimer's dispositive motion, the Estate conceded, "At the time of the accident [Mr. Poppenheimer] was working as a volunteer fireman for the Bridgetown Fire Department." (R. at 38).

In any event, Mr. Poppenheimer's undisputed deposition testimony leaves no doubt. He testified that after being paged via his radio, he informed dispatch he was responding to the fire call. (R. at 227). After the communication with dispatch, Mr. Poppenheimer left his home in his truck to proceed to the station to get a fire truck. (R. at 227). It was for the sole purpose of responding to the fire call in his capacity as a volunteer firefighter – and for no other purpose – that Mr. Poppenheimer left his home and was operating his vehicle at the time of the collision.

In order to fall within the course and scope of employment, "the act must have been committed in the course and as a means to accomplishing the purposes of the employment and therefore in the furtherance of the master's business." *Adams v. Cinemark USA, Inc.*, 831 So. 2d 1156, 1159 (¶ 9) (Miss. 2002) (citing *Sears, Roebuck & Co. v. Creekmore*, 199 Miss. 48, 23 So.2d 250, 252 (1945); *Alden Mills v. Pendergraft*, 149 Miss. 595, 115 So. 713, 714 (1928)). Without question, Mr. Poppenheimer's act of driving to the fire station to retrieve the fire truck in response to a fire call meets the definition.

c. Mr. Poppenheimer Was No Independent Contractor

The Estate argued below that Mr. Poppenheimer acted not as an employee but as an independent contractor as contemplated by various decisions by Mississippi's appellate courts

deciding whether physicians in various roles were employees or independent contractors. (R. at 92). Primarily, the Estate relied upon *Miller v. Meeks*, 762 So. 2d 302 (Miss. 2000) in support of its position.

Miller involved a medical negligence complaint filed against a physician, Dr. Weeks, an employee of the state-run University of Mississippi Medical Center. *Id.* at 313 (¶ 1). The estate did not cite any authority interpreting Mississippi's or any other state's Tort Claims Act that held any firefighter or police officer could be considered an independent contractor. The differences between a physician at a hospital and a firefighter performing the quintessential governmental function of fire protection and suppression are so vast that the Court should reject the independent contractor argument immediately. The Mississippi Supreme Court has directly addressed the nature of firefighting activity and written that due to its very nature, those who perform it are afforded the protection of the act. *Maldonado v. Kelly*, 768 So. 2d 906, 900 (¶ 6) (Miss. 2000).

In any event, the Estate relied on the following five-part test set forth by the *Miller* Court for purposes of determining whether a physician is an employee or independent contractor for Tort Claims Act purposes:

> 1. the nature of the function performed by the employee;
>
> 2. the extent of the state's interest and involvement in the function;
>
> 3. the degree of control and direction exercised by the state over the employee;
>
> 4. whether the act complained of involved the use of judgment and discretion;
>
> 5. whether the physician receives compensation, either directly or indirectly, from the patient for professional services rendered.

Miller, 762 So. 2d at 310 (¶ 20). Even if the five part test applied here, its application shows that

Mr. Poppenheimer was not an independent contractor. As shown above, fire suppression is a quintessential governmental function, placed by the Mississippi Legislature and the Mississippi Supreme Court on the same tier as police protection. *See Maldonado v. Kelly*, 768 So. 2d 906, 900 (¶ 6) (Miss. 2000); *See also* MISS. CODE ANN. § 11-46-9(1)(c).

As also shown above, the state is heavily involved in regulating by statute fire suppression, even to the point of creating a state fire academy for training firefighters. *See* MISS. CODE ANN. § 45-11-7. Mississippi statutes provide for funding of volunteer fire departments, *see* MISS. CODE. ANN. § 83-1-39 (creating a County Volunteer Fire Department Fund to help fund training and equipment for volunteer fire departments); MISS. CODE. ANN. § 83-13-23 (providing for payments from insurance companies to volunteer fire departments for fire response); MISS. CODE. ANN. § 19-5-95 (authorizing funding of volunteer fire departments by counties), authorize the purchase of equipment, *see* MISS. CODE. ANN. § 19-5-97, to assign ratings to fire districts, *see* MISS. CODE. ANN. § 83-3-24, and provide authority to appoint and compensate a county fire coordinator, *see* MISS. CODE. ANN. § 19-3-71.

