

Mississippi Court of Appeals Bars Lawsuit Against Conservation Officers

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Photograph of the Tchoutacabouffa River; courtesy of the Land Trust for the Mississippi Coastal Plain.

In the summer of 2009, tragedy struck on the Tchoutacabouffa River in Harrison County, Mississippi. A boater fleeing from Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP) conservation officers collided with another boat, killing the driver and seriously injuring a passenger. Family members of the victims (collectively “the plaintiffs”) filed suit for wrongful death against the MDWFP under the Mississippi Torts Claim Act, alleging the conservation officers acted with reckless disregard for the safety of the victims and other boaters using the river. Following a bench trial, the

Harrison County Circuit Court ruled against the MDWFP and awarded judgment to the plaintiffs in the amount of \$500,000. The MDWFP appealed.

The Traffic Stop

On August 22, 2009, two MDWFP conservation officers witnessed a boater, Donald Bernius, speeding in a boat on the Tchoutacabouffa River. The officers, who were in two separate patrol boats, approached Bernius’ boat to investigate and Bernius came to an initial stop in the middle of the river. According to the officers, the stop

occurred in a dangerous stretch of the river where blind spots made it difficult for boaters to see other boaters approaching in opposite directions.

To eliminate a potential hazard to boaters, the officers ordered Bernius to move to a safer location. One officer proceeded ahead to block oncoming traffic, and the other directed Bernius to follow him. Bernius initially complied with instructions, but then abruptly turned and fled. The collision occurred shortly thereafter. A blood sample drawn from Bernius at the hospital two hours later indicated that his blood-alcohol concentration (BAC) was .25 percent – three times the legal limit. Bernius pled guilty to boating under the influence and is currently serving a twenty-year prison sentence.

Liability

A government generally cannot be brought into a court of law without its consent. Governments, including state governments, have sovereign immunity from lawsuits unless authorized by law. The Mississippi Torts Claim Act (MTCA) sets forth the claims that may be brought against a governmental entity or its employees in Mississippi. Under the MTCA, the MDWFP and its officers may not be held liable for any claim arising out of the actions of an officer engaged in execution of law enforcement activities “unless the [officer] acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury.”¹

The Harrison County Circuit Court focused on the decision of the officers to direct Bernius to move his boat. In the court’s opinion, the officers acted with reckless disregard by permitting Bernius to continue operating his boat after being stopped for speeding. The court found that the officers’ instructions to Bernius violated the MDWFP’s Standard Operating Procedures (SOPs) for Boating Under the Influence (BUI) situations. SOP 04/01, for example, requires citations to be issued “at the scene” and SOP 07/03 states that an officer’s “effort to establish probable cause for BUI will be after an [o]fficer’s stopping of watercraft...”² Although the officers testified that they did not observe signs of intoxication at the initial stop, the court questioned this testimony in light of Bernius’s BAC and the reports of others witnesses claiming to have smelled alcohol on Bernius after the accident. The court faulted

the officers for not questioning Bernius about the speeding or possible use of alcoholic beverages immediately after the stop. The court concluded that the officers’ decision “was made with a deliberate disregard for the risk.”³

On appeal, the MDWFP argued that the circuit court misapplied the reckless disregard standard. A divided Mississippi Court of Appeals agreed. The court gave greater weight to the officers’ testimony regarding their observations of Bernