

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2016-IA-01595-SCT

APRIL HORTON

APPELLANT

v.

NO. 2016-IA-01595-SCT

CITY OF VICKSBURG, MISSISSIPPI

APPELLEE

**PRINCIPAL BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED**

On Appeal from the
Circuit Court of the Warren County, Mississippi
No. 14,0047CI

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Miss. R. App. P. 28(a)(1), 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. April Horton, as administrator and on behalf of the Estate of Emmanuel Erves, and wrongful death beneficiaries of Emmanuel Erves
Appellant/Trial Court Plaintiff
2. Crystal Wise Martin; Suzanne Keys, RaToya Gilmer (Precious Martin & Associates),
Counsel for Appellant/Trial Court Plaintiff
3. City of Vicksburg, Mississippi, *Appellee/Trial Court Defendant*
4. Malcolm Carson, Rose Carson, MM&R Land Investments, LLC (Carson Defendants), *Trial Court Defendants*
5. J. Michael Coleman; Kately Riley; *Counsel for Appellee/Trial Court Defendant*
6. Robert Stephenson; *Counsel for Carson Defendants/Trial Court Defendants*
7. The Honorable James Chaney, Jr.
Circuit Judge, Circuit Court of Warren County, Mississippi

SO CERTIFIED, this the 16th day of August, 2017.

Respectfully submitted,

/s/ RaToya Gilmer
Attorney for Appellant

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STATEMENT OF THE ISSUES

1. Whether the circuit court erred in ruling that the City of Vicksburg is entitled to discretionary function immunity; and
2. Whether the City's Motion for Summary Judgment should have been granted.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to MRAP 34(b), the Appellant requests oral argument. The specialized facts of this matter make this a case in which oral argument will assist the Court.

STATEMENT OF THE CASE

Procedural History

On February 24, 2014, Emmanuel Erves fell down the exterior stairs to the rooming house where he lived. R. at 21. The configuration of the stairs violated the housing code adopted by the City and lacked a handrail. RE at 14. Not being able to break his fall, Emmanuel Erves tumbled down the concrete steps, hit his head and died. RE at 13. On May 6, 2014, Plaintiff filed a negligence action in the Circuit Court of Warren County, Mississippi against Rose Carson, Malcolm Carson and MM&R Land Investments for their failure to provide a reasonably safe premises, failure to provide adequate security and failure to warn of a dangerous condition. R. at 3. The parties entered into a scheduling order and exchanged discovery. R. 3. Caleb Erves, a tenant at the subject home, was indicted for depraved heart murder as a result of the decedent's death. After reviewing discovery, Plaintiff determined there was a cause of action against the City of Vicksburg ("City") for negligent inspection, negligent assignment, hiring and retention of employee Benjie Thomas. The civil action was stayed until the statutory time lapsed for the City to respond to the notice of claim. R. at 6.

On May 7, 2015, Plaintiff filed her Amended Complaint adding as Defendants the City of Vicksburg and Benjie Thomas in his official capacity as code enforcement officer. R. 19. The parties engaged in substantial discovery, during which the City continued to reserve its statutory defenses. However, the parties were unable to secure a final trial date because a Protective Order prohibited the parties from speaking to the eye witness until after the pending criminal trial.

The criminal matter was continued several times; resulting in several continuances of the civil trial and discovery deadlines including the expert designation. R. at 7 -10. The criminal matter was finally heard on December 5, 2016; however, before the criminal trial and before the parties designated experts, the City of Vicksburg filed its Motion for Summary Judgment on

August 19, 2016. R. at 119. After the court reviewed the pleadings and heard oral argument, on October 21, 2016, the trial court granted the City's motion for summary judgment ruling that the City was entitled to discretionary function immunity finding that code enforcement is a discretionary function based on the historic building provision of the relevant building code. R. at 241. RE at 23 -24. Plaintiff disagreed and timely filed her Petition for Interlocutory Appeal. Said Petition was granted on March 23, 2017. The civil matter is currently stayed until the conclusion of this appeal.

Facts

Emmanuel Erves, deceased, was a tenant at 819 Walnut Street, Vicksburg, Mississippi for several years. R. at 21. The home was originally erected as a single family dwelling; however, prior to February 2014, the owner, Defendant Malcolm Carson modified the home and operated it as a rooming house where unrelated individuals rented rooms and shared a restroom, kitchen and the common areas. R. at 41; 138.

On February 24, 2014, an alleged altercation arose between two tenants, Caleb Erves¹ and Emmanuel Erves inside the home. R. at 138. Emmanuel apparently left out the front door of the house and was later found at the bottom of the stairs.² Emmanuel Erves died as a result of his injuries from the fall. At the time of the incident, the exterior stairs consisted of nine concrete stairs with no landing. R. at 138-139. RE at 13. The stairs were not consistent throughout with several areas of sloping and changes in the level of the surface area of the steps. R. at 139. RE at 13. In other words, some stairs were narrower than others and taller than others. Further, the subject stairs did not have any handrails or guards on either side of the stairs. R. at 139. RE at 13. The stairs had a visibly worn and degraded condition and were visibly in disrepair. *Id.*

¹ There was some allegation that Caleb Erves and the decedent were distant relatives; however, those allegations have not been substantiated.

² There were allegations that Caleb Erves pushed Emmanuel down the concrete stair but, the jury reached a not guilty verdict in Caleb Erves criminal trial.

The stairs were not the only area of the house that was in disrepair. Due to the allegation that the decedent was pushed down the stairs, detectives were called to the home. On February 24, 2014, Lt. Williams from the Vicksburg Police Department observed the poor maintenance and poor sanitary conditions of the home and reported the conditions to the City of Vicksburg's Community Development Division. R. at 139. As a result of his call and a subsequent inspection of the home, on February 27, 2014 the City posted a condemnation notice on the property stating that the house "was found to be unsafe, lacks maintenance to a serious degree, in disrepair, unsanitary, contains filth and therefore creates a serious hazard to the health and/or safety of the occupants" and gave the occupants thirty days to vacate the home." R. at 167. RE at 42. The notice also provided that the house was found to be in violation of the 2009 International Property Maintenance Code. *Id.*

Prior to the time of the incident, the City had adopted the 2009 International Property Maintenance Code ("Property Maintenance Code" or "Code") to regulate all properties, buildings and structures. R. at 139. RE at 41. When adopted, the code became a part of the City's ordinances. The City had the option of adopting the code as written or deleting and altering the code. In this case, the City adopted the code as written and kept all its provisions. The City ordinance adopting the code is found at Sec. 6-213 and read as follows:

The 2009 International Property Maintenance Code and Commentary **as published** by the International Code Council, Inc. is hereby adopted as the Property Maintenance Code and Commentary of the City of Vicksburg, Mississippi, for the regulations governing the condition and maintenance of all property, buildings and structures as herein provided; and **each and all of the regulations, provisions, penalties, conditions and terms of said Property Maintenance Code and Commentary are hereby referred to, adopted and made a part hereof, as if fully set out in this section, with the additions, changes insertions, and deletions, if any, prescribed in section 6-214 of this article.** A copy of the property maintenance code is now filed in the office of the city clerk of this city.

Sec. 6-213. (emphasis added.) R. at 192. RE at 41. The City adopted the Property Maintenance Code without any deletions or amendments to any of the sections. By adopting this code, the

City not only mandated inspections of buildings and structures but set the standard for these inspections.

The February 27, 2014 condemnation notice was not the first time the City cited Mr. Carson regarding this property. Prior to the decedent's fall, the subject home was cited by the City on numerous occasions about the maintenance, sanitation and upkeep of the property with one citation dated just eleven months before decedent's fall. On April 25, 2005, both Malcolm Carson and wife Rose Carson³ received a notice requesting that they cut the grass and weeds and remove the trash and debris from the property. R. at 49. On May 8, 2008, Malcolm Carson was mailed a notice of hearing to appear before the Board of Aldermen of the City of Vicksburg to determine whether or not the subject property was in such a state of uncleanness as to be a menace to the public health and safety of the community in accordance with Section 21-19-25, Mississippi Code. R. at 51. On April 3, 2013, Malcolm Carson was sent a notice for violations of the Property Maintenance Code for, *inter alia*, the failure to maintain the property, the failure to remove the trash, rubbish and debris around home, the failure to cut the grass, the failure to maintain all shared areas of the home, and the failure to install smoke alarms in each rooming unit and hallway. R. at 237. RE at 43 – 46. Carson was given thirty days to comply.

