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

REBUTTAL BRIEF OF THE APPELLANT, GLENN POPPENHEIMER

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STATEMENT REGARDING ORAL ARGUMENT

As the appellees point out, the instant appeal presents a question of first impression. Under normal circumstances, such a question would be ripe for oral argument before the Court. However, given the direct application of MISS. CODE ANN. § 11-46-9 and MISS. CODE ANN. § 11-46-1 to the question before the Court, the required analysis is straightforward and oral argument should not be required.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

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REBUTTAL BRIEF OF THE APPELLANT

I. SUMMARY OF THE ARGUMENT

In his principal brief, Mr. Poppenheimer demonstrated that a Mississippi volunteer fire department, such as the Bridgetown Volunteer Fire Department, squarely fits the statutory definition of a political subdivision under the Tort Claims Act. As shown by the record and the argument from the principal brief, the fire department (1) is a body politic that (2) performs a governmental function; it is, therefore, in and of itself a political subdivision. It and its employees, such as Mr. Poppenheimer, are entitled to Tort Claims Act protection by operation of simple and straightforward statutory analysis.

Perhaps unable to do so, the Estate fails to truly attack the straightforward argument presented by Mr. Poppenheimer, instead presenting a dazzling array of straw men and red herrings. As will be shown below, none of them succeed. The Tort Claims Act applies to the claims against Mr. Poppenheimer and he accordingly asks the Court to reverse the County Court of DeSoto County and render judgment in his favor as to all claims against him.

II. ARGUMENT

A. Revisiting the Applicable Standard of Review

While both parties agree that a *de novo* standard of review applies to the instant appeal, the Estate relies heavily on the findings of the trial court throughout its brief and presents them as

though they govern the Court's decision here. Of course, the very meaning of the *de novo* standard is that the Supreme Court considers all issues afresh and is not in any way bound by the findings of the trial court. A de novo review "means that the case shall be tried the same as if it had not been tried before, and the court conducting such a trial may substitute its own findings and judgment for those of the inferior tribunal from which the appeal is taken." *Southern Healthcare Serv., Inc. v. Lloyd's of London*, 20 So. 3d 84, 92 (¶ 37) (Miss. App. 2009) (quoting *California Co. v. State Oil and Gas Bd.*, 200 Miss. 824, 838-39, 27 So.2d 542, 544 (1946)).

Accordingly, the Supreme Court should make its own findings and not adopt the erroneous findings of the trial court.

B. The Estate's Lone Challenge to Poppenheimer's Primary Argument Fails.

The trial court erred when it wrote that "[N]o statute confers the status of "governmental entity" upon a volunteer fire department and the statute defining political subdivisions of the State of Mississippi is silent on the issue." (R. at 136). The Estate compounds the error when it relies upon and agrees with the trial court's position. (Brief of Appellee at 29).

MISSISSIPPI CODE ANNOTATED Section 11-46-9(1)(c) provides protection for *governmental entities and their employees* when *engaged in fire protection activities*. There is no dispute that Mr. Poppenheimer had left his home to respond to a fire call when the underlying accident occurred and was therefore engaged in fire protection activities on behalf of the Bridgetown Volunteer Fire Department.

In fact, the entire case can be decided based on MISS. CODE ANN. § 11-46-9(1)(c). In *Herndon v. Mississippi Forestry Comm'n*, 67 So. 3d 788 (Miss. 2010), the Court of Appeals held that in order to be immune, an entity need not be a fire department at all, but merely engaged in

fire protection activities. *Id.* at 792 (¶ 10). There is no question from the record on appeal in the instant case that the BVFD and Mr. Poppenheimer were engaged in fire protection activities at the time of the underlying accident. Pursuant to *Herndon*, his actions receive the protection of MISS. CODE ANN. § 11-46-9(1).

In any event, the Estate does not challenge the bulk of Mr. Poppenheimer's argument establishing the BVFD as a governmental entity. The only premise the Estate attacks is that the volunteer fire department meets the definition of a body politic. It does not attack the second premise, that fire suppression is a governmental function, nor does it disagree that if both supporting premises are true then the Bridgetown Volunteer Fire Department is a governmental entity.

