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THE EROSION OF GOVERNMENTAL DISCRETIONARY IMMUNITY UNDER THE MISSISSIPPI TORT CLAIMS ACT: *LITTLE*'S BIG EFFECT

*R. Lane Dossett**

ABSTRACT

The historically broad blanket of governmental discretionary immunity is tearing apart at the seams. Recent Mississippi Supreme Court decisions, with a divided court, have rewritten and narrowed the application of discretionary immunity afforded governmental entities under the Mississippi Tort Claims Act, codified at Mississippi Code § 11-46-9(1)(d). For years, the court confirmed the wide application of discretionary immunity and the test to be employed to determine its application in defense of a lawsuit. As recently as 2012, the *Pratt v. Gulfport-Biloxi Regional Airport Authority* decision confirmed the extensive shield of discretionary immunity.[1] In 2013, however, the case of *Little v. Mississippi Department of Transportation*[2] punched a hole in the barrier of sovereign immunity, and with subsequent decisions, the entire defense of discretionary immunity is in serious jeopardy.

I. INTRODUCTION

Tort suits against governmental entities proceed under the Mississippi Tort Claims Act.[3] The discretionary function immunity applies when a claim against a governmental entity is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the governmental entity or employee thereof, whether or not the discretion be abused."[4] According to long standing jurisprudence, a governmental action was found to be discretionary if it satisfied the Public Policy Function Test ("PPFT").[5] Under the PPFT, discretionary acts first involve an element of choice or judgment.[6] That choice involves a social, economic, or political policy.[7]

A governmental act is either discretionary or ministerial. When a statute requires the government or its employees to act, all actions taken in furtherance of that ministerial duty are mandated as well, and no immunity

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1. Pratt v. Gulfport-Biloxi Reg'l Airport Auth., 97 So. 3d 68 (Miss. 2012).
2. Little v. Miss. Dep't of Transp., 129 So. 3d 132 (Miss. 2013).
3. MISS. CODE ANN. § 11-46-1 *et seq.* (West 2015).
4. MISS. CODE ANN. § 11-46-9(1)(d).
5. Jones v. Miss. Dep't of Transp., 744 So. 2d 256, 260 (Miss. 1999).
6. *Id.*
7. Mississippi Transp. Comm'n v. Montgomery, 80 So. 3d 789, 800 (Miss. 2012).

attaches.[8] Historically, if the legislature mandated the government to perform a function, but specifically set forth that some aspect of that function was discretionary, acts fulfilling the discretionary portion were covered by immunity.[9] Prior to *Little*, ministerial functions were ones that were "positively imposed by law and required to be performed at a specific time and place, removing an officer's or entity's choice or judgment."[10] Under this analysis, practitioners were able to easily determine if a claim was covered with immunity by examining if the governmental entity allegedly violated a statutory mandate.

II. History of Sovereign Immunity

In 1982, the Mississippi Supreme Court determined that "absolute sovereign immunity was out of date in modern society and modern legal concepts."[11] Several years later, the Mississippi Legislature enacted the Mississippi Tort Claims Act, which provided for a limited waiver of sovereign immunity.[12] The Act became effective in 1993.[13]

As reported cases accumulated, discretionary function immunity was found to provide little or no protection to governmental entities. In fact, the Mississippi Supreme Court read § 11-46-9(1)(b)[14] to impute a standard of ordinary care for discretion of governmental entities and their employees throughout all of the immunity subsections, including discretionary immunity in subsection (d), irrespective of the immunity provided for discretionary decisions involving choice and judgment.[15] This was problematic for the defense bar because "[t]he issue of ordinary care is a fact question."[16] This interpretation, which appears to have arisen in 1999, was overruled in 2004,[17] marking the beginning of discretionary immunity being favored.

III. Pre-*Little* Application of Discretionary Immunity

Previously, determining whether discretionary immunity applied was straightforward. Discretionary immunity applied in the absence of a statute or other regulation that imposed a "specific time and place" requirement on how a governmental agency was required to act. If there was no specific statute or regulation, acts were deemed discretionary, and immunity applied because the "who, what, when, where, and how" decisions

8. *Id.* at 798.

9. *Id.*

10. Pratt v. Gulfport-Biloxi Reg'l Airport Auth., 97 So. 3d 68, 72 (Miss. 2012).

11. City of Tupelo v. Martin, 747 So. 2d 822, 830 (Miss. 1999) (citing Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982)).

12. Miss. Code Ann. §§ 11-46-1 to -23.

13. Miss. Code Ann. § 11-46-5.

14. All statutes referenced or stated herein refer to the Mississippi Code.

15. Fairley v. George Cnty., 871 So. 2d 713, 727 (Miss. 2004) ("[I]mmunity for discretionary duties is granted only when ordinary care is used.").

16. Brewer v. Burdette, 768 So. 2d 920, 923 (Miss. 2000).

17. Collins v. Tallahatchie Cnty., 876 So. 2d 284, 289 (Miss. 2004).

were left to the discretion of government employees. This analysis is seen in a number of high profile decisions on discretionary immunity.

In *Fortenberry v. City of Jackson*,[18] a homeowner sued the City of Jackson because their home overflowed with raw sewage due to a backup. The court found that § 21-27-189(b) allowed Jackson to operate and maintain its sewage system with discretion that invoked immunity because the statute that provided municipalities with the authority to operate sewer systems expressly empowered them to act according to their "discretion."[19] In *City of Natchez v. De La Barre*, the plaintiff was injured from falling on a city sidewalk.[20] Unlike *Fortenberry*, the statute at issue in *De La Barre*, § 21-37-3, did not expressly use the word "discretion."[21] Discretionary immunity applied, however, because the statute that empowered the City with control over sidewalks did not impose a duty to maintain them. Conversely, discretionary immunity did not apply in *Nosef ex. rel. Cowart*, where the decedent's vehicle flipped over a culvert.[22] Section 65-21-1 imposed a ministerial duty to place warning posts at culverts, which was not performed.[23]

IV. *LITTLE v. MISSISSIPPI DEPARTMENT OF TRANSPORTATION*

"Today, we provide a much needed correction."[24]

In *Little*, three motorists struck a pine tree that had fallen across a highway.[25] Section 65-21-1 states that it "shall be the duty" of the Highway Department to "main[tain], repair and inspect all of the state-maintained state highway system."[26] Numerous decisions have declared the duty to maintain highways under the statute discretionary because the statute does not provide any specifics concerning how the duty is to be performed.[27] Initially, the Mississippi Court of Appeals found, consistent with prior cases, that maintenance of highways was discretionary. The court stated in *Farris v. Mississippi Transportation Commission* that because "[s]ection 65-1-65 does not 'impose any specific directives as to the time, manner, and conditions for carrying out . . . MDOT's duty to maintain highways,'"

18. Fortenberry v. City of Jackson, 71 So. 3d 1196 (Miss. 2011).
19. *Id.* at 1200.
20. City of Natchez v. De La Barre, 145 So. 3d 729, 730 (Miss. Ct. App. 2014).
21. *Id.* at 732; *see* MISS. CODE ANN. § 21-37-3 (West 2015).
22. Miss. Dep't of Transp. v. Nosef *ex. rel.* Cowart, 110 So. 3d 317, 318 (Miss. 2013).
23. *Id.* at 319.
24. Little v. Miss. Dep't of Transp., 129 So. 3d 132, 138 (Miss. 2013).
25. *Id.* at 134.
26. MISS. CODE ANN. § 65-21-1 (West 2015).
27. *See* Miss. Dep't of Transp. v. Cargile, 847 So. 2d 258, 269 (Miss. 2003), *overruled by* Miss. Transp. Comm'n v. Montgomery, 80 So. 3d 789 (Miss. 2012); Brewer v. Burdette, 768 So. 2d 920, 923 (Miss. 2000), *overruled by* Miss. Transp. Comm'n v. Montgomery, 80 So. 3d 789 (Miss. 2012); Mohundro v. Alcorn Cnty., 675 So. 2d 848, 854 (Miss. 1996); Coplin v. Francis, 631 So. 2d 752, 754-55 (Miss. 1994); State *ex rel.* Brazeale v. Lewis, 498 So. 2d 321, 323 (Miss. 1986); *see also* McFarland v. Miss. Dep't of Transp., 81 So. 3d 1209, 1212 (Miss. Ct. App. 2012); Farris v. Miss. Transp. Comm'n, 63 So. 3d 1241, 1244 (Miss. Ct. App. 2011); Lee v. Miss. Dep't of Transp., 37 So. 3d 73, 81 (Miss. Ct. App. 2009); Knight v. Miss. Transp. Comm'n, 10 So. 3d 962, 970 (Miss. Ct. App. 2009).

