

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-CA-00018-SCT

***RONNIE MOSES, DEE MOSES, GARY LAWSHE,
SUZY LAWSHE, BILL DAVIS, LINDA DAVIS,
DAN RITCHIE, LAUREN RITCHIE, GARY
FREEZE, VICKIE FREEZE, MAX COURTNEY,
LAURIE COURTNEY, JILL SHIELDS, LARRY
LUKE, NANCY LUKE, SHERRILL EVANS, RUSH
BUSBEE, MIKE COBB, FAY COBB, AND JUDY
BUSBEE***

v.

***RANKIN COUNTY, MISSISSIPPI, AND BOARD
OF SUPERVISORS OF RANKIN COUNTY***

DATE OF JUDGMENT: 12/07/2018
TRIAL JUDGE: HON. WILLIAM E. CHAPMAN, III
TRIAL COURT ATTORNEYS: MICHAEL VERDIER CORY, JR.
CHRISTIAN MEDINA
MICHAEL JEFFREY WOLF
COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS: MICHAEL VERDIER CORY, JR.
CHRISTIAN MEDINA
ATTORNEY FOR APPELLEES: MICHAEL JEFFREY WOLF
NATURE OF THE CASE: CIVIL - PROPERTY DAMAGE
DISPOSITION: REVERSED AND REMANDED - 12/12/2019
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE KITCHENS, P.J., COLEMAN AND GRIFFIS, JJ.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. Following a heavy rain on April 2-3, 2017, several homes in the Mill Creek Place Subdivision flooded and were damaged. Several homeowners, whose homes had been damaged, sued Rankin County for failing to properly maintain Mill Creek, which is adjacent

to the Mill Creek Place Subdivision. Rankin County filed a Mississippi Rule of Civil Procedure 12(b)(6) motion to dismiss the complaint. The trial court granted Rankin County’s motion, finding that Rankin County was immune from liability—specifically discretionary function immunity—under the Mississippi Tort Claims Act. The homeowners appeal, arguing that Rankin County is not immune. The trial court erred by dismissing the complaint based on discretionary function immunity. Accordingly, we reverse the trial court’s judgment and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2. Several homeowners in the Mill Creek Place Subdivision sued Rankin County for failure to properly maintain Mill Creek. Mill Creek functions as part of the storm water drainage system for the subdivision.¹ The plaintiffs alleged that although Rankin County had previously performed routine maintenance on Mill Creek, no maintenance or other work had been performed from early 2011 through April 3, 2017. Plaintiffs alleged that “[a]s a result, shrubs, vegetation and trees were allowed to grow to the point where a barrier was created which significantly obstructed the flow of storm water on April 2-3, 2017.” Due to the condition of Mill Creek, the plaintiffs claimed that the storm water was diverted from the Mill Creek channel and flooded the plaintiffs’ homes. The plaintiffs set out their theory of Rankin County’s negligence as follows:

¹ On December 5, 2018, the plaintiffs filed a motion to file an amended complaint and attached a proposed first amended complaint. The trial court granted the motion and deemed filed the attached first amended complaint when it entered its final judgment. On January 3, 2019, Moses filed the first amended complaint for purposes of completing the record.

Rankin County had a duty to properly maintain its storm water drainage system, including but not limited to that portion of Mill Creek immediately north of Lakeland Drive.

Rankin County breached that duty by failing to properly maintain and clear that portion of the Mill Creek channel immediately north of Lakeland Drive.

As a result of Rankin County's failure to properly maintain its storm water drainage system, the Mill Creek channel's flow capacity was substantially diminished on April 2-3, 2017.

Because of the diminished flow capacity, storm water was diverted away from the Mill Creek channel onto Westlake Drive and flowed down Westlake Drive in a northerly direction resulting in the flooding of the homes of the Plaintiffs who live on Westlake Drive. Also, because of the flooding on Westlake Drive storm water backed up onto Millcreek Drive resulting in the flooding of the homes of the Plaintiffs who live on Millcreek Drive.

Rankin County was negligent in failing to maintain its storm water drainage system. Said negligence was a substantial contributing cause of the flood event.

As a proximate result of the negligence of Rankin County, the Plaintiffs sustained actual damages and suffered emotional distress.

¶3. The plaintiffs alleged that Rankin County's Stormwater Management Program of May 2016 demonstrates Rankin County's responsibility for the maintenance of Mill Creek. The Stormwater Management Program was prepared by the Rankin County Board of Supervisors for the Mississippi Department of Environmental Quality. Excerpts of the Stormwater Management Program referencing the maintenance of Mill Creek were attached to the complaint.

¶4. On September 18, 2018, Rankin County filed a Rule 12(b)(6) motion to dismiss. Rankin County argued that the plaintiffs' claims were barred by the Mississippi Tort Claims Act, specifically Mississippi Code Sections 11-46-9(1)(d), (g), (p), and (v) (Rev. 2019).

¶5. On December 7, 2018, the trial court granted Rankin County’s motion to dismiss. The trial court found that, “[a]fter reviewing the First Amended Complaint[] and giving due consideration to the additional facts alleged therein, the [trial c]ourt remains of the opinion that the Defendant has complete immunity for the Plaintiffs’ claims.” The trial court found

The parties do not dispute that the claims asserted involve the element of “choice or judgement” but do dispute whether the allegations are capable of “political, social, or economic policy consideration.” The [trial c]ourt finds that the allegations are sufficiently clear on the Complaint that the acts are such that they are capable of policy analysis as contemplated by the immunity of 11-46-9(1)(d).

¶6. Finally, the trial court noted that the complaint “is dismissed based on discretionary function immunity; all other immunity related arguments which may or may not result in dismissal are moot.” Furthermore, the trial court “incorporate[d] . . . any other applicable provision of the [T]ort [C]laim[s] [A]ct as pled by the parties to the extent that such immunity may also apply.”

¶7. The plaintiffs appealed and now argue that Rankin County does not have immunity under Sections 11-46-9(1)(d), (g), (p), or (v). While the plaintiffs argue that none of the statutory immunity provisions apply, the trial court’s decision to dismiss was based solely on discretionary function immunity. Thus, the only question we consider is whether Rankin County enjoys discretionary function immunity. Indeed, at the trial level, Rankin County acknowledged that further evidence is needed before the immunity provisions of Section 11-46-9(1)(p) and (v) might be applied. For the same reason, addressing the applicability of Section 11-46-9(1)(g) is premature. No discovery has commenced, and the Court is considering only the allegations contained in the complaint.

STANDARD OF REVIEW

¶8. The Court reviews a trial court’s dismissal based on immunity under the Tort Claims Act *de novo*. ***Wilcher v. Lincoln Cty. Bd. of Supervisors***, 243 So. 3d 177, 181 (¶ 8) (Miss. 2018). Likewise, “[a] motion to dismiss under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure raises an issue of law, which is reviewed under a *de novo* standard.” ***Rose v. Tullos***, 994 So. 2d 734, 737 (¶ 11) (Miss. 2008) (citing ***Cook v. Brown***, 909 So. 2d 1075, 1078 (¶ 8) (Miss. 2005)). “A Rule 12(b)(6) motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint.” *Id.* (citing ***Cook***, 909 So. 2d at 1078 (¶ 8)). Thus, “[w]hen considering a motion to dismiss, the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim.” ***Scaggs v. GPCH-GP, Inc.***, 931 So. 2d 1274, 1275 (¶ 6) (Miss. 2006) (internal quotation marks omitted) (quoting ***Lang ex rel. Lang v. Bay St. Louis***, 764 So. 2d 1234, 1236 (¶ 7) (Miss. 1999)).

DISCUSSION

I. Whether Rankin County has discretionary function immunity under Mississippi Code Section 11-46-9(1)(d).

¶9. The plaintiffs argue that the trial court erred by finding that Rankin County enjoyed discretionary immunity under Mississippi Code Section 11-46-9(1)(d). Section 11-46-9(1)(d) provides as follows:

(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) (Rev. 2019).