The Mississippi Legislature possesses the power to define statutory terms however it sees fit. *Richardson v. Canton Farm Equipment, Inc.*, 608 So. 2d 1240, 1250 (Miss. 1992). In the Tort Claims Act, it defined "governmental entity" as (1) the state itself and (2) political subdivisions of the state. MISS. CODE. ANN. § 11-46-1(g). Clearly, the BVFD is not the state itself, *but it is a political subdivision.*

> "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). (Emphasis added). As already shown by Mr. Poppenheimer in his brief, the BVFD meets the definition of a body politic and it is undoubtedly engaged in a governmental function, *i.e.*, fire protection.

1. Volunteer Fire Departments Meet the Authoritative Definition of Bodies Politic

The *only* direct attack by the Estate on Mr. Poppenheimer's main argument, that the BVFD is a political subdivision, involves whether the BVFD is a body politic. The Mississippi Supreme Court has 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)).

The Estate cites no authority, binding or otherwise, in opposition to the above-quoted definition, nor does it suggest any alternate definition of body politic. (Brief of the Estate at 35-36). The only argument offered by the Estate to escape the Supreme Court's definition of a body politic is an attempted factual distinction between the facts of the *Tackett* case and those of the instant case.

According to the Estate, the definition does not apply in the instant case because in *Tackett*, the entity in question was created by a municipality. However, the quoted definition, which is long and detailed, contains no requirement whatsoever that a group must be created by

another political entity in order to meet the definition. In fact, the definition explicitly states that a body politic may find its origins in "a voluntary association of individuals," which implies no governmental creation at all. Although the group at issue in *Hackett* may have been created by a municipality, that fact is wholly immaterial to the application of the definition.

In any event, volunteer fire departments in Mississippi are largely governed by the state itself. 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. Accordingly, if a connection to a governmental entity is required as suggested by the Estate, then volunteer fire departments are directly and fundamentally connected to the ultimate governmental entity – the State of Mississippi itself.

Accordingly, the sole direct attempt of the Estate to discredit Mr. Poppenheimer's position fails. The remaining arguments amount to no more than distractions and red herrings.

2. Mr. Poppenheimer Does Not, as Suggested by the Estate, Rely on the Wrong Statute.

The Estate first tries to argue that MISS. CODE ANN. § 95-9-1, *et seq.*, applies to the instant case involving a firefighter engaged in fire protection related activities and not the Tort Claims

Act. The Mississippi Tort Claims Act specifically singles out two activities to which it applies – police and fire protection. MISS. CODE ANN. § 11-46-9(1)(c). The Estate's argument that Mr. Poppenheimer relies upon the wrong statute strains the bounds of reason. Section 95–9-1, *et seq*, may or may not *also* apply to volunteer firefighters, but nothing in the statutes or any other authority cited by the Estate indicates that the Tort Claims Act does not also apply. Certainly, nothing in Section 95-9-1, *et seq.*, obviates the notice and statute of limitations requirements applicable when a plaintiff attempts to sue a governmental entity such as the BVFD.

The April 16, 1991, Attorney General's Opinion cited by the Estate and now over two decades old has no applicability here. The question being addressed in the opinion was one arising from Workers' Compensation law, not the Tort Claims Act. Moreover, the question involved the relationship of firefighters to a county, not whether a volunteer fire department is a governmental entity. The remaining Attorney General's Opinions cited by the Estate have even less applicability to the case.

Mr. Poppenheimer asks the Court not to be distracted by these straw men offered up by the Estate to distract from the simplicity of the statutory analysis involved; the Court should hold that the Tort Claims Act applies to volunteer fire departments and their firefighters. Perhaps lacking any real argument against the statutory analysis offered in Mr. Poppenheimer's brief, the Estate has chosen instead to create its own issues, not applicable to the appeal.

