

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2012-IA-00280-SCT

**MISSISSIPPI DEPARTMENT OF
TRANSPORTATION and MISSISSIPPI
TRANSPORTATION COMMISSION**

DEFENDANTS/APPELLANTS

VS.

**PRESLEY Y. NOSEF, INDIVIDUALLY AND
ON BEHALF OF ALL WRONGFUL DEATH
BENEFICIARIES OF A.J. COWART**


PLAINTIFFS/APPELLEES

**APPEAL FROM THE CIRCUIT COURT
OF COAHOMA COUNTY, MISSISSIPPI**

CIRCUIT CAUSE NO. 14-CI-08-0067

**BRIEF OF APPELLANTS
MISSISSIPPI DEPARTMENT OF TRANSPORTATION AND
MISSISSIPPI TRANSPORTATION COMMISSION**

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this particular 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 disqualifications or recusal.

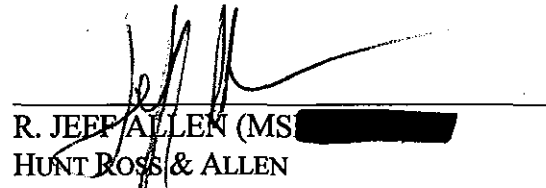
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II. STATEMENT OF THE ISSUES

Whether the lower court was in error in denying Defendants/Appellants Mississippi Department of Transportation and Mississippi Transportation Commission's motion for summary judgment based upon the finding that 1) the placement or non-placement of traffic control warning devices or signs is *not* a discretionary government function; and 2) that Miss. Code Ann. §65-21-1 – which concerns the placement of warning signs near culverts – is controlling and has not otherwise been abrogated by more recent law, including Miss. Code Ann. §63-3-301 and §63-3-303.

III. STATEMENT OF THE CASE

This lawsuit involves an August 27, 2007, incident whereby Plaintiffs' decedent, A.J. Cowart, attempted to make a U-turn on MS Highway 1 in Coahoma County, at which time his car drove over a culvert and overturned at a slow rate of speed. [R. 1-4]. The subject culvert was more than eight (8) feet from the edge of the subject roadway, and per district policy, did not have any warning signs concerning its presence. [R. 98-99, 150].

Mr. Cowart, who was 93 years old at the time, was taken to the hospital, where approximately five (5) days later he suffered an onset of paralysis. Less than a year after the incident, he died from apparent complications of pneumonia. This wrongful death action followed, with Mr. Cowart's heirs contending that but for the subject culvert not being affixed with warning signs, the accident would not have occurred. [R. 1-4].

Appellants readily acknowledge that no signs were in place at the subject culvert which Mr. Cowart ultimately drove over. However, the signs were not "missing." Rather, it was the Department of Transportation's policy in the subject district that encompassed Coahoma County that

no road markers are/were required at the subject culvert (when it was more than eight (8) feet removed from the roadway). There are and were no warning signs at any similarly situated culverts in Coahoma County or the rest of district, which is generally known as the “Batesville” district and which includes multiple counties.¹

It is longstanding statutory law as well as Mississippi’s Tort Claims Act and case law interpreting the same that the placement of warning signs (or the lack thereof) is a discretionary function. Plaintiffs’ entire case is predicated upon an arcane state statute (§65-21-1) which dates back to the 1930 code (and possibly earlier) and which speaks singularly to the placement of warning signs around culverts on state highways.² It is the Department of Transportation’s position that this statute – and any other similar ones directing or purporting to direct the state’s transportation system – have been abrogated by subsequent statutes, the primary ones being Miss. Code Ann. §63-3-301 and §63-3-303.

It is well-settled law in Mississippi that when a subsequent statutory enactment covering a field of operation coexistent with a prior statute cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts, the *latest* legislative expression controls, and the prior law yields to the extent of the conflict. Applied to this case, the statutes enacted directing the public safety commission to adopt a uniform system of traffic control devices and to place traffic control devices on state highways (see §63-3-303) control, and because they merely serve to give guidance – while ultimately leaving discretion

¹ The state of Mississippi is divided into six (6) separate highway districts.

² §65-21-1 states, in part: “All culverts hereafter built, rebuilt, or placed in any public road in this state shall be not less than the full width of the crown of the roadway, and shall have guide or warning posts on either side.”

with the transportation department / commission on how and where to place warning signs on state highways – these statutes take precedent over §65-21-1.