The last citation was eleven months before the decedent's fall and was as a result of a site inspection. R. at 237. RE at 43 – 46. Despite the site inspection and the fact that the code enforcer had to climb the subject stairs to enter the home, the City did not cite Mr. Carson for the lack of a handrail or guards, which are specifically required by the Code.⁴ See RE at 30. After Mr. Erves' death, code enforcer, Benjie Thomas met Malcolm Carson at the home to give him a list of repairs needed to stop the condemnation. One of those repairs was to install a handrail on

³ Rose Carson deeded her interest over to her husband.

⁴ Section 307.1 provides that every exterior and interior flight of stairs having more than four risers shall have a handrail on one side of the stair and every open portion of a stair, landing, balcony, porch, deck, ramp or other walking surface which is more than 30 inches (762 mm) above the floor or grade below shall have guards.

the front steps. R. at 89 - 90. This shows the City was aware of the code provision but had failed to enforce it before Mr. Erves fell. Mr. Carson made some repairs but did not install the handrail on the front steps; astoundingly, the City allowed him to reopen the rooming house without the installation of the handrail.

The City argued during litigation that the home was located in the historic district and as a result; it was not subject to the provisions of the Property Maintenance Code. However, that is not the case. The Property Maintenance Code exempts **particular houses** from the code provisions that have been deemed a historic building or structure. Carson's rooming house has not been designated a historic home. Moreover, the City's code that established the historic district also requires that "[a]ll land, buildings and other improvements located in a designated historic district or comprising a landmark or landmark site designated hereunder shall continue to be subject to all zoning and other ordinances of the City of Vicksburg, Mississippi, that would otherwise be applicable." R. at 169. RE at 47. In this case, the Property Maintenance Code applies to the subject home. As a result of this, prior to Mr. Erves' fall, the home was in violation of several provisions of the Property Maintenance Code and the City failed to enforce the Property Maintenance Code. Consequently, the decedent died as a result of the City of Vicksburg's failure to properly enforce the Code provisions and properly inspect the property.

SUMMARY OF THE ARGUMENT

This case involves a claim of negligence against a municipality which is covered by the Mississippi Tort Claims Act ("MTCA"). On August 19, 2016, the Defendant's filed a motion for summary judgment alleging that the adoption of building codes and the inspections of buildings and structures by the City are discretionary functions. R. at 119. The discretionary function immunity provided in the MTCA gives municipalities immunity from suits for negligence when that municipality was carrying out a discretionary function. On October 21, 2016, the trial court

erroneously ruled that based on *Brantley*, the City was entitled to discretionary function immunity. R. at 241. RE at 21 -24.

In *Brantley v. City of Horn Lake*, this Court departed from prior precedent and articulated a new standard for determining if a municipality was entitled to discretionary function immunity. *Brantley v. City of Horn Lake*, 152 So. 3d 1106 (Miss. 2014). In *Brantley*, the court established a two part analysis. First, in determining if a municipality is entitled to discretionary function immunity, the court must look at the broadest function and determine if the overarching function is discretionary or ministerial. But then, a court must look at the narrower duty associated with the broadest function and determine whether some sort of statute, regulation, or other binding directive renders that narrower duty ministerial. See *Brantley v. City of Horn Lake*, 152 So. 3d 1106 (Miss. 2014).

In this case the broadest function was the adoption of building codes which under Mississippi Code § 21-19-25 is a discretionary function. The narrower duties therein, however, are code enforcement and inspections. Code enforcement and inspections are made ministerial duties once a municipality utilized its discretion in adopting a building code. Here, the City adopted a building code and codified it in its ordinances. Ordinances are binding laws not only for its citizens but city officials as well. The Code the City adopted, the 2009 International Property Code, has strict requirements for owners, builders and code enforcers making it a binding directive. There is no room for deviation unless expressly stated in the code.

In the code, there is a provision that deals with code enforcement for buildings that have been deemed historic. In that limited instance, an inspector can determine whether the historic building is safe. Section 102.6 provides as follows:

The provisions of this code shall not be mandatory for existing buildings or structures designated as historic buildings when such buildings or structures are judged by the *code official* to be safe and in the public interest of health, safety and welfare.

