

IN THE COURT OF APPEALS 05/21/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01009 COA

RANKIN COUNTY, MISSISSIPPI

APPELLANT

v.

**JIMMIE D. HUTCHINSON, JR., A MINOR, BY NEXT FRIEND JIMMIE D.
HUTCHINSON, SR.**

AND JIMMIE D. HUTCHINSON, SR.

APPELLEES

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

TRIAL JUDGE: HON. JOHN B. TONEY

COURT FROM WHICH APPEALED: RANKIN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MICHAEL P. YOUNGER

ATTORNEY FOR APPELLEES:

ANSELM J. MCLAURIN

NATURE OF THE CASE: PERSONAL INJURY: AUTOMOBILE

TRIAL COURT DISPOSITION: VERDICT AND JUDGMENT FOR APPELLEES

BEFORE THOMAS, P.J., BARBER, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

A jury awarded \$47,250.00 to Jimmie Hutchinson and his father for damages arising from an accident on a Rankin County road. On appeal, the county contends that an affidavit was improperly admitted into evidence, that the verdict was contrary to the evidence, and that it had no liability to the Hutchinsons. We conclude on the facts before us that the county has no liability to the Hutchinsons under the doctrine of sovereign immunity, unless in 1990 when the accident occurred the county had partially waived its immunity by purchasing insurance. Accordingly, we reverse and remand. We find the other issues raised by the county to be without merit.

FACTS

In 1990, Jimmie Hutchinson was driving his father's car down a country lane in Rankin County when he careened over a cross-street and into a gully. His injuries included a broken jaw and the loss of several teeth.

The location of his accident was an area Hutchinson had previously passed through at least twice. The intersection consisted of the lane which emptied into a road running perpendicular to the lane—referred to by witnesses at the trial as a "T" intersection. The county maintained the intersection and had placed stop signs which would have warned drivers on the lane of the approaching intersection. However, the stop signs were stolen and missing on the date of the accident. There was testimony from the county that the signs had been replaced at least twice that day. The Hutchinsons put on evidence that this was incorrect. In any event, Hutchinson was unable to detect the intersection until it was too late.

Following presentation of the case, the jury awarded damages for Jimmie Hutchinson's personal injuries and for repairs to the car.

DISCUSSION

1. Sovereign Immunity

Because this cause of action arose in 1990, we apply those principles of sovereign immunity existing prior to *Presley v. Mississippi State Highway Comm'n*, 608 So. 2d 1288, 1298-99, 1301 (Miss. 1992) (citations omitted); *Robinson v. Stewart*, 655 So. 2d 866, 868 (Miss. 1995) (*Presley* has no retroactive application). Reviewing the Mississippi law of sovereign immunity is no task for the squeamish, as the conditional and prospective overruling of some of the cases cited here makes explanations difficult. Suffice it to say that *Presley* fixed the point at which the old rules end and the new rules begin. That court called a halt to the several-year long "discussion" between the legislature and the supreme court as to what would replace the ancient and judicially-created doctrine of sovereign immunity. The supreme court's ruling of August 31, 1992 "suddenly scraps the continuing, temporal extensions of immunity the State of Mississippi and its political subdivisions were granted" by a statute that attempted legislatively to reinstate the traditional judicial rules on sovereign immunity. *Presley*, 608 So. 2d at 1298. That statute, Miss. Code Ann. § 11-46-6, effectively

preserved the case law we cite here until August 1992. *Robinson*, 655 So. 2d at 868. The rules cited are of the law as it existed in 1990 at the time of this accident. Applying that law, we are left with two considerations: whether Rankin County was immune from suit under the common law and whether that immunity was limited by the presence of liability insurance.

Some of the decisions cited by the parties concern the liability of *municipalities* in cases such as this. A municipality is not liable for damage resulting from execution of governmental functions; it is liable when such damage results from the performance of a proprietary function. *Nathaniel v. City of Moss Point*, 385 So. 2d 599, 601 (Miss. 1980) (citation omitted). In the determination of the nature of the function, *Wall v. City of Gulfport*, 252 So. 2d 891 (Miss. 1971) is especially cogent. Two months after hurricane Camille had blown away a stop sign from an intersection where it had been for several years, a passenger was killed in an automobile accident when a motorist failed to stop before entering the intersection where the sign had been. *Wall*, 252 So. 2d at 892. It appeared that but for the absence of the sign, the accident would not have happened. *Id.* The court distinguished between *Wall's* relevant facts and those presented two years earlier in *Tucker v. City of Okolona*, 227 So. 2d 475, 475 (Miss. 1969). *Wall*, 252 So. 2d at 893. The court explained that two reasons favored concluding that *Wall* presented an exercise of a governmental function: there was no active negligence on the part of the city operating in the accident and the decision to place a traffic control device is a classic governmental function. As the court stated:

[T]here is a marked distinction between maintaining an overhead traffic light and the replacement of one that has been completely removed. The action of the city in having a defective light which showed green to both oncoming vehicles could render the street unsafe for persons using ordinary care for their own safety. However, the absence of any traffic control device at an intersection does not render the intersection unsafe for use by persons exercising ordinary care and caution for their own safety. It is a well settled rule that the decision by a municipality whether to place traffic control devices at an intersection is a governmental function and a municipality cannot be held liable for failure to place traffic control devices at an intersection.