IV. SUMMARY OF THE ARGUMENT

As this case is primarily, if not wholly, a purely legal question concerning statutory control and abrogation, the facts of this case – as developed to date – are not in dispute. As such, Defendants / Appellants would submit that in the preceding section entitled “Statement of the Case,” a summary of the argument is likewise included therein and is incorporated by reference in this section.

V. ARGUMENT

A. Plaintiffs’ Claims Are Governed by the Mississippi Tort Claims Act

Defendants / Appellants fall under the purview of Mississippi’s Tort Claims Act. MISS. CODE ANN. §11-46-1(j). Further, the events giving rise to this action occurred after July 1, 1993. MISS. CODE ANN. §11-46-5. As such, the Tort Claims Act provides Plaintiffs’ exclusive remedy for any tortious acts or omissions of Defendant Department of Transportation / Transportation Commission. MISS. CODE ANN. §11-46-7(1); see also Jackson v. City of Booneville, 738 So.2d 1241, 1243 (Miss. 1999).

The cornerstone of the Tort Claims Act is sovereign immunity – that is, the principle that the State of Mississippi and its political subdivisions “are, always have been and shall continue to be immune from suit . . . on account of any wrongful or tortious act or omission.” MISS. CODE ANN. §11-46-3(1). The Tort Claims Act provides a waiver of “the immunity of the state and its political

subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment.” MISS. CODE ANN. §11-46-5(1). However, this waiver of immunity is subject to certain limitations and requirements. City of Jackson v. Lumpkin, 697 So.2d 1179 (Miss. 1997). Among these are a notice requirement (MISS. CODE ANN. §11-46-11), a one-year statute of limitations (MISS. CODE ANN. §11-46-11), a “cap” on compensatory damages (MISS. CODE ANN. §11-46-15), and an exclusion of punitive damages, prejudgment interest, and attorney’s fees (MISS. CODE ANN. §11-46-15).

B. The Placement (Or Non-placement) of Traffic Control Warning Devices or Signs Is a Discretionary Governmental Function.

In Webb v. County of Lincoln, 536 So.2d 1356 (Miss. 1988), the Mississippi Supreme Court ruled that the placement or non-placement of traffic control devices or signs is a discretionary governmental function. Webb, 536 So.2d at 1359 (*holding* government not liable for failure to warn of dead end at end of road); see also Nathaniel v. City of Moss Point, 385 So.2d 599, 601 (Miss.1980) (*holding* government not liable for failure to erect stop sign); Wall v. City of Gulfport, 252 So.2d 891, 893 (Miss.1971) (*holding* decision of whether to replace stop sign that was blown away by hurricane was governmental function and immune from liability).

In Barrentine v. Mississippi Department of Transportation, 913 So.2d 391 (Miss. App. 2005), the Mississippi Court of Appeals noted:

The decision to place traffic control signs is a discretionary governmental function . . . and discretionary governmental functions are immune from liability ‘whether or not the discretion be abused’.”

Barrentine, 913 So.2d at 393; MISS. CODE ANN. §11-46-9(1)(d) (Rev.2002). Because the Mississippi Supreme Court has ruled that placement (or lack thereof) of warning signs is a discretionary function, Defendants / Appellants should be absolved of any potential liability herein, even if they “abused” their discretion for any failure to provide advanced warnings. See also Mississippi Code Annotated §11-46-9(1)(d).³

In Willingham v. Mississippi Transportation Commission, 944 So.2d 949 (Miss. App. 2006), a case arising out of Coahoma County and involving the same Defendants as here, the Plaintiffs therein urged the appellate court to find that the Transportation Commission had a statutory duty to place warning signs, per Miss. Code Ann. §63-3-303. However, the court noted that although said section might, at first glance, appear to place upon the Commission a statutory duty to place warning signs, it found that **“the clear meaning of the section is to create a statutory duty that must be carried out in a *discretionary* matter.”** Further, “[w]hen an official is required to use his own judgment or discretion in performing a duty, that duty is discretionary.” Harris v. McCray, 867 So.2d 188, 191 (Miss. 2003). **The Willingham court found that the phrase “as it shall deem necessary” indicates that the transportation commission’s employees must use their own “judgment or discretion” in choosing where and when to place warning signs, and because the**

³ (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.