International Property Maintenance Code, Section 102.6, 2009 Edition. RE at 38. However, the trial court erroneously applied that provision to the facts of this case. Here, Mr. Carson's rooming house was never deemed a historic building. The historic building exemption in this provision does not extend to all buildings in a historic district but only to buildings deemed historic. Therefore, the Carson rooming house in this case is subject to all other provisions of the Code, which are not discretionary. Therefore, the codification of the 2009 International Property Maintenance Code made code enforcement and inspections ministerial duties, not subject to the sovereign immunity defense.

STANDARD OF REVIEW

In determining whether the trial court properly granted a motion for summary judgment, the court conducts a de novo review of the record. *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790 (Miss. 1995). The court reviews orders granting summary judgment de novo without deference to the trial court. *Palmer v. Biloxi Regional Medical Ctr.*, 649 So.2d 179 (Miss. 1994). Summary judgment is proper only where there exists no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Bennett v. Highland Park Apts., LLC*, 170 So. 3d 450 (Miss. 2015). Since the movant must be entitled to a judgment as a matter of law, a summary judgment motion is usually limited to questions of law, which this court always reviews de novo. *Id.* Immunity is a question of law and is a proper matter for summary judgment. *Brantley v. City of Horn Lake*, 152 So. 3d 1106 (Miss. 2015). This Court reviews the application of the Mississippi Tort Claims Act de novo. *Id.* citing *Lee v. Mem'l Hosp. at Gulfport*, 999 So. 2d 1263, 1266 (Miss. 2008).

ARGUMENT

- I. Based on the test established in *Brantley*, by adopting of the 2009 International Property Maintenance Code, the City of Vicksburg made code enforcement and inspections ministerial duties.**

The Mississippi Tort Claims Act (MTCA) provides specific instances in which a governmental entity and its employees shall be exempt from liability. *See* Miss Code Ann. §11-46-9. One of those instances is when a governmental entity and its employees are performing a discretionary function. *See* Miss Code Ann. §11-46-9(1)(d). Entities performing ministerial functions; however, are not immune from suit. In the instant case the duties to enforce and to perform inspection were not discretionary, but rather ministerial. A duty is ministerial if it is positively imposed by law and required to be performed at a specific time and place, removing an officer's or entity's choice of judgment. *Fortenberry v. City of Jackson*, 71 So. 3d 1196 (Miss. 2011). The duty to enforce code and inspections in the contexts of this case are ministerial duties.

In determining whether or not a governmental entity is entitled to discretionary function immunity, courts had traditionally applied the public-policy function test.⁵ *See Brantley v. City of Horn Lake*, 152 So. 3d 1106 (Miss. 2014). However, in 2014 in the case of *Brantley v. City of Horn Lake*, this court abolished the public-policy function test and articulated a two step analysis of government function to determine if a governmental function is a ministerial or discretionary duty or function. *Id.*

Based on the *Brantley* test, in order to determine if a governmental entity or its employees enjoy the protection of discretionary function immunity, the court must 1) consider the broadest function involved in order to make a baseline determination of whether the overarching function is discretionary or ministerial and then 2) examine any narrower duty associated with the activity at issue to determine whether a statute, regulation, or other binding directive renders that particular duty a ministerial one, notwithstanding that it may have been performed within the scope of a broader discretionary function. *Brantley* at 1114 - 1115. A plaintiff may defeat sovereign immunity by proving that the act, even if it furthered a

⁵ Under this test, the court first determines whether the activity in question involved an element of choice or judgment and if so whether that choice or judgment involved social, economic, or political-policy considerations.

discretionary function or duty, also furthered a more narrow function or duty which is made ministerial by another specific statute, ordinance, or regulation promulgated pursuant to lawful authority. *Id* at 1115. If the duty or function is deemed ministerial then the governmental entity does not enjoy the discretionary function immunity afforded to it in Miss Code Ann §11-46-9(1)(d). *Id*.

