IN THE SUPREME COURT OF MISSISSIPPI

ORIGINAL

LEE COUNTY, MISSISSIPPI,
LEE COUNTY EMERGENCY COMMUNICATION
DISTRICT, ET AL. APPELLANTS

v.

2001-M-00636
IA

KERMIT DAVIS AND NANCY DAVIS APPELLEES

INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT
OF LEE COUNTY, MISSISSIPPI

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

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Without a single authority imposing a duty in tort on facts even remotely close to the facts of this case, the Plaintiffs ask this Court to transform the taxpayers of Lee County into home insurers because 911 did dispatch police quickly enough to thwart the criminal acts of three unidentified burglars who broke into their Tupelo residence on a stormy night while the Plaintiffs were vacationing in Florida. All of the remotely factually similar authorities that have considered the questions raised by this interlocutory appeal have uniformly rejected positions taken similar to those taken by the Plaintiffs and have consistently refused to impose the onerous liability on taxpayers that Plaintiffs seek to impose. This Court should do likewise.

ARGUMENT

I.
The Plaintiffs' mistaken defense of the trial court's application of the governmental/proprietary function test to their lawsuit, which they admit falls within MTCA, is directly contrary to the legislature's elimination of that distinction by its passage of the MTCA.

Plaintiffs' mistakenly defend the trial court's application of the now abandoned governmental/proprietary function test. As this Court made clear in an en banc decision in *City of Tupelo v. Martin*, 747 So.2d 822 (Miss. 1999) (a case reversing this same trial judge), the governmental/proprietary distinction no longer applies in the context of MTCA claims:

> Prior to the enactment of the MTCA, we did use the governmental/proprietary function test in applying sovereign immunity to municipalities. *See, e.g., Parker v. City of Philadelphia*, 725 So.2d 782, 784 (Miss. 1998); *White v. City of Tupelo*, 462 So.2d 707, 708 (Miss. 1984). However, **with the enactment of the MTCA, that test [the governmental/proprietary function test] is no longer applicable to claims subject to the MTCA** except to the extent which it may be incorporated in the provisions of the MTCA. We find no such incorporation. Therefore, we reject the argument that we must apply that test here . . ..

Martin, 747 So.2d at 828 ¶19 (emphasis supplied).

Here, Plaintiffs have admitted that their claims are subject to the MTCA:

"The suit brought against Lee County, Mississippi, and any of the named political subdivisions is brought pursuant to MTCA 11-46-1 et seq. and is applicable only to those defendants protected under the immunity of state and political subdivisions from liability and suit for torts and torts of employees."

Complaint at ¶ III.

Undeterred by a case on all fours rejecting the governmental/proprietary test in the context of the MTCA (*see also* Miss. Code Ann. § 11-46-3, political subdivisions are immune notwithstanding governmental or proprietary nature of act), and undeterred by their own admission and own limitation of this cause of action to those defendants protected under the MTCA, Plaintiffs wrongly insist that E911 is a proprietary function based upon an uninformed and narrow view of Miss. Code Ann. § 19-5-301 et seq.

Even assuming this Court still applied the governmental/proprietary distinction, the superficial "logic" (such as it is) of the Plaintiffs' argument does not follow. For example, lets roll the clock back half a century. No 911. Just a police station and a primitive telephone system (in some counties). Freddie Citizen sees a burglar breaking into a Johnny Jones' house. What does Freddie do? He calls the police. Who answers the telephone? Sargent Steady, a uniformed police officer. What does Sargent Steady do? He dispatches Johnny on-the-spot, another uniformed beat officer. The point of this vignette is that there has always been and there will always be an intermediary between the public and the police officer or firefighter or whatever other emergency service is needed that serves as the communicator and coordinator. That line of communication is integrally related to the provision of police services and is clearly a governmental function. *See Fried v. Archer*, 775 A.2d 430, 446 (Md.App. 2001) ("A police dispatcher's work is necessarily an integral link in the chain of emergency services ultimately delivered by the responding police officers.")