MISS. CODE ANN. §11-46-9(1)(d).

commission's duty is discretionary, the commission's failure to place warning signs is shielded from liability according to Mississippi Code Annotated §11-46-9(1)(d).

The Willingham court further found that its interpretation of §63-3-303 was supported by a myriad of case law which has generally interpreted the commission's duty to warn as a discretionary function. See, e.g., Miss. Dep't of Transp. v. Cargile, 847 So.2d 258, 269 (Miss.2003) (incorrectly holding that discretionary function is subject to ordinary care standard, based on preexisting case law). In Jones v. Miss. Dep't of Transp., 744 So.2d 256, 262 (¶¶ 18-19) (Miss.1999), the Mississippi Supreme Court determined, in accordance with then-existing case law, that the placement of traffic control devices is a discretionary function because it involves an "element of choice or judgment" that impacts "social, economic or political policy." Like the Willingham court, the Jones court specifically addressed the phrase "as it shall deem necessary." Id. at 262. The placement, or non-placement, of warning signs is a discretionary act, involving a choice that must be based upon public policy and other considerations. The Willingham court concluded: "While the MTC's duty to place warning signs is statutory, the execution of that duty is discretionary. As such, the MTC is entitled to immunity under Mississippi Code Annotated section 11-46-9(1)(d)." Willingham, 944 So.2d at 953.

C. When a Subsequent Statutory Enactment Covering a Field of Operation Cannot Be Given Effect While the Prior Law Remains in Existence Because of Irreconcilable Conflict, the Latest Legislative Expression Pertains, and the Prior Law Yields to the Extent of the Conflict.

The key question in this action appears to come down to controlling statutory law. Plaintiffs/Appellees would argue that §65-21-1 controls, whereas Defendants/Appellants maintain

– and case law supports – that the subsequently enacted statutes §§ 63-3-301 and 63-3-303 control, thereby abrogating the authority of the older statute.⁴

§63-3-301, entitled “Adoption of uniform system of traffic-control devices,” reads as follows:

The commissioner of public safety shall adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of this chapter for use upon highways within this state. Such uniform system shall correlate with and so far as possible conform to the system then current as approved by the American Association of State Highway Officials.

MISS. CODE ANN. §63-3-301.

In addition, §63-3-303 (discussed *supra* in the Willingham case), which is entitled “Placing and maintaining of traffic-control devices upon state and county highways; placement of devices upon such highways by local authorities,” reads as follows:

The commissioner of public safety and the state highway commission shall place and maintain such traffic-control devices conforming to its manual and specifications, upon all state and county highways *as it shall deem necessary* to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic. No local authority shall place or maintain any traffic-control device upon any highway under the jurisdiction of the commissioner of public safety and the state highway commission except by the latter's permission. (emphasis added)

MISS. CODE ANN. §63-3-303. **Thus, in this cause, there is not one, but two separate statutes which conflict with §65-21-1.** First, §63-3-301 directs the implementation of a uniform manual of traffic control devices, with §63-3-303 then adding that the public safety and highway commission shall place and maintain traffic-control devices *as it shall deem necessary* ... Thus, the first statute (§63-3-301) broadly grants the highway commission the authority to adopt its own guidelines (albeit with an effort, but not a mandate, to conform to uniform standards) whereas the second statute (§63-

⁴ §65-21-1 appears to have been enacted as early as 1930, and possibly earlier. On the other hand, §§63-3-301 and 303 were enacted as late as 1938, and not first codified until 1942.

3-303) mandates the placement of signs, but within the statute grants *discretion* in so doing. See Willingham, 944 So.2d at 953. Without a doubt, we have a statute which on its face appears mandatory (§65-21-1) being trumped by subsequent statutes which, by their very nature, grant discretion to the decision makers performing the same tasks.