In *Brantley* the plaintiff sued the City of Horn Lake after he was injured when he was improperly removed from an ambulance which caused him to fall to the ground and sustained injuries. The City of Horn Lake, as the operator of the ambulance service, claimed that it was entitled to discretionary immunity. The trial court granted the Defendants motion for summary judgment based on the fire protection immunity. This court upon its own initiative discussed the discretionary function immunity on appeal. While applying the new test, this court determined that the overarching function at issue was the operation of a city-run ambulance service which was made discretionary by state legislation.

However, the court further stated that “once a municipality has decided to operate and maintain its own ambulance service, it is subject to several ministerial statutes and regulations which remove the municipality’s discretion from many functions and duties and render such functions and duties ministerial.” *Id* at 1116. This court noted that the rules established by the State Board of Health require strict compliance and many areas of the operation of the ambulance service are dictated by the Board of Health. This court remanded the matter to the trial court to determine whether a regulation requires specific standards for loading and unloading a patient from the ambulance. The court also noted that based on the newly established test “this Court must look closely at any of the narrower functions or duties underlying the claim at issue and determine whether a statute or other regulation removes it from the umbrella of discretionary function immunity.” *Id* at 1117.

Following *Brantley*, several cases were appealed that involved the issue of discretionary function immunity. In each of these cases, this court remanded the case to the trial court for a determination of whether or not the governmental entities were entitled to discretionary immunity based on the newly established test. See *Boroujerdi v. City of Starkville*, 158 So. 3d 1106 (Miss. 2015); *City of Magee v. Jones*, 161 So. 3d 1047 (Miss. 2015); *Calhoun Health Servs. v. Glaspie*, 165 So. 3d 1289 (Miss. 2015); *Logan v. Miss. DOT*, 174 So. 3d 249 (Miss. 2015); *Doe v. Rankin Cnty. Sch. Dist.*, 189 So. 3d 616 (Miss. 2015); and *Crum v. City of Corinth*, 183 So. 3d 847 (Miss. 2016).

More recently, this Court affirmed the ruling of the trial court denying the Mississippi Transportation Commission (“MTC”) and the Mississippi Department of Transportation’s (“MDOT”) motion for summary judgment based on discretionary function immunity although the trial court did not apply the test articulated in *Brantley*. See *Miss. Transp. Comm’n v. Adams*, 197 So. 3d 406 (Miss. 2016). This case is similar to the case at hand, where a governmental entity adopted a body of standards that set minimum requirements for a particular duty.

In *Adams*, the plaintiff sued MTC and MDOT after her husband died in a motorcycle accident on Interstate 10 in Jackson County. When the decedent drove onto an eastbound lane of I-10 in a construction zone, the decedent accidentally drove into a closed lane and tried to navigate back into an open lane. When he did this, his motorcycle hit an uneven surface between lanes and “rotated”. The decedent was thrown from his motorcycle into traffic where two vehicles hit him. He died from his injuries. The decedent’s wife sued MTC and MDOT and alleged among other things that the defendants failed to comply with the Mississippi Standard Specifications for Road and Bridge Construction (“Red Book”) and failed to comply with the Manual on Uniform Traffic Control Devices. The defendants filed a motion to dismiss or motion for summary judgment based on MTCA immunities soon after answering the complaint.

The trial court entered a scheduling order for discovery of the immunity issue and after the period ended, the defendants filed their supplemental motion to dismiss or for summary judgment. The plaintiff responded by alleging that while the Mississippi Code Section 63-3-303 did give the defendants discretion regarding the overall function of placing and maintaining traffic-control devices, other statutes and the Red Book sections rendered ministerial some narrower duties associated with traffic-control devices. The trial court agreed with the plaintiff and denied the defendant's motion for summary judgment. In applying the *Brantley* test, this court noted that the "Red Book covers all areas of road construction from the bid process to traffic control in construction and reconstruction zones." *Adams* at 412. MTC had adopted the Red Book and ordered that the Red Book govern "all road and bridge construction except as may be designated otherwise in the contract documents for work already advertised or under construction." *Id.* Further, the plaintiff pointed to several sections of the Red Book that the Defendants violated. Therefore, based on this court's holdings in *Brantley* and *Boroujerdi* this court held that the trial court in *Adams* did not err when he found that the defendants were not entitled to discretionary-function immunity. *Id.* at 413.