¶10. The “the purpose of discretionary-function immunity is not to protect *all* decisions by governmental employees involving some level of discretion but instead only those functions that by their nature are policy decisions[.]” *Wilcher*, 243 So. 3d at 182 (¶ 12). “Very recently, th[e] Court returned to its traditional, two-part, public-policy function test to determine when Section 11-46-9(1)(d) applies.” *City of Clinton v. Tornes*, 252 So. 3d 34, 39 (¶ 20) (Miss. 2018) (citing *Wilcher*, 243 So. 3d at 187 (¶ 29)). Before employing the test, the Court must “correctly identif[y] the ‘activity in question’—the allegedly tortious act giving rise to the claim.” *Wilcher*, 243 So. 3d at 187 (¶ 30).

The public-policy function test has two parts. “This Court first must ascertain whether the activity in question involved an element of choice or judgment.” *Miss. Transp. Comm’n v. Montgomery*, 80 So. 3d 789, 795 (Miss. 2012). If so, this Court also must decide whether that choice or judgment involved social, economic, or political-policy considerations. *Id.* Only when both parts of the test were met did a government defendant enjoy discretionary-function immunity.

Id. at 182 (¶ 12) (footnote omitted). The Court explained,

Because discretionary-function immunity “protects only governmental actions and decisions based on considerations of public policy,” when “applying the discretionary-function exception, this Court must distinguish between *real policy decisions* implicating governmental functions and *simple acts of negligence* which injure innocent citizens.” Thus, “[w]hen reviewing whether a challenged action is afforded immunity, a court’s focus is ‘on the nature of the actions taken and whether they are susceptible to policy analysis.’”

Id. at 188 (¶ 34) (citations omitted).

¶11. In the return to the public policy function test, the Court adopted Chief Justice Waller’s dissenting opinion in *Pratt v. Gulfport-Biloxi Regional Airport Authority*, 97 So. 3d 68 (Miss. 2012) (Waller, C.J., dissenting), to be included as part of the public policy function analysis. *Wilcher*, 243 So. 3d at 188 (¶ 33). In *Pratt*, the activity in question was an “airport’s alleged failure to provide a safe means of exiting an airplane[.]” *Pratt*, 97 So. 3d at 77 (¶ 25). Chief Justice Waller—relying on *Indian Towing Co. v. United States*, 350 U.S. 61, 76 (1955)—wrote that “[t]he United States Supreme Court has made clear that maintenance decisions such as the one at issue today do not involve public policy considerations.” *Pratt*, 97 So. 3d at 77 (¶ 26) (Waller, C.J., dissenting). In *Indian Towing*, a tugboat towing a barge went aground on Chandeleur Island and the barge’s cargo was damaged. *Indian Towing*, 350 U.S. at 62. Indian Towing Company and others sued the United States Coast Guard under the Federal Tort Claims Act for negligently operating a lighthouse on Chandeleur Island. *Id.* at 61-62. The United States Supreme Court held that, although the Coast Guard was not required to undertake a lighthouse service, once it

exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning.

Id. at 69.

¶12. As for the first part of the public policy function test, the plaintiffs argue that “up to a point, the maintenance of Mill Creek involved an element of choice or judgment” and “decisions about how exactly Mill Creek was going to be maintained involved discretion.”

However, the plaintiffs argue that “Rankin County did not have the discretion to ignore its obligations to inspect and perform routine maintenance in accordance with its own Stormwater Management Program.” The argument is without merit. See *Hudson v. Yazoo City (In re Estate of Hudson)*, 246 So. 3d 872, 879 (¶ 48) (Miss. 2018) (holding that “Yazoo City’s failure to comply with its ordinances and federal regulations . . . fails as a matter of law for failure to state a cause of action.”). Furthermore, in response to Rankin County’s motion to dismiss, the plaintiffs agreed that “the maintenance of Mill Creek involved an element of choice or judgment.” The trial court confirmed that the question of whether the alleged tortious conduct involved an element of choice or judgment was not in dispute. Regardless of whether the plaintiffs have conceded the first part of the test, the alleged activity in question—Rankin County’s failure to properly maintain Mill Creek’s drainage path after it had undertaken the responsibility for doing so—involves an element of choice or judgment.