Plaintiffs' contorted view of Miss. Code Ann. § 19-5-301 et seq. does not aid their cause. For example, Plaintiffs conclude (without any reasoning, much less any persuasive reasoning) that because Miss. Code Ann. § 19-5-305 says that the Board of Supervisors "may" create an emergency communications district, that E911 is proprietary. Plaintiffs' "logic" (such as it is) appears to be that if the State Legislature gives the counties any discretion, then the activity engaged in cannot possibly be a governmental function.

The flaws in Plaintiffs' logic are demonstrated by considering but two of many, many statutes in which the State Legislature has given the counties discretion as to particular activities. For example, Miss. Code Ann. § 27-31-101 gives counties the discretion as to whether to impose taxes or grant tax exemptions for certain activities. Similarly, Miss. Code Ann. § 45-7-1 gives counties the discretion to employ officers to patrol and enforce road and motor vehicle laws. These two activities—taxation and law enforcement—are quintessential governmental functions, yet the counties are imbued with discretion. Surely that discretion does not convert these quintessential governmental functions into proprietary functions.

The proper question to ask would be (assuming that the governmental/propriety distinction applied, which it does not) is not whether the counties have a choice to do something, but is rather what is the nature of the activity engaged in. Here, as explained above, the service provided by the E911 telecommunicators is an integral link in the provision of police protection and services. If E911 did not do it, then police officers would. The legislature recognized the very public nature of the providing 911 services in Miss. Code Ann. § 19-5-301 et seq. where it found that "[t][he provision of a single, primary three-digit emergency number through which emergency services can be quickly and efficiently obtained will provide a significant contribution to law enforcement and other public service efforts by simplifying the notification of public service personnel." It also recognized the public nature

and public importance of 911 services by specifically preempting all local laws and acts under which emergency communication districts were previously created. Miss. Code Ann. § 19-5-315(1). Plaintiffs suggestion that E911 services are proprietary is not only irrelevant (because the MTCA and this Court's precedents eliminate the distinction in the context of MTCA claims, which plaintiffs have admitted this is), but is also plainly wrong.

Finally, for several reasons, Plaintiffs' argument that E911 is not specifically immune under Miss. Code Ann. § 19-5-361 or under MTCA is similarly wrong. First, Miss. Code Ann. § 19-5-361 broadens the application of the MTCA (rather than narrows it as Plaintiffs suggest) by extending immunity to telephone service suppliers and their employees—the statutory maxim of expressio unius est exclusio alterius (the expression of one thing is the exclusion of another) does not apply.

Second, even if Plaintiffs had not already admitted that their claims were subject to the MTCA (which they did in their Complaint at paragraph III), E911 is clearly an instrumentality of Lee County, and, therefore a "political subdivision" entitled to sovereign immunity:

> "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 supplied); *see also* MISS. CODE ANN. § 11-46-3 (political subdivisions are immune from suit).

The Mississippi Attorney General recognized that E911 is entitled to sovereign immunity under the MTCA over a decade ago when he opined that an E911 Commission, as an instrumentality of the county, is a political subdivision within the meaning of the MTCA. Op. Miss. Att'y Gen. No. 1991-0614 (Aug. 19, 1991) ("It is our opinion that the E911

Commission, as an instrumentality of the county, would meet this definition and would have sovereign immunity"). Plaintiffs' arguments are without merit.

II.
The Plaintiffs' misguided attempt to avoid the absolute immunity available to Lee County on these facts under MISS. CODE ANN. § 11-46-9(1)(c) is founded upon fallacious reasoning.