The state exercises control and discretion over firefighters by requiring training. According to Mr. Poppenheimer's undispuited testimony, while any member of the community may join that member of the community must undergo training provided by DeSoto County. (R. at 220). Mr. Poppenheimer testified that he did not go through the training because he already achieved certification, indicating that a firefighter must be certified by the government. (R. at 45).

Even the act of driving to a fire or firehouse itself is limited by state control, as the undisputed testimony establishes that firefighters are to obey the rules of the road and not exceed posted speed limits. (R. at 46).

In other words, of the four applicable prongs of the *Miller* test, all four weigh against a finding that Mr. Poppenheimer or any other volunteer firefighter is an independent contractor. Should the issue be argued by the estate on appeal, this Court should hold that as a matter of law a volunteer firefighter acting within the course and scope of his duties is an employee and not an independent contractor.

C. The County Court of Desoto County Erred by Failing to Dismiss the Claims of the Estate as Time Barred under the Applicable One-year Statute of Limitations.

1. Under Mississippi Law, Mr. Poppenheimer Is An Employee Covered by the Tort Claims Act

Once again, MISS. CODE. ANN. § 11-46-9(1)(c) provides as follows:

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim . . . [a]rising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury.

It is undisputed that at the time of the underlying collision Mr. Poppenheimer acted as a volunteer firefighter in the course and scope of his employment with the Bridgetown Volunteer Fire Department. (R. at 32).

2. The Applicable Statute of Limitations Bars the Estate's Claims

MISSISSIPPI CODE ANNOTATED Section 11-46-11(3) bars all actions against a governmental entity or its employee not filed within one year of the date of the allegedly tortious activity. In the instant case, the underlying collision occurred on January 27, 2007, in DeSoto County, Mississippi. (R. at 32). The estate filed its complaint almost three years later, on January 14, 2010. (R. at 4, 9). Accordingly, the plaintiffs claims were time barred. Mr.

Poppenheimer requests the Court to reverse the County Court's denial of summary judgment and render judgment in favor of Mr. Poppenheimer.

3. The Estate Failed to Comply with the Tort Claims Act Notice Requirements

MISSISSIPPI CODE ANNOTATED Section 11-46-11(3) further provides various requirements that a putative plaintiff notify the governmental entity that is subject to forthcoming litigation. As the record reflects, the Estate never met any of the notice requirements, and its deficiency is fatal to its claims. Mr. Poppenheimer requests the Court to reverse the County Court's denial of summary judgment and render judgment in favor of Mr. Poppenheimer.

4. The Estate Never Produced Evidence upon which A Successful Claim Could Be Made Under the Tort Claims Act

In order to succeed in its claims against Mr. Poppenheimer and avoid summary judgment, the Estate must come forward with proof that Mr. Poppenheimer "acted in reckless disregard of the safety and well being of any person not engaged in criminal activity at the time of the injury. . . ." MISS. CODE. ANN. § 11-46-9(1)(c). The record on appeal is wholly devoid of evidence that Mr. Poppenheimer failed to act reasonably, much less that his actions meet the reckless disregard level imposed by the Tort Claims Act. He was driving with his red emergency light and hazard lights operating, and he was driving to the fire department. He testified via affidavit that he was driving approximately forty miles per hour. Mr. Poppenheimer proceeded through an intersection where he had no stop sign, but cross-traffic did. Mr. Coyle pulled out in front of him. Mr. Poppenheimer unsuccessfully attempted to avoid the collision by applying his brakes and swerving. (R. at 32).

The Estate never came forward with proof to the contrary. Accordingly, summary

judgment in favor of Mr. Poppenheimer is appropriate. Mr. Poppenheimer requests the Court to reverse the County Court's denial of summary judgment and render judgment in favor of Mr. Poppenheimer.

D. The County Court Erred by Failing to Dismiss the Claims of the Estate Due to Its Failure to Prove any Acts of Negligence on the Part of Mr. Poppenheimer.

