IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-01312 COA

MYRL BARFIELD **APPELLANT**

v.

CITY OF CALHOUN CITY, MISSISSIPPI **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	NOVEMBER 13, 1995
TRIAL JUDGE:	HONORABLE R. KENNETH COLEMAN
COURT FROM WHICH APPEALED:	CALHOUN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	DANA J. SWAN
	J. KIRKHAM POVALL
ATTORNEYS FOR APPELLEE:	JOHN DONELSON BRADY
	JOSEPH MCCOY
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	DIRECTED VERDICT GRANTED IN FAVOR OF APPELLEE.
DISPOSITION:	AFFIRMED - 11/18/97
MOTION FOR REHEARING FILED:	11/24/97
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

In a personal injury action brought by Myrl Barfield and tried without a jury, the circuit court granted a directed verdict in favor of the City of Calhoun City. On appeal, Barfield asserts that the court erroneously applied the open and obvious defense rather than the doctrine of comparative negligence. We find that in fact the trial court properly applied the controlling statute on municipal immunity. We therefore affirm.

FACTS

On rainy December 13, 1993, Myrl Barfield traveled with a friend to Calhoun City. After parking their car in front of City Hall, they proceeded across the street. While on the street, Barfield fell and injured her wrist and shoulder.

Barfield filed suit against Calhoun City alleging that the City negligently maintained the street. She contended that a pothole in the street caused her fall. Barfield made no report of the accident at that time. At trial Barfield called City employees to testify regarding the pothole and the City's street inspection program. Photographs were introduced of a pothole, but these were taken after the incident. Between the time of the injury and the photographs, north Mississippi suffered a severe ice storm that according to testimony, may have caused the photographed pothole. A City employee testified as to repairing the photographed pothole as soon as it was discovered after the ice storm. There was some evidence the pothole had been there from before the storm.

At the close of Barfield's case, the trial court granted the City's motion for directed verdict. The court concluded that the city was immune from suit under a statute barring any claim:

> Arising out of an injury caused by a dangerous condition on the property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care[.]

Miss. Code Ann. § 11-46-9(v) (Supp. 1995). The trial court made a fact finding that any pothole was obvious, and therefore Barfield could not recover from the City.

DISCUSSION

At the close of Barfield's case, the City moved for directed verdict pursuant to Rule 50(a) of the Mississippi Rules of Civil Procedure. In deciding whether to grant the City's motion, the court stated that it had reviewed the evidence in the light most favorable to the plaintiff, Barfield. After considering the evidence, the court granted the City's motion. However, since this was a non-jury trial, the proper motion at this stage of the proceedings would have been a motion to dismiss pursuant to Rule 41(b). Trial courts are to apply a different standard in deciding whether to grant a Rule 41(b) motion to dismiss in a bench trial as opposed to a Rule 50(a) motion for directed verdict in a jury trial. ***Herrington v. Herrington*, 660 So. 2d 215, 218 (Miss. 1994).** In considering a Rule 41(b) motion to dismiss, the trial court must examine the evidence "fairly, as distinguished from the light most favorable to the plaintiff." ***Id.*** If the court would find for the defendant, the case must be dismissed. ***Id.*** The court must deny a motion to dismiss only if the judge would be obliged to find for the plaintiff if the plaintiff's evidence were all the evidence offered in the case. ***Smith v. Smith*, 574 So. 2d 644, 649 (Miss. 1990).** Consequently, the trial court applied a stricter standard than necessary in granting the City's motion for directed verdict. On appeal, this Court will not reverse the trial judge as fact-finder unless there was manifest error. ***Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359, 369 (Miss. 1992).**

The trial court stated that if the pothole existed, "it was such that it was obvious to anyone walking there. . . ." Consequently, the court concluded that under ***Burton v. City of Philadelphia*, 595 So. 2d**

1279, 1280-81 (Miss. 1991) and §11-46-9(1)(v) of the Mississippi Code the City was not liable for the alleged dangerous condition which was obvious to Barfield.

Barfield argues that the court's reliance on *Burton* and the statute is misplaced. Specifically, Barfield contends that in ***Tharp v. Bunge Corp.*, 641 So. 2d 20 (Miss. 1994)** the supreme court abolished the open and obvious defense as an absolute bar to recovery. In *Tharp*, the supreme court held that the open and obvious defense was not a complete bar to recovery and was only a "mitigation of damages on a comparative negligence basis. . . ." ***Id.* at 25.**

Though agreeing with this interpretation of *Tharp,* that case does not address a cause of action involving a governmental entity. Unlike *Tharp,* this suit involves an individual seeking to recover compensation from the City of Calhoun City. Therefore, section 11-46-9(1)(v) controls.

A governmental entity and its employees are exempt from liability for any claim that results from "a dangerous condition" on the government's property in three separate circumstances: 1) when the condition "was not caused by the negligent or other wrongful conduct" of a government employee, 2) when the condition was one "of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against", or 3) when the failure to warn is "of a dangerous condition which is obvious to one exercising due care[.]" **Miss. Code Ann. §11-46-9(1)(v) (Supp. 1995).**

The only evidence presented stating that there was a pothole at the time of the injury was from Barfield. Barfield testified that the pothole was approximately eighteen inches wide and two or three inches deep. As the trier of fact, examining the merits of a directed verdict motion under Rule 50(a), the trial court weighed the evidence in "the light most favorable to the plaintiff" and found the pothole to be obvious to someone exercising due care. As we pointed out previously, the proper motion was under Rule 41(b) and the analysis by the trial court should be more balanced -- looking at the plaintiff's evidence "fairly" as if it were the only evidence, would a verdict for the plaintiff be justified? The trial court under a standard unnecessarily biased towards the plaintiff stated that judgment for the defendant was proper. Looking at the evidence "fairly," we find that judgment by the ultimate fact-finder at that stage was not manifest error.

Barfield disputes this by contending that the allegations in her complaint do not relate to a failure to warn. Barfield asserts that the facts in this case involve a failure to repair a known dangerous condition rather than a failure to warn, and thus Section 11-46-9(1)(v) is not applicable. However, whether Barfield raises all parts of the law of governmental premises liability or not, the courts must apply it all. The issue of failure to warn is a necessary component for consideration under the immunity statute. The City would be liable if the pothole was one of which they had notice (a fact question here) and having notice, failed to repair or give warnings. Even when the governmental entity had notice and failed to warn, there is still immunity if the condition would be obvious to someone exercising due care.

We agree that *Tharp* would control if this injury occurred on private property. It did not. The legislature has the prerogative to adopt this statute. We have the obligation to enforce it.

THE JUDGMENT OF THE CALHOUN COUNTY CIRCUIT COURT IN FAVOR OF THE APPELLEE IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE

APPELLANT.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.