In Greenville Public School District v. Western Line Consolidated School, 575 So.2d 956 (Miss. 1990), a case which involved school district annexation, two statutes were in direct conflict before the Mississippi Supreme Court. While the statutes are in no way analogous to the subject case, the prescription dictated by the court in addressing said conflict is. Therein, the court stated as follows concerning statutory construction:

A [statutory] repeal may arise by necessary implication from the enactment of a subsequent act. 1A N. Singer, Statutes and Statutory Construction §23.09, at 332 (4th ed. 1985). When a subsequent enactment covering a field of operation co-existent with a prior statute cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict. Cooper v. General Dynamics, Corvair Aerospace Div., 533 F.2d 163 (5th Cir. 1976). The intent to repeal all former laws upon a subject is made apparent by the enactment of subsequent comprehensive legislation establishing elaborate inclusions and exclusions of the persons, things and relationships ordinarily associated with that subject. Singer §23.13, at 358.

Western Line, 575 So.2d at 963-64.

Thus, it is clear by operation of law that in enacting §§63-3-301 and 303 that the state legislature intended for the highway commission to have both the authority and discretion to establish and maintain the state's traffic-control device and warning system. It is also clear that with regard to §65-21-1 (and likely other arcane statutes that remain on the state's books), that said statute cannot peacefully coexist with §§63-3-301 and 303 because they are polar opposites. One *mandates*

sign placement, while the others provide discretion in the placement of signs. Therefore, and pursuant to Western Line, the latter enacted statutes must control, and this court must find §65-21-1 to be inapplicable to the subject case.⁵

VI. CONCLUSION

It is longstanding statutory law – as well as Mississippi’s Tort Claims Act and case law interpreting the same – that the placement (or non-placement) of warning signs is a discretionary function. Section 65-21-1, an antiquated statute, was put into place long before our state highway system became what it is today. It has long since been usurped by Miss. Code Ann. §63-3-301 and §63-3-303 which are in line with the discretionary nature of Tort Claims Act case law.

The court should use this case as an opportunity to correct the inconsistencies which exist in our state statutes and our case law. While the legislature – in the days of dirt and gravel roads – may have once been a decisive force in dictating highway construction and placement of warning signs, that day has passed. Clearly, the legislative intent when it enacted §63-3-301 and 303 was to create a uniform system of traffic-control devices. This power was given to the Mississippi Transportation Commission, and with it came the discretion to create said system. For this fact, Plaintiffs’ claim must fail as it was a discretionary decision to *not* have a “culvert sign” in place at the time and place of the subject accident.

⁵ Briefly addressing Barr v. Hancock County, 950 So.2d 254 (Miss. App. 2007), a case relied upon by the Plaintiffs and cited by the court in its order denying Defendants’ Motion for Summary Judgment [R. 170-72], said case is inapplicable to the subject dispute. This is because: 1) the underlying allegation therein was an issue of road disrepair, not lack of warning signs; and 2) the issue of warning signs was not pled by the Plaintiff so that when the appellate court discussed, in dicta, that §65-21-1 would apply, it was clearly not considering any contrary arguments (*i.e.*, statutory construction) from the Defendant since that issue had not been raised.

For all of these reasons, the trial court should be reversed and Defendants' Motion for Summary Judgment should be granted.

Respectfully submitted this the 17th day of September, 2012.

MISSISSIPPI DEPARTMENT OF
TRANSPORTATION and MISSISSIPPI
TRANSPORTATION COMMISSION

BY: _____

R. JEFF ALLEN (MSB [REDACTED])

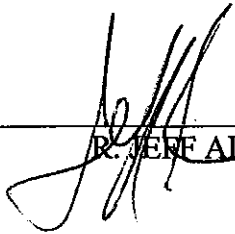
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CERTIFICATE OF FILING

I, R. Jeff Allen, attorney for Defendants/Appellants Mississippi Department of Transportation and Mississippi Transportation Commission in the above styled and numbered cause, pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure do hereby certify that the original and three (3) copies of the foregoing Brief of Appellants were this day forwarded via first class mail, postage prepaid, to the Clerk of the Supreme Court, and accordingly, such Brief is deemed filed as of today.

This the 17th day of September, 2012.



R. JEFF ALLEN

CERTIFICATE OF SERVICE

I, R. Jeff Allen, attorney for Defendants/Appellants Mississippi Department of Transportation and Mississippi Transportation Commission in the above styled and numbered cause, do hereby certify that a true and correct copy of the foregoing instrument has been this day forwarded by U.S.

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This the 17th day of September, 2012.



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