The Estate failed to produce any evidence which would tend to suggest that Mr. Poppenheimer was negligent in any way. Accordingly, the County Court should have granted summary judgment in favor of Mr. Poppenheimer.

The undisputed facts in this case were that Mr. Poppenheimer was traveling at a speed of 40 miles per hour and enjoyed the right of way as he approached the intersection where the accident occurred. (R. at 232, R.E. at 16). He had his headlights, emergency flashers and flashing dash light engaged and all of his lights were functioning properly (R. 228, R.E. at 15). Mr. Poppenheimer testified that the accident occurred as follows: "It all happened so fast. He was right – he was right there, and I knew if he saw me and stopped, then I could safely go around him, or if he sped up, I could have gone around behind him. But, there again, it all happened so fast. I chose to take the first point and go around the front of him, and, obviously, he sped up at the same time. That's when we made impact" (R. at 241, R.E. at17). Mr. Poppenheimer further testified that he "never thought anything in the world about him not seeing me or running the – you know, coming out of the intersection" (R. at 245, R.E. at 18) and that even though he applied his brakes prior to the collision, he was simply unable to stop in time (R. at 251, R.E. at 19).

As the party moving for summary judgment, Mr. Poppenheimer bore the burden of

showing that no genuine issue of material fact exists as to his liability in this matter and that he was entitled to judgment as a matter of law. *Palmer v. Biloxi Reg'l Med. Center*, 564 So. 2d 1346, 1355 (Miss. 1990). In response, the Estate must meet the burden it would bear at trial, i.e., it must prove that Mr. Poppenheimer was negligent and that his negligence was the proximate cause of the accident. *Fruchter v. Lynch Oil*, 522 So. 2d 195, 198 (Miss. 1998). In such situations, "the burden on the moving party may be discharged by 'showing' – that is, pointing out ... that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In its Order, the Court recognized that there was no proof that Mr. Poppenheimer was exceeding the speed limit at the time of the accident. (R. at 137). However, the County Court relied on two cases for the proposition that in "intersection collisions" there always exists questions of fact as to the negligence of a motorist in failing to reduce speed when approaching an intersection. *Richardson v. Adams*, 223 So. 2d 536 (Miss. 1969); *Shaw v. Phillips*, 193 So. 2d 717 (Miss. 1967). Mr. Poppenheimer respectfully submits that more recent caselaw as to intersection collisions holds otherwise.

The County Court's decision is ultimately based upon the oft maligned and somewhat discredited Miss. Code Ann. § 63-3-505 which, *inter alia*, requires a motorist to decrease speed when approaching and crossing an intersection. *See Clark v. Clark*, 863 So. 2d 1027, 1034 ¶ 30 (Miss. Ct. App. 2004) (Southwick, P.J. concurring) (discussing the "continuing distortions caused by [this] antiquated statute."); *Martin v. B&B Concrete Co.*, 71 So. 3d 611, 615 ¶ 12 (Miss. Ct. App. 2011) (discussing "irrational results" from some interpretations of the statute).

Presiding Justice Southwick's concurrence in *Clark v. Clark* provides a detailed,

scholarly and well researched discussion of the history of Miss. Code Ann. § 63-3-505 and its purposes dating all the way back to 1916.[5] The concurrence discussed the state of roads in Mississippi in 1938 (when the "slow at all intersections" statute was adopted) where only approximately half were paved, and many intersections then existing in the state were unmarked and without any traffic control devices at all, making understandable the need for every vehicle to slow at every intersection. *Id.* at 1036 ¶ 37. The concurrence stated:

> This obsolete statute fully served its purpose long ago and should legislatively be repealed because the usual negligence rules already focus on the requirement of reasonable care in driving. In most circumstances slowing at every intersection would not be part of the standard of care and should not be made so by statute. Something besides the mere existence of an intersection should be needed before the duty to slow is invoked.

Id. at 1036 ¶ 41.