The case at hand is analogous to *Adams*. Like *Adams*, this case deals with a governmental entity utilizing its discretion to carry out a discretionary function designated by state statute but after using that discretion, adopting a body of standards that render certain functions ministerial. The overarching function in this case is the adoption of building codes. Mississippi Code §21-19-25 provides that any "municipality within the State of Mississippi may, in the discretion of its governing authority, adopt building codes, plumbing codes, electrical codes, gas codes, sanitary codes, or any other codes dealing with general public health, safety or welfare..." Miss. Code § 21-19-25.

The City of Vicksburg utilized its discretion and adopted the 2009 International Property Maintenance Code. The City adopted the Code as a city ordinance without any alteration, deletions or amendments. The 2009 International Property Maintenance Code sets mandatory requirements for all properties, buildings and structures. Section 104.1 of the Code provides that the code official is hereby authorized and **directed** to enforce the provisions of the code. International Property Maintenance Code, Section 104.1, 2009 Edition. (emphasis added.) RE 40. Based on the commentary of this code section, it is the **duty** of the code official to enforce the code. *Id.* (emphasis added.) In exercising its authority, the code official **cannot set aside or ignore any provision of the code.** *Id.* (emphasis added). Therefore, the duty to enforce the Code is mandatory and does not allow any deviation from the Code.

The City of Vicksburg was relying on the International Property Maintenance Code in April 2013 to perform inspections and cite landlords with violations, which was eleven months before the subject incident. R. at 237. RE at 43. In a letter dated April 3, 2013, the City sent a notice to Mr. Carson of several deficiencies/violations based on the International Property Maintenance Code. R. at 237. RE at 43 – 46. The notice also stated that failure to comply would result in prosecution within the limits provided by state or local laws. RE at 45. The notice, however, failed to cite Mr. Carson for violations about the exterior steps as directed by code provisions. Though the parties have not designated experts, plaintiff has retained two experts who will opine that the subject home violated several provisions of the IPMC. These violations include Sections 302.3, 304.1.1, 305.4, 306.1.1, 307.1, 402.2, 404.1, 404.5, 502.2, and 605.3. R. at 160; 189. *See* RE at 25 - 40. One of these experts is Johnnie Daniels, a construction manager and property inspector through his company Metro Home Inspection, LLC. RE at 49. In his affidavit submitted to the trial court in response to the City's motion for summary judgment, Mr. Daniels opined that the City of Vicksburg breached its duty to enforce the code at 819 Walnut

Street as of February 2014, as it failed in the April of 2013 notice to cite the non-compliance with code provisions mentioned above. R. at 189. RE at 51. After the incident, Benjie Thomas, code enforcer officer for the City of Vicksburg, meet with owner, Malcolm Carson to discuss what was need to prevent condemnation of the home. One of those items needed was for Carson to “install a handrail on front steps.” R. at 89 -90.

The City alleges that it has discretion in applying the Code to the Carson boarding house because it is located in the City’s historic district. This is a misreading of the code. The provision only exempts historic buildings that have been deemed historic buildings. Section 102.6 provides as follows:

The provisions of this code shall not be mandatory for existing buildings or structures **designated as historic buildings** when such buildings or structures are judged by the *code official* to be safe and in the public interest of health, safety and welfare.

This section provides the code official with the widest flexibility in enforcing the code when the building in question has historic value. This flexibility, however, is not provided without conditions. **The most important criterion for application of this section is that the building must be specifically classified as being in historic significance by a qualified party or agent.** Usually this is done by a state or local authority after considerable scrutiny of the historical value of the building. Most, if not all, states have such authorities, as do many local jurisdictions. The agencies with such authority typically exist at the state or local government level.