MDOT was required to "use its judgment and discretion in carrying out that duty."[28]

The Mississippi Supreme Court granted certiorari to review the decision of the Court of Appeals. The court opened its analysis by emphasizing that "[t]he language of Section 11-46-9(1)(d) requires us to look at the *function* performed—not the *acts* that are committed in furtherance of that function—to determine whether immunity exists."[29] The particular "function" at issue was right-of-way maintenance, not the specific decision concerning whether or not to cut down a tree.[30] The court noted that, previously, "while a certain act may be mandated by statute, *how* that act is performed can be a matter of discretion."[31] The court found that such law no longer applied because "[i]t is the *function* of a governmental entity—not the *acts* performed in order to achieve that function—to which immunity does or does not ascribe under the MTCA."[32] The court, therefore, suggested that jurists should take a wider view of the statutes into the presence or absence of controlling guidelines.

The *Little* court heavily emphasized the importance of examining the "function" of the governmental entity and not the acts involved, pursuant to the express language of § 11-46-9(1)(d). In emphasizing the importance of the "function" inquiry, the court ignored, without explanation, the immunity that is equally provided to any "duty." In context, § 11-46-9(1)(d) provides immunity for the "performance or the failure to exercise or perform a discretionary *function or duty* on the part of the governmental entity . . . ."[33] Although Mississippi courts have stated that immunity does not apply to "acts," they have not explained how an "act" differs from a "duty" or "function."

V. THE BIG IMPACT OF *LITTLE*

At the time of the writing of this Article, there were at least twenty reported decisions citing or relying on *Little*. Many of these decisions have extended *Little*'s reach into areas that have been traditionally shielded with immunity.

Relying upon *Little*, the Mississippi Court of Appeals in *Serrano v. Laurel Housing Authority*[34] held that discretionary immunity did not apply to an injury caused by a falling light fixture because the legislature created housing authorities to "provid[e] . . . safe and sanitary dwelling accommodations for persons of low income," pursuant to § 43-33-3.[35] The broad, sweeping holding of the *Serrano* opinion, that "Laurel Housing's duty to

28. Farris v. Miss. Transp. Comm'n, 63 So. 3d 1241, 1244 (Miss. Ct. App. 2011), *overruled by* Little v. Miss. Dep't of Transp., 129 So. 3d 132 (Miss. 2013).
29. Little v. Miss. Dep't of Transp., 129 So. 3d 132, 136 (Miss. 2013).
30. *Id.*
31. *Id.* at 137.
32. *Id.* at 138.
33. MISS. CODE ANN. § 11-46-9(1)(d) (emphasis added).
34. Serrano v. Laurel Hous. Auth., 151 So. 3d 256 (Miss. Ct. App. 2014).
35. *Id.* at 261 (alteration in original).

provide safe apartments for its low-income residents is clearly mandated by the Legislature," effectively makes it an absolute insurer of safety without any mandatory directive to act in any certain way.[36] The court held that "[b]uilt into the Legislative definition of a 'housing project' is that it is a 'work or undertaking . . . to provide decent, *safe* and sanitary urban or rural dwellings, apartments, or other living accommodations for persons of low income[.]'"[37] The court stated it was attempting to follow "*Little*'s logic, [that] "all acts in furtherance of that [mandated] duty . . . are ministerial unless . . . another statute makes a particular act discretionary."[38] Unlike *Little*, where the statute stated that the Highway Department "shall . . . maintain [and] repair" highways, the statutes in *Serrano* merely provided aspirations for safety that were void of any mandatory directive to act, such as a directive to provide maintenance.[39]

The Mississippi Supreme Court indicated its clear desire to remodel discretionary immunity with several other recent decisions, including a climactic point that occurred on December 4, 2014, when the court acknowledged the sweeping changes in *Brantley v. City of Horn Lake*[40] and *Booneville Collision Repair, Inc. v. City of Booneville*.[41]

In *Brantley*, the plaintiff was injured while being transported on a stretcher that was dropped.[42] The municipal defendant moved for summary judgment under § 11-46-9(1)(c), which protects governmental employees engaged in the performance or exercise of duties or activities in relation to police or fire protection, and the trial court granted summary judgment on that ground.[43] The Mississippi Supreme Court requested supplemental briefing on the applicability of discretionary function exemption.[44] The court found that defendants were not engaged in fire protection.[45] The court then discussed discretionary immunity, and abolished the two-part PPFT, which had been used over a decade.[46] Consistent with prior statutory analysis, the court noted § 41-55-1 provides that a municipality "may, in its discretion, own, maintain, and operate an ambulance service."[47] But the court then stated that "once a municipality has decided to operate and maintain [an] 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."[48] The case was remanded for specific inquiry into the existence of

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36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 259-61.
40. Brantley v. City of Horn Lake, 152 So. 3d 1106 (Miss. 2014).
41. Booneville Collision Repair, Inc. v. City of Booneville, 152 So. 3d 265 (Miss. 2014).
42. *Brantley*, 152 So. 3d at 1108.
43. *Id.*
44. *Id.*
45. *Id.* at 1111.
46. *Id.* at 1112.
47. *Id.* at 1116.
48. *Id.*

regulations or training policies on" how to fulfill the duty of unloading a patient from an ambulance safely."[49]