Plaintiffs' base their faulty argument that Lee County is not entitled to the absolute immunity under MISS. CODE ANN. § 11-46-9(1)(c) upon false and loose conclusory statements, rather than the any solid reasoning or analysis. For example, Plaintiffs first mistakenly cite two cases, *Gant v. Maness*, 786 So.2d 401, 406 (Miss. 2001) and *Turner v. City of Ruleville*, 735 So.2d 226 (Miss. 1999), as examples of this Court finding reckless disregard on the part of police officers involved in motor vehicle accidents. Neither case found reckless disregard on the part of police officers involved in motor vehicle accidents.[1]

Second, cases in which the Court has found that police officers who were driving vehicles in reckless disregard of the rights of others are easily distinguishable from the case of an E911 telecommunicator. In the former case, the governmental actor actually creates the peril by his own acts. In the latter, the E911 is responding to a peril created by a third party, in this case unidentified burglars. Moreover, unlike *L.W.* (the school case), the E911 telecommunicator does not have any control over the victim, the perpetrator or the environment. Plaintiffs' arguments that E911 telecommunicators are similar to police officers driving vehicles and creating hazards or like school teachers in a position to control the

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[1] *Gant* reversed and rendered a trial court's decision not to grant summary judgment to a Sheriff where the plaintiff sued the Sheriff, whose duties were owed to the general public and therefore not actionable, where the plaintiff failed (as the Plaintiffs have in this case) to establish a special relationship. *Turner* simply held that a plaintiff stated a claim against a police officer where she alleged that the officer wantonly and willfully by intentionally allowing a visibly intoxicated driver to continue driving.

environment and protect their students are "apples to oranges" arguments that are not pertinent.

Third, the MTCA's police protection exception preserves the sovereign's absolute immunity for acts or omissions of employees of governmental entities engaged in the performance of activities "**relating to** police . . . protection." MISS. CODE ANN. § 11-46-9(1)(c) (emphasis supplied):

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

***

(c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities **relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person** not engaged in criminal activity at the time of injury.

(emphasis supplied).

Here, the question of whether the E911 employees' alleged acts and omissions "relate to" police protection is a question of statutory construction that requires ascertaining the legislature's intent. *See Clark v. State ex rel. Miss. State Medical Ass'n*, 381 So.2d 1046, 1048 (Miss. 1980) (fundamental duty of a court in construing a statute is to give effect to the legislature's intent); *see also Kerr-McGee Chemical Corp. v. Buelo*, 670 So.2d 12, 16-17 (Miss. 1995) (citations omitted). Because conduct that "relates to" police protection is not defined by the MTCA or by other statutory authority, the phrase must be ascribed its common and ordinary meaning, MISS. CODE ANN. § 1-3-65 (1972), *see also Tower Loan v. Miss. State Tax Comm'n*, 662 So.2d 1077, 1083 (Miss. 1995) (relying upon BLACK'S LAW DICTIONARY (6th ed. 1990)), in light of the best statement of policies and principles justifying the statutory language. *See Jones v. Mississippi Employment Security Comm'n*, 648 So.2d 1138, 1142 (Miss. 1995).

In this case, the legislative policy of the MTCA appears on its face as broadly immunizing all governmental entities from liability, MISS. CODE ANN. § 11-46-3, except to the extent that the MTCA waives such immunity. MISS. CODE ANN. § 11-46-5(1) (waiving immunity to the extent provided for in MISS. CODE ANN. § 11-46-15). Construing the phrase "relating to" in light of this legislative policy of broad immunity then, an act "relates to" police protection if it has a connection with such protection. BLACK'S LAW DICTIONARY 1288 (6th ed. 1990) (defining related as being connected); *see also* THE AMERICAN HERITAGE DICTIONARY 1211 (3d ed. 1992) (defining related as being associated or connected with). 911 dispatch services, which as explained above form an integral link in the provision of police protective services, are clearly connected with and related to police protection, and, therefore, fall within the police protection liability shield. *Compare Fried v. Archer*, 775 A.2d 430, 447 (Md.App. 2001) (courts treat emergency service dispatchers and responding emergency personnel services personnel alike for purposes of determining whether an enforceable duty in tort exists) (citing *Sullivan v. City of Sacramento*, 190 Cal.App.3d 1070 (1987) (liability of police operator determined under same duty rule applied to responding police officer); *Noakes v. City of Seattle*, 895 P.2d 842 (1995) (same, 911 dispatcher); *City of Rome v. Jordan*, 263 Ga. 26, 426 S.E.2d 861 (1993) (same, police dispatcher); *Koher v. Dial*, 653 N.E.2d 524 (Ind.App.1995) (same, police radio dispatcher); *De Long v. County of Erie*, 457 N.E.2d 717 (1983) (same, 911 "complaint writer" and police dispatcher)).