(emphasis added.) RE at 38. Plaintiff’s expert, Mr. Daniels points out that since the home is not deemed a historic home, the home is still required to comply with the Code. RE at 51. Mississippi landmarks are designated by the Mississippi State Historic Preservation office Board of Trustees as Mississippi landmarks. Tr. at 24. The national landmarks are designated by the National Register of Historic Places which is a part of the Department of Interior. Tr. At 24. These national designations have to be approved by the Secretary of Interior. *Id.* The subject home is not a part of the National Registry. R. at 228 - 232. RE at 55 – 59. In the State of Mississippi, in order to perform any work on a historical building, you must get special clearance. Tr. at 24. When owner, Malcolm Carson, renovated his home, he did not get any

special clearance. Tr. at 24 -25. The subject home is not deemed a historic home but is simply a part of a local historic district. RE at 54. Also inside the historic district of the City of Vicksburg are gas stations, parking garages, and commercial buildings. R. at 207 – 225. These structures are definitely not historic yet according to the City’s argument, they too would be exempt from the Code provisions, which is clearly not the case.

Further, Mr. Daniels opined that based on Code Section 102.6, even if a house is located in a historical district it cannot lay in a state of disrepair. RE at 50 - 51. The house must be maintained and repaired. RE at 51. The code provision itself states that the home must be safe and in the public interest of health, safety and welfare. RE at 38. Furthermore, Mr. Daniels also opined that the safety features provided in the Code are required for any house or building including such safety features as handrails and landings. RE at 50. The trial court erroneously applied this provision of the code as an exemption that granted the City discretionary in applying the code to the subject home; therefore, creating a discretionary function. This is not the case. The provision requires a designation of the building or structure as a historic building.

Based on the holding in *Brantley* and *Boroujerdi*, the trial court erred in holding that the city was entitled to discretionary function immunity. While the adoption of building codes is discretionary, code enforcement and inspections are rendered ministerial by the 2009 International Property Maintenance Code, a lawful city ordinance, adopted by the City.

II. Other jurisdictions that follow similar test and have similar laws concluded that code enforcement is a ministerial duty.

The Mississippi Supreme Court has not dealt per se with issues regarding the enforcement of building codes or the duty to inspect or enforce as set by municipalities policies and adopted codes. However, other jurisdictions have and concluded that inspections are ministerial functions. The State of Georgia has determined that when a public officer or employee is absolutely required to perform a specific task, even if the manner in which it is to be

performed is left to the employee's discretion, the duty to perform the task is ministerial. See *Cotton v. Smith*, 310 Ga. App. 428 (Ga. App. 2001), *Happoldt v. Kutscher*, 256 Ga. App. 96 (Ga. App. 2002), *Georgia Dept. of Transp. v. Heller*, 285 Ga. 262 (2009), and *Vann v. Finley*, 721 S.E. 2d 156 (Ga. App. 2011). In each of these cases, the court looked to the act of the specific task and when a municipality's own policies or ordinances required an act, the act was deemed ministerial.

In *Vann v. Finley* the court held that although some aspects of the manner in which a reconnect inspection is to be performed may be left to the discretion of the inspector, that fact alone does not render the duty to inspect discretionary. *Vann* at 162. The plaintiffs in *Vann* filed suit against Vann, an electrical inspector with the Augusta License Inspection Department for wrongful death after their children died in an electrical fire at their mobile home. The plaintiffs alleged that Vann negligently failed to inspect the home or failed to inspect it properly. The decedents leased a mobile home and Georgia Power needed to connect electrical power to the home. The home was vacant for more than 180 days so based on the Augusta License Inspection Department's policies, a reconnect inspection needed to be done before Georgia Power could connect the electrical power. Vann alleged that he made arrangements to go to the home but when he did, no one was there. He inspected the exterior of the home and did not see any problems and left a door hanger on the door for someone to contact him. The owners followed up and Vann informed them that they needed smoke detectors installed in the home. The woman advised Vann that smoke detectors were installed in the home or were about to be installed in the home, so Vann signed an electrical release form without inspecting the interior of the home. The power was connected. Sometime later, an electrical fire occurred and two decedents died as a result. The court concluded that Vann had a ministerial duty to inspect the mobile home. *Vann* at 162. The court further concluded that Augusta-Richmond County absolutely required a reconnect

inspection of any dwelling that has been vacant for more than 180 days pursuant to the applicable policies. *Id.*