Id. This case indicates that a municipality likely would not have been liable for the sort of accident that occurred here. See *King v. City of Jackson*, 667 So. 2d 1315, 1316 (Miss. 1995).

However, this is not a case in which the governmental/proprietary distinction applies. Counties, as subdivisions of the state, had absolute sovereign immunity in 1990. *Berry v. Hinds County*, 344 So. 2d 146, 147-48 (Miss. 1977) (citations omitted) (our discussion of this decision's status and validity is contained in the first footnote to this decision). A county enjoyed immunity from suit, regardless of whether the function giving rise to liability was governmental or proprietary, unless the immunity was abrogated by statute. *Id.* There is much authority in Mississippi supporting the proprietary/governmental distinction, but it has always been applied to municipalities. "[This test] is peculiar to municipalities and is 'different both in origin and scope from the 'sovereign' or governmental immunity of the state.'" *Strait v. Pat Harrison Waterway Dist.*, 523 So. 2d 36, 40 (Miss. 1988) (citations omitted) (our discussion of this decision's status and validity is contained in the first footnote to this decision). Counties "are political divisions of the State, created for

convenience. They are not corporations[,]” such as are municipalities. *Brabham v. Hinds County Bd. of Supervisors*, 54 Miss. 363, 364 (1877) (holding that these principles “still apply today”) (*quoted in LeFlore County v. Big Sand Drainage Dist.*, 383 So. 2d 501, 502 (Miss. 1980)); *see Berry*, 344 So. 2d at 148. Counties can neither “sue nor be sued, except as authorized by statute.” *Brabham*, 54 Miss. at 364.

One recent authority directly on point is *Webb v. County of Lincoln*, 536 So. 2d 1356 (Miss. 1988). For some period of time a stop sign had marked the termination of Robert Adams Road onto the perpendicular Hog Chain Road. On the night in question, the sign was missing for reasons unstated in the opinion and perhaps unknown to the parties. The driver of a vehicle on Robert Adams Road did not realize the road was ending, and proceeded through the “T” intersection and struck a tree on the other side. The supreme court noted that the Mississippi Code, section 19-13-51 partially abrogated sovereign immunity as to the board of supervisors, not the county, for damage resulting from defects in bridges and culverts. *Webb*, 536 So. 2d at 1359. This left a county board with the “authority to make discretionary decisions with regard to the general condition and state of maintenance of county roads and bridges, thus leaving intact the board’s qualified immunity for such decision” *Webb*, 536 So. 2d at 1359 (citing *State v. Lewis*, 498 So. 2d 321, 323 (Miss. 1986)). The county itself was completely immune from suit for injuries resulting from the missing stop sign, while the board of supervisors enjoyed the qualified immunity just described. Thus neither the board nor the county was liable.

Recent legislative action has potentially made the distinction between proprietary and governmental functions applicable to cases involving the state and its political subdivisions, such as counties. Miss. Code Ann. § 11-46-9(d) (Supp. 1995). Since this statutory provision was not in place at the time the Hutchinsons’ claim arose, we must consider whether a statute that existed at the time of the accident abrogated the immunity otherwise enjoyed by Rankin County.

If liability insurance is in effect in such county, such county may be sued by anyone affected to the extent of such insurance carried; provided, however, that immunity from suit is only waived to the extent of such liability insurance carried and a judgment creditor shall have recourse only to the proceeds or right to proceeds of such liability insurance.

Miss. Code Ann. § 19-7-8(2) (1972). As a consequence of this statute, Rankin County would have waived its immunity from the Hutchinsons’ suit if it had insurance coverage for claims like the Hutchinsons’. *See Van Ovest v. City of Ackerman*, 147 F.R.D. 112, 122 (N.D. Miss. 1993) (citations omitted) (insurance coverage creates an exception to *Presley’s* prospective abrogation of sovereign immunity). The record does not reveal whether such coverage was in place. Accordingly, we are unable to resolve this case based on sovereign immunity.

The trial court on remand should conduct whatever proceedings it deems necessary, to determine whether Rankin County had insurance coverage applicable to this claim at the time of the accident.