¶13. Turning to the second part of the public policy test, the plaintiffs argue that maintaining Mill Creek does not involve social, economic, or political policy considerations. The plaintiffs separate the adoption of the Stormwater Management Program, *i.e.*, deciding to maintain Mill Creek, from the execution of the plan, *i.e.*, maintaining Mill Creek. The plaintiffs rely on *Indian Towing* in support of their argument.

¶14. While *Indian Towing* is instructive, the Court’s decision in *In re Estate of Hudson* involved a nearly identical theory of negligence under the Tort Claims Act. In that case, nine-year-old Patrauna Hudson “drowned in flash-flood waters that swept through a drainage

ditch that ran alongside her family’s residence.” *Id.* at 873 (¶ 1). Patrauna’s estate sued Yazoo City for wrongful death, alleging that the city was liable for negligently failing to maintain its drainage ditches. *Id.* at 873 (¶ 1, 5). The trial court granted summary judgment in favor of the city. *Id.* at 873 (¶ 1). The trial court found that Yazoo City was immune from liability because the maintenance of drainage ditches is a discretionary function under Section 11-46-9(1)(d). *Id.* at 876 (¶ 25). On appeal, the Court found that the estate’s claim of liability based on Yazoo City’s failure to comply with its ordinances and federal regulations failed as a matter of law for failure to state a cause of action. *Id.* at 880 (¶ 48). The Court continued, however, by holding that after a *de novo* review of the record, slight evidence existed, which, if developed further, might create a genuine issue of fact with regard to the estate’s claim that Yazoo City was liable for negligently failing to maintain its drainage ditches. *Id.* at 873 (¶ 5). The Court explained,

the Estate also alleged in its complaint that the Seventh Street drainage ditch constituted a dangerous condition because Yazoo City had failed to properly maintain the ditch by keeping it free of vegetation, trash and debris. This claim is predicated on ordinary negligence, and is entirely different from the Estate’s theory of liability with regard to Yazoo City’s failure to comply with ordinances and federal regulations associated with the NFIP.

Id. at 880 (¶ 49). Because *Wilcher* reinstated the public policy function test under Section 11-46-9(1)(d) while the Estate’s case was pending, the Court held that “the Estate should be allowed the opportunity to fully present its negligence claim” and remanded the case for further proceedings. *Id.* at 880 (¶¶ 49-52).

¶15. As in *In re Estate of Hudson*, the plaintiffs’ “claim is predicated on ordinary negligence.” *Id.* at 880 (¶ 49). Also, as in *Indian Towing*, once Rankin County undertook

the duty to inspect and maintain Mill Creek, it was obligated to use due care to make certain that Mill Creek was properly maintained. *Indian Towing*, 350 U.S. at 69. We hold that the trial erred by finding that Rankin County is protected by discretionary function immunity.

¶16. Taking all of the allegations of the plaintiffs' complaint as true, Rankin County's alleged failure to maintain Mill Creek is a case of simple negligence contemplated in *Wilcher*. Such maintenance decisions do not involve policy considerations. See *Pratt*, 97 So. 3d at 77 (¶ 26) (Waller, C.J., dissenting). We follow the lead of *In re Estate of Hudson* and reverse and remand for further proceedings. The plaintiffs ought to be given the opportunity to fully present their simple negligence claim.

CONCLUSION

¶17. For the foregoing reasons, we reverse the trial court's judgment and remand the case for further proceedings.

¶18. **REVERSED AND REMANDED.**

**RANDOLPH, C.J., KITCHENS AND KING, P.JJ., MAXWELL, BEAM,
CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.**