In *George Dept. of Transp. v. Heller*, the court concluded that the acts of the inspector were ministerial as he did not have any “discretion” to ignore the minimum legal requirements of the applicable laws. *George Dept. of Transp. v. Heller*, 674 S.E. 2d 914, 919 (2009). In *Heller*, the plaintiff’s wife died after she was killed when a taxi cab she was riding in spun out of control on a rain-slick interstate highway and hit a tree. The plaintiff filed suit against the taxicab driver, the taxi company, Georgia Department of Transportation, Shepard, a City of Atlanta Vehicle for Hire Inspector and the City of Atlanta. Plaintiff filed suit against Shepard based on the fact that one day before the accident Shepard had given the taxi a passing grade even though there was little or no tread on the tires. The trial court granted summary judgment to the governmental defendants. Heller appealed. Shepard argued that his actions in inspecting the taxi cab were discretionary; therefore, Heller’s claims against him were barred by the doctrine of official immunity.

The Georgia Supreme Court found that “a ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.”*Id* at 918. After considering the difference between ministerial and discretionary and reviewing the record in the matter, the court concluded that Shepard’s responsibilities were ministerial in nature. In reaching this conclusion, the court relied on the fact that the City of Atlanta Code of Ordinances requires that prior to the inspection, a Vehicle for Hire Inspector must receive proof that a prior inspection of the cab was performed by the taxi company. A Vehicle for Hire Inspector cannot proceed with

his inspection without first receiving the proof outlined in the ordinance. Shepard conducted his inspection without this required proof. Further, when he conducted his inspection he did nothing to verify whether the taxi's badly worn tires had legally required minimum amount as outlined in state statute. Therefore, Shepard had a specified duty he had to perform based on city ordinances that made the duty to inspect ministerial.

Just as in the above mentioned Georgia cases, the City of Vicksburg has its own ordinances that require the code enforcer officers to inspect properties to determine if the property complies with the public health and safety. The purpose of the code is to protect the public health, safety and welfare in both existing residential and nonresidential structures and on all existing premises. See the commentary for International Property Maintenance Code, Section 101.2, 2009 Edition.

The provisions of the Code shall apply to all existing residential and nonresidential structures and all existing premises and constitute the minimum requirements and standards for premises...for light, space, sanitation, protection from the elements, life safety, safety from fire and other hazards, and for safe and sanitary maintenance...

International Property Maintenance Code, Section 101.2, 2009 Edition. Re at 39. Further, the code also provides specific requirements to promote public health and safety. Section 307.1 provides that every exterior and interior flight of stairs having more than four risers shall have a handrail on one side of the stair and every open portion of a stair, landing, balcony, porch, deck, ramp or other walking surface which is more than 30 inches (762 mm) above the floor or grade below shall have guards. International Property Maintenance Code, Section 307.1, 2009 Edition. RE at 30.

In each of the Georgia cases, the Georgia court did not require a separate state agency adopt rules or regulations for a particular function to be deemed ministerial, but looked to the specific duty performed to determine if it was a requirement. The case at hand is even stronger, because the City of Vicksburg adopted specific standards and requirements for use. Section

104.2 of the IPMC provides that the code official or designee is **required** to make the necessary inspections to determine compliance with the code. International Property Maintenance Code, Section 104.2, 2009 Edition. RE at 40. This provision removes the element of choice from the city and makes the inspections, which is a part of code enforcement, a requirement, along with the extent of those inspections. The City's failure to strike certain portions of the IPMC when it was adopted made all portions of the code applicable. Therefore, the enforcement of the building code and the duty to inspect according to the code is not a discretionary function but a ministerial function.

CONCLUSION

The adoption of building codes is a discretionary function. Code enforcement and inspections are narrower duties associated with the adoption of building codes that was rendered ministerial by the adoption of the 2009 International Property Maintenance Code. Plaintiff fulfilled her duty imposed by the test articulated in *Brantley* by showing to the trial court that the 2009 International Property Maintenance Code renders the City's duty to enforce the code and inspect as ministerial. The trial court was erroneous in granting the City's motion for summary judgment only the basis that code provision 102.6 exempts the subject property from the Code and provides the City with discretion in applying the code to historic homes. The subject home was not deemed a historic building, which is a requirement of the code provision.

RESPECTFULLY SUBMITTED, this the 16th day of August, 2017.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day mailed and/or filed via MEC, a true and correct copy of the above foregoing instrument to the following:

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SO CERTIFIED, this the 16th day of August, 2017.

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