In *Martin v. B&B Concrete*, the court discussed at length one of the cases relied upon by the County Court in this case, *Richardson v. Adams*, 223 So. 2d 536 (Miss. 1969). The court noted that *Richardson* actually held that the statute in question must be read in conjunction with other statutes regarding speed, and that for there to be a violation of the statute, there must be a failure "to reduce . . . speed from the maximum" speed provided, and if the motorist was already traveling at a speed lower than the speed limit, there was no violation of the statute. *Martin*, 71 So. 3d at 614-15 ¶ 10 (citing *Richardson*, 223 So. 2d at 538).

But even assuming that Mr. Poppenheimer was in violation of some statutory or common

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[5] Justice Southwick noted the predecessors to this statute referred to "motor cars" and their duties persons "driving a horse or horses or other domestic animals." *Clark*, 863 So. 2d at 1035 ¶ 34 (citing 1916 Miss. Laws, ch. 116 (codified at Hemingway's Code 1927, § 6681)).

law standard of care in regard to his speed, there is no evidence that such violation was the proximate cause of the accident in question. *See Havard v. State*, 800 So. 2d 1193, 1198 ¶ 15 (Miss. Ct. App. 2001) (stating "[c]ommitting a misdemeanor traffic offense is negligence, but such negligence does not constitute a prima facie case of vehicular manslaughter if a death results. The negligence of speeding or of running a stop sign must still be shown to have been the cause of the accident."). *McFarland v. Leake*, 864 So. 2d 953, 962 ¶¶ 6-8 (Miss. Ct. App. 2003) is a case arising out of an automobile accident with the same facts as the instant case: the plaintiff failed to yield to the right of way and pulled out from a side street into the path of the defendant. The court, applying a *de novo* standard, found that the underlying plaintiff had failed to prove that speed was a proximate cause of the accident in question, and the defendant was entitled to summary judgment. *McFarland*, 864 So. 2d at 962 ¶¶ 6-8.

Here, there is no evidence that Mr. Poppenheimer's speed had anything to do with the accident. The uncontradicted evidence shows that Mr. Coyle failed to yeild to the right of way and pulled out in front of Mr. Poppenheimer, giving him no chance to avoid colliding with him. Therefore, Mr. Poppenheimer is entitled to the entry of summary judgment in his favor on the issue of negligence, and the Court should reverse and render this matter in his favor.

V. CONCLUSION

The Bridgetown Volunteer Fire Department meets the statutory definition of a governmental entity, and it and its employee Mr. Poppenheimer are entitled to the procedural protections of the Tort Claims Act. Mr. Poppenheimer acted within the course and scope of his employment as a firefighter as he proceeded to the fire station to retrieve a fire truck. The estate failed to give the notice required by the Tort Claims Act or to file its complaint within the one

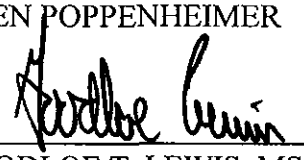
year statute of limitations.

Additionally, there is no evidence of any negligence on the part of Mr. Poppenheimer which was the proximate cause of the accident in question.

Accordingly, Mr. Poppenheimer asks the Court to reverse the decision of the County Court denying the dispositive motion and render summary judgment in his favor.

Respectfully submitted, this the 13th day of January, 2012.

GLEN POPPENHEIMER



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CERTIFICATE OF SERVICE

I, GOODLOE T. LEWIS, of Hickman, Goza & Spragins, PLLC, Attorneys at Law, Oxford, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

Honorable Allen Couch
County Court Judge
2535 Highway 51 South
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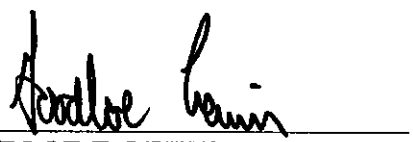
THIS, the 13th day of January, 2012.



GOODLOE T. LEWIS

CERTIFICATE OF MAILING

I, GOODLOE T. LEWIS, of Hickman, Goza & Spragins, PLLC, Attorneys at Law, Oxford, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, the original and three copies of the Brief of the Appellant to be filed with the Clerk of the Supreme Court.

THIS, the 13th day of January, 2012.

GOODLOE T. LEWIS