In *Booneville*, the plaintiff unknowingly purchased land that had been sold for delinquent municipal taxes.[50] The *Booneville* plaintiff redeemed the land and sued Prentiss County, the City of Booneville, and the City Tax Collector for damages incurred from their failure to provide notice of a tax sale.[51] Consistent with *Brantley*, the *Booneville* court addressed the issue of discretionary function immunity even though the issue was not raised by any of the parties.[52] The court found § 27-41-79 imposed a ministerial duty upon the tax collector to file the tax sale list with the chancery clerk, and that such acts were not shielded with immunity because they are not left to the choice or judgment of the official.[53]

Most recently, in *Boroujerdi v. City of Starkville*, the Mississippi Supreme Court disturbed the firmly grounded immunity for municipal operation of a sewer system[54] provided by *Fortenberry*. The court affirmed that sewer maintenance is presumptively discretionary by statute, pursuant to § 21-27-163.[55] The court, however, stated that the statute was not the end of the inquiry, but that the court must also consider, "pursuant to our holding in *Brantley*[,] . . . whether there are narrower functions or duties concomitant to the general discretionary function of sewage maintenance that have been rendered ministerial through statute, ordinance, or regulations."[56] The court then noted that "sewage systems must comply with the Federal Water Pollution Control Act, a statute which makes it unlawful to dump raw sewage into the environment."[57] The court stated that, while "[m]unicipal sewage maintenance generally is a discretionary function . . . several narrower functions and duties associated with sewage maintenance are mandated by statute or regulation and thus are ministerial and removed from discretionary function immunity."[58] The case was remanded to allow the plaintiff an opportunity to "prove that the City's alleged inaction in repairing the sewage system was related to a more narrow function made ministerial by statute, ordinance, regulation, or other binding directive."[59]

The *Little* decision contains a self-pronounced change in the law,[60] and subsequent decisions have shown how far that change extends. A sample

49. *Id.* at 1117.

50. Booneville Collision Repair, Inc. v. City of Booneville, 152 So. 3d 265, 267 (Miss. 2014).

51. *Id.*

52. *Id.* at 276.

53. *Id.*

54. Boroujerdi v. City of Starkville, No. 2012-CA-01458-SCT, 2015 WL 574802, at *1 (Miss. Feb. 12, 2015) (mandate has not been issued at the time of publication).

55. *Id.* at *7.

56. *Id.* at *5.

57. *Id.*

58. *Id.* at *7.

59. *Id.*

60. Little v. Miss. Dep't of Transp., 129 So. 3d 132, 137 (Miss. 2013).

of the changes in areas that were traditionally shielded with immunity include *Little*'s requirement for the Department of Transportation to "maintain and repair state highways,"[61] *Calonkey v. Amory School District*'s obligation to maintain schools,[62] *Serrano*'s "duty to provide safe apartments[,]"[63] and *Boroujerdi*'s suggestion of ministerial duties in the operation of municipal sewer systems.[64]

VI. CONCLUSION

Discretionary function immunity is in a period of significant transition. This judicially imposed shift is occurring despite the courts' previous statements that "the judiciary [is] not the appropriate branch of government to regulate sovereign immunity."[65] The best avenue for addressing these closely divided court decisions may be a legislative change, as the appellate courts' new direction appears firmly set. Perhaps changes in the court roster will restore the old established test for discretionary immunity, which is similar to the Federal test. Until then, governmental defense practitioners should be diligent in studying this ever-changing area and strive to compel plaintiff-practitioners to identify a specific statute or other law which moves the governmental function into a ministerial realm. While prevailing on the discretionary immunity defense will be more problematic, the defense should fight to protect the legislative intent to establish broad discretionary immunity to governmental entities under § 11-46-11(1)(d).

61. *Id.* at 138.
62. Calonkey v. Amory Sch. Dist., No. 2013-CA-01290-COA, 2014 WL 4548866 (Miss. Ct. App. Sept. 16, 2014).
63. Serrano v. Laurel Hous. Auth., 151 So. 3d 256, 261 (Miss. Ct. App. 2014).
64. *Boroujerdi*, 2015 WL 574802, at *5.
65. Wells by Wells v. Panola Cnty. Bd. of Educ., 645 So. 2d 883, 889 (Miss. 1994) (citing Pruett v. City of Rosedale, 421 So. 2d 1046, 1051 (Miss. 1982)).