3. The Legislature Clearly Stated that the List Found in Section 11-46-1(i) Is Not All-Inclusive.

The Estate appears to take the position that the Section 11-46-1(i) list is all-inclusive when it writes, "The trial court observed that the 'over 10,000 volunteer firemen in the State of

Mississippi' are 'hardly a small number or obscure class of employees that were somehow left on the legislature's cutting room floor.'" (Brief of Appellee at 33). The Legislature clearly wrote in Section 11-46-1(I) that the list *included* but *was not limited to* the listed entities.

Moreover, firefighters were not left on the legislative "cutting room floor." MISSISSIPPI CODE ANNOTATED Section 11-46-9(1)(c) specifically provides protection for *governmental entities and their employees* when *engaged in fire protection activities*, thus showing the Tort Claims Act includes firefighters.

4. The *Williams* Control Test Does Not Apply

The Estate contends that a line of cases, including *Bolivar Leflore Med. Ass'n, LLP v. Williams*, 938 So. 2d 1222 (Miss. 2006), show that the BVFD is a private as opposed to public entity because DeSoto County does not exert enough control over it to qualify it as a public entity. The Estate's contention fails because the control test set forth in *Williams* by statute applies only when the Court must determine whether an institution is a community hospital.

a. The *Williams* Control Test Applies Only to Whether a Healthcare Provider Is a Community Hospital.

In *Williams*, the question was whether an entity, the Bolivar Leflore Medical Alliance, LLP ("BLMA") was entitled to the protections of the Tort Claims Act. *Williams*, 938 So. 2d at 1223 (¶ 1). BLMA was a family medical clinic created by agreement between the Greenwood Leflore Hospital and two physicians. *Id.* at 1223 (¶ 2). In order to answer the overall question – whether the Tort Claims Act covered BLMA – the *Williams* Court had to address two issues – (1) whether BLMA itself met the Tort Claims Act definition of a political subdivision, *Id.* at 1231 (¶ 24), and (2) whether BLMA was an instrumentality of a political subdivision. *Id.* at 1231 (¶ 25).

In order to address the first of the two above-listed questions, the *Williams* Court turned to the control test relied upon by the Estate. However, as shown below, by operation of statutory law that "ultimate test" pertains only to the status of community hospitals under the Tort Claims Act. The entire line of cases upon which the Estate relies is dedicated to determining the tricky relationship of privately owned healthcare providers to entities such as community hospitals and the University of Mississippi Medical Center, which are themselves undisputedly governmental entities.

MISSISSIPPI CODE ANNOTATED Section § 11-46-1(i) provides 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.

(Emphasis added). The *Williams* Court employed the test to determine whether a healthcare entity met the definition of a community hospital under MISS. CODE ANN. § 41-13-10(c). *Williams*, 938 So. 2d at 1227 (¶ 15). Pursuant to the above-quoted section of the Tort Claims Act, meeting the definition of a community hospital under Section 41-13-10 is a prerequisite to meeting the definition of a political subdivision. In other words, the control test exists not to determine the applicability of MISS. CODE ANN. § 11-46-1(i), but to determine the applicability of MISS. CODE ANN. § 41-13-10.

In *Williams*, the Court held that BLMA, which had contracted with Greenwood Leflore Hospital – itself a community hospital and political subdivision – was not itself a community hospital and therefore not itself a governmental entity. *Id.* at 1231 (¶ 21). In reaching its

conclusion, the *Williams* Court employed the "ultimate test" in order to determine the applicability of MISS. CODE ANN. § 41-13-10, which in turn determined whether BLMA met the definition of a political subdivision. In other words, the entire control analysis was performed pursuant to MISS. CODE ANN. § 41-13-10, which applies only to the question of whether entities meet the community hospital definition. The definitional requirement of Section 41-13-10 *applies only to community hospitals* and simply does not apply here.