Moreover, as this Court made clear in *Simpson v. City of Pickens*, 761 So.2d 855 (Miss. 2000), to lose the immunity defense of MISS. CODE ANN. § 11-46-9(1)(c), the government must act in reckless disregard of the plaintiff or claimant, not property:

> We hold that **a governmental agency and its employees acting within the course and scope of their employment or duties shall not be liable for any claim** arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection **unless . . . the employee acted in**

reckless disregard of the safety and well-being of any person (claimant) not engaged in criminal activity at the time of injury.

Simpson, 761 So.2d at 859 (emphasis supplied).

Here, Plaintiffs again flatly ignore the controlling Mississippi authority (*Simpson*) and the restrictions imposed by MISS. CODE ANN. § 11-46-9(1)(c) and emotionally demand that they can recover for property damage and alleged mental anguish they have allegedly suffered as a result of the burglary of their home by unidentified criminals while they vacationing in Florida. Contrary to *Simpson* and without any authority, Plaintiffs also argue that whether or not they sustained physical injury is immaterial. Likewise, on page 6 of their brief Plaintiffs argue without authority that the public duty doctrine has been subsumed by the MTCA. These arguments unsupported by any authority and any reasoning. Failure to cite authorities in support of an arguments acts as a procedural bar to their consideration. *Williams v. State*, 708 So.2d 1358, 1360 (Miss. 1998); *New Bellum Homes, Inc. v. Swain*, 806 So.2d 301, 306 (Miss. App. 2001). Plaintiffs meritless and unsupported arguments need not and should not even be considered by this Court.

III.
The Plaintiffs' misleading arguments regarding the Public Duty Doctrine reflect a complete misunderstanding of the doctrine and its purposes.

On page 5 of their brief, Plaintiffs argue that this is not the case to "establish a "Public Duty Doctrine" and a special relationship exception" as though it is doctrine foreign to Mississippi. As explained on pages 9-10 Lee County's principal brief, the doctrine was recognized by the United States Supreme Court as early as 1855 and by the Mississippi Supreme Court in 1944. As throughly explained in Lee County's principal brief and in the in the cases cited therein (*see* Lee County's principal brief at pp. 9-16), it is a thoroughly developed doctrine, reflecting the rejection on policy grounds of imposing an onerous and

potentially unlimited liability on the public purse based upon duties owed to the public at large. Public duties, such as the duty of police protection, are simply not actionable in tort. Over the years a very narrow exception has arisen to the no duty rule of the public duty doctrine, which holds that an enforceable duty can be found where there is a "special relationship" between the plaintiff and the governmental actor. The "special relationship" exception to the no duty rule arises only, however, when (1) there is direct contact between the public official and the injured plaintiff, (2) express assurances are given by the public official to the plaintiff which (3) gives rise to a justifiable reliance on the part of the injured plaintiff). Here, the Plaintiffs were unaware of the burglary—they were vacationing in Florida and did not learn of the burglary until after it occurred. The only case cited by Plaintiffs in support of their baseless argument (that since they asked their neighbor to "keep an eye on their place" they can rely upon their neighbor as a proxy for purposes of the special relationship exception) is *City of Rome v. Jordan*, 426 S.E.2d 861 (Ga. 1993), a case in which they mislead the Court as to the holding of the case by quoting *dicta* and by suggesting that it somehow supports their position.