2. Remaining Issues

Prior to trial, an affidavit was obtained from an individual who lived near the accident site. In the affidavit, the individual stated, under oath, that stop signs had been missing from the scene of the accident for months. This testimony contradicted the County’s proof that it had sent repair crews to

the site of the accident several times to replace stolen signs. The individual providing the affidavit died prior to trial. Ten days before the trial was to begin, the Hutchinsons' attorney notified the County of the death. At trial, the Hutchinsons offered the affidavit for admission in evidence. The County objected, contending that it contained inadmissible hearsay. The trial judge overruled the objection and admitted the affidavit under Mississippi Rule of Evidence 804(b)(5). We conclude that the trial court did not abuse its discretion in so doing.

The rules of evidence provide, under what is commonly known as the "catch-all exception" to the hearsay rule, for admission of:

A statement not specifically covered by any of the forgoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the Court determines that (a) the statement is offered as evidence of material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interest of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial to provide the adverse party a fair opportunity to prepare to meet it"

M.R.E. 804(b)(5). If a trial judge admits hearsay evidence under this exception, his decision is not subject to reversal in the absence of an abuse of discretion. *Parker v. State*, 606 So. 2d 1132, 1139 (Miss. 1992).

There was no abuse of discretion by the trial judge. The document admitted was an affidavit, given under oath, thereby indicating some degree of trustworthiness. There is no reason to doubt the affiant's credibility when he made the statement. *Parker*, 606 So. 2d at 1139. While the testimony given in the affidavit was not then subject to cross-examination, the County presented ample evidence in direct opposition to the import of the affidavit. The affidavit is probative of a central issue—whether there was a failure to properly maintain signs at the intersection. Moreover, the County was given adequate time prior to trial to consider the impact of the affiant's absence on its case and to prepare its defense. There is no suggestion by any of the parties that the County made efforts to depose the affiant or that the County had information that would directly impeach the affiant's statements other than the evidence it presented on the issue of whether signs had been replaced at the intersection. Hutchinson offered other witnesses who were cross-examined, who made the same assertions. Under these circumstances, the trial judge did not abuse his discretion in admitting the affidavit.

The County would have us reverse on grounds that the verdict was contrary to the overwhelming weight of the evidence. A verdict may not be reversed on this ground unless no reasonable juror could have concluded that, viewing the evidence in the light most favorable to the Hutchinsons, the County was liable. *Sowell v. Meridian Mattress Factory, Inc.*, 263 So. 2d 190, 191-92 (Miss. 1972). The Hutchinsons presented evidence that the stop sign at this intersection was missing and that the County had failed to replace it after being notified. We must view the evidence in the light most favorable to the Hutchinsons. There is no argument by the County that the jury was improperly

instructed on negligence law, including comparative negligence, and in fact the instructions do not appear in the record. There is evidence -- even if contradicted -- that there was no stop sign, that there had not been one for weeks, and that the absence of the sign was the proximate cause of the accident. Accordingly, the weight of the evidence does not require reversal.

Finally the County contests the amount of the jury's award. A jury award is subject to reversal only if damages are excessive in light of the evidence presented at trial. *See Copeland v. City of Jackson*, 548 So. 2d 970, 974 (Miss. 1989) (citation omitted); *Entex, Inc. v. McGuire*, 414 So. 2d 437, 443-44 (Miss. 1982). In this case, the jury returned verdicts in favor of the younger Hutchinson in the amount of \$42,000.00, and \$5,250.00 in favor of his father. As to the damages suffered by the father, the jury's verdict apparently represents compensation for the loss to his car and is justifiable in light of evidence that repairs to the car cost over seven thousand dollars. The son's actual medical damages amounted to over thirteen thousand dollars. However, the jury was properly asked to award compensation to the son for his pain and suffering and the additional amount awarded can be viewed as reasonable compensation for that element of damages. Evidence was presented that the fracture of the son's jaw, lacerations in his mouth, and the loss of several teeth, caused excruciating pain. Moreover, the jury, having been properly instructed on the issue of comparative fault, could reasonably conclude that the son was not contributorily negligent. *See Purina Mills, Inc. v. Moak*, 575 So. 2d 993, 997 (Miss. 1990) (citations omitted). The evidence at trial is not so wanting that we can reverse the jury's award.

In conclusion, the trial court is to determine if there was any insurance in effect at the time of this accident, insuring Rankin County in such a manner as to cover claims arising from negligence in the maintenance of the stop sign. If there was, then judgment is to be reinstated in favor of the Hutchinsons consistent with the jury verdict rendered in this case. If there was no insurance, then the case against Rankin County is to be dismissed. Should insurance have been available at the time to cover this claim, but a claim cannot now be made on that policy, the court will need to determine the impact of Mississippi Code, section 19-7-8(2), on the waiver of sovereign immunity.

THE JUDGMENT OF THE CIRCUIT COURT OF RANKIN COUNTY IS REVERSED AND THIS CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE PARTIES.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, AND McMILLIN, JJ., CONCUR.

BRIDGES, P.J. , AND PAYNE, J., NOT PARTICIPATING.