5. The Estate's Independent Contractor Argument is Equally Inapplicable

Next, the Estate cites *Rolison v. City of Meridian*, 691 So. 2d 440 (Miss. 1997), for the proposition that the BVFD is an independent contractor as to DeSoto County. (Brief of Appellee at 37). The Court should wholly disregard the Estate's *Rolison* argument, as the *Rolison* case had nothing to do with the Tort Claims Act and contains absolutely no analysis of its applicability. The status of the umpires in *Rolison* as independent contractors was relevant only for vicarious liability purposes and for no other reason. *Id.* at 445.

The Estate cites no authority whatsoever showing that the independent contractor analysis is relevant to the definition of the BVFD as a political subdivision, and the Court should decline to consider the offered red herring.

Mr. Poppenheimer does offer the alternative argument that, if the BVFD is not itself a governmental entity, it is a instrumentality of DeSoto County. Mr. Poppenheimer quoted the definition of the word instrumentality adopted by this Court in *Bolivar Leflore Med. Alliance, LLP v. Williams*, 938 So.2d 1222, 1228 (Miss.2006), and there taken from the Webster's Dictionary. Pursuant to it, an instrumentality 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." *Id.*

The Estate responds by accusing Mr. Poppenheimer of taking the definition out of context, but does not explain its position. (Brief of Appellee at 40). The definition is the dictionary definition of the word adopted by this Court and, as shown in Mr. Poppenheimer's principal brief, under that definition the BVFD is an instrumentality of the county because it is responsible for providing certain governmental services within certain designated areas. The fact that the BVFD serves DeSoto County is clear from the undisputed fact that Mr. Poppenheimer was responding to a fire call from DeSoto County dispatch when the underlying collision occurred. (R. at 227). DeSoto County dispatch notifies its volunteer firefighters of the need for fire protection, a governmental activity, and the firefighters act as the agents of the county who go put out the fires.

The Estate's only other response is to rely on *Richardson v. APAC-Mississippi, Inc.*, 631 So. 2d 143 (Miss. 1994), for the proposition that BVFD is an independent contractor and the county does not exercise sufficient control over it to render it an instrumentality. Once again, the Estate relies on a case that contains not one iota of discussion relevant to the Tort Claims Act. The question in *Richardson* was one of *respondeat superior*, not whether any entity was an instrumentality of a governmental entity under the Tort Claims Act. *Id.* at 148. The type of control necessary to establish *respondeat superior* liability simply is not part of the definition of instrumentality adopted by this Court and should be disregarded.

C. The Record on Appeal Clearly Shows that the Tort Claims Board Recognized the Volunteer Fire Department as a Governmental Entity

The Estate's contention that the Tort Claims Board never recognized the Bridgetown Volunteer Fire Department as a Governmental Entity strains the bounds of credulity on two points. First, the Tort Claims Board directly addressed the BVFD as "Governmental Entity." (R.

at 342). Second, as more fully set forth in Mr. Poppenheimer's principal brief, under the statute governing the Tort Claims Board it *may only* issue certificates of coverage to governmental entities. MISS. CODE ANN. § 11-46-17(2).

The only authority mustered by the Estate to counter Mr. Poppenheimer's argument is an Attorney General's opinion dated January 24, 1997. (Brief of Appellee at 39). Attorney General's opinions are not binding on the Court. *Shelter Mut. Ins. Co. v. Dale*, 914 So. 2d 698, 703 (¶ 20) (Miss. 2005). Given both the nature and the age of the opinion on which the Estate relies, it should be wholly disregarded.

As an initial matter, the subject opinion was issued in 1997, or more than a decade before the Tort Claims Board issued the certificates to the BVFD contained in the record. The opinion in turn cites a letter from the Tort Claims Board, itself dated 1993, in which the Board purportedly communicated that volunteer fire departments would not be considered political subdivisions. No copy of the 1993 letter is available for analysis.

Whatever the stance of the Tort Claims Board in 1993 or 1997, the Board – as clearly shown in the record – considered the BVFD to be a political subdivision in 2006, (R. at 353, 348); 2007, (R. at 354); 2009, (R. at 363); and 2010. (R. at 365). As shown in Mr. Poppenheimer's principal brief, the Tort Claims Board did so *while acting under direct legislative oversight.* MISS. CODE ANN. § 11-46-18(4).