City of Rome in fact demonstrates the absolute fallacy of Plaintiffs' position. For example, *City of Rome* held that no duty arose under the special relationship exception to the public duty doctrine where a third party (here, Plaintiffs' neighbor Kenneth Baker), rather than the plaintiff contacted the police. Although in *dicta* the Georgia Supreme Court stated that it would not strictly impose the "direct contact" requirement between the public entity and the plaintiff (that is absolutely required by almost every other state), the Georgia Court imposed a substantively identical requirement by "specifically requiring that the injured party rely on the promise of the [public entity] to her detriment." *City of Rome*, 426 S.E.2d at 863.

The facts in the *City of Rome* are as follows. Therein, the plaintiff—Patricia—argued that since a third party—Dana—told her that she would call the police and in fact Dana did call the police, Patricia was justified in relying upon the police to come (the police failed to come and Patricia was repeatedly sexually assaulted). *Id.* at 864. The Georgia Court expressly rejected the plaintiff's argument (which is the same argument made by the Plaintiffs in this case) that she was entitled to rely upon her belief that the police would come because a third party (here, Kenneth Baker) called. In explaining its rejection of the plaintiff's theory, the Georgia Court noted that the "evidence shows that [plaintiff] was not aware that the police had made any promise of assistance, if in fact they did." *City of Rome*, 426 S.E.2d at 864. "To allow such an expression of reliance to satisfy the reliance requirement in the special relationship test would render the requirement virtually meaningless." *Id.* Plaintiffs in this case are in an identical position. They were in Florida and unaware of any alleged "promise of assistance" made by Lee County to their neighbor, Kenneth Baker. The Plaintiffs have not established any facts that would remotely support application of the special relationship exception and have cited not a single case authority in support of their preposterous position for extending a duty in tort beyond reason.

The trial court's decision not only ignores this Court's established sovereign immunity precedents, but also creates a new duty in tort on facts far removed from any reported case that has found a duty (and there are only a few, most of which are in the context of a rape victim remaining in a house, but note that some courts have refused to impose a duty even on those facts). The trial court's decision wrongly shifts the risks of loss resulting from criminal acts of third parties from property owners (for whom property insurance is readily available) to the public at large. The trial court's decision directly contradicts the expressed policy of the State of Mississippi and directly contradicts the reasoned judgment of the majority of state courts

that have carefully considered the broader implications imposing such a duty in the context of 911 telecommunication services and police dispatchers.

This Court should reject the Plaintiffs' request to reject centuries of reasoning and the reasoning of the majority of state courts and to move the boundaries of tort law to an area in which no Court has went before. Movement of tort boundaries to the point Plaintiffs' suggest "would not only be unjust, but preposterous. Wisdom, the disciple of experience, advocates the extension of a rule of law only so far as reasonable necessity requires." *McGill v. City of Laurel*, 252 Miss. 740, 764, 173 So. 2d 892, 903 (Miss. 1965). As one court wisely cautioned, "[f]or the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits." *Riss v. City of New York*, 240 N.E.2d 860, 861 (N.Y. 1968). Ultimately, recognizing a duty in tort on such a thin reed as this case presents could result in the reduction of public safety services, including emergency response programs and personnel, to the community. For the reasons explained herein and in Lee County's principal brief, Lee County asks the Court to reverse the trial court's decision and render a decision in its favor dismissing the case against it based upon sovereign immunity and based upon the lack of a duty owed in tort to the Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gregory M. Hunsucker, one of the attorneys for Petitioners do hereby certify that I have this day served a true and correct copy of the above and foregoing reply brief along with its accompanying record excerpts on the following counsel of record by placing said copy in the United States Mail, postage prepaid:

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with a copy to

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THIS, the 10th day of May, 2002.

Gregory M. Hunsucker

CERTIFICATE OF FILING

I, Phyllis Schmidt, do hereby certify that I have this day transmitted by Federal Express, for overnight delivery, postage prepaid, the original and four (4) copies of Reply Brief of Appellant for filing to:

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This the 10th day of May, 2002.

Phyllis Schmidt