It should also be noted that the question posed to the Attorney General in the 1997 opinion was whether the County, as a political subdivision itself, would have to obtain insurance to cover the volunteer fire department. The notation that the Tort Claims Board at that time did not consider volunteer fire departments to themselves be political subdivisions was *dicta*, at best.

D. The Estate Has Produced No Competent Summary Judgment Proof Showing Negligence on the Part of Mr. Poppenheimer.

In responding to Mr. Poppenheimer's motion for summary judgment, the Estate must come froward with competent proof, and may not rely on the allegations of the complaint or mere argument of counsel. MISS. R. CIV. P. 56(e).

In its brief, the Estate takes two quotes out of context from Mr. Poppenheimer's deposition to attempt to create an issue of fact. First, the Estate quotes Mr. Poppenheimer as saying, ". . . I never thought anything in the world about him not seeing me or running the – you know, coming out of the intersection." (R. at 245). The quoted sentence comes from the end of a long paragraph of testimony in which Mr. Poppenheimer indicated that he saw the Coyle vehicle at the intersection prior to the collision. There is no inference to be drawn from this testimony that Mr. Poppenheimer was not paying due attention. He did not anticipate that the Coyle vehicle would, after coming to a stop at its stop sign, proceed into the intersection and into his path. 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. There is no reasonable inference to be drawn that Mr. Poppenheimer was not paying attention at the pertinent time.

The Estate also quotes Poppenheimer's testimony that he had noticed that other firefighters had obtained the truck and put it into service. (R. at 248). The line of questioning being directed at Mr. Poppenheimer in that section of his deposition had nothing to do with whether he was paying attention or being careless. Mr. Poppenheimer was answering questions about what vehicles the BVFD had at its disposal, and then he testified that when he approached

the fire station he perceived that the truck was already out of the garage and in service. (R. at 73). Once again, there is no reasonable inference to be drawn from the whole of his testimony that he did not maintain a proper lookout for the Coyle vehicle.

Mr. Poppenheimer stands by the analysis of MISS. CODE ANN. § 63-3-505 found in his principal brief and would urge the Court to adopt the positions laid out therein.

Finally, the Estate comes forward with no competent proof as to the element of causation. *See Havard v. State*, 800 So. 2d 1193, 1198(¶ 15) (Miss. 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. 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).

The Estate has come forward with no proof, whatsoever, that Mr. Poppenheimer's speed caused the accident. Without such evidence, they cannot create issues of fact as to all elements of their negligence claim and summary judgment is appropriate. Accordingly, Mr. Poppenheimer asks the Court to reverse the trial court's denial of summary judgment and render judgment in his favor.

III. CONCLUSION

Pursuant to the Tort Claims Act, the BVFD is a political subdivision of the State because it is a body politic that performs a governmental function. Because it is a political subdivision, it is a governmental entity. Because it is a governmental entity, it and its employees – such as Mr. Poppenheimer – receive the protections of the Tort Claims Act, including the one-year statute of limitations and immunity against claims for mere negligence. Because the Estate did not file its complaint within a year of the underlying collision and produced no evidence of reckless disregard, summary judgment was appropriate; this Court should reverse and render judgment in favor of Mr. Poppenheimer.

Respectfully submitted, this the 25th day of April, 2012.

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CERTIFICATE OF SERVICE

I, JOSIAH DENNIS COLEMAN, 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:

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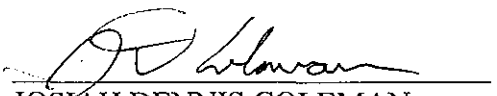
THIS, the 25th day of April, 2012.

JOSIAH DENNIS COLEMAN

CERTIFICATE OF MAILING

I, JOSIAH DENNIS COLEMAN, 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 25th day of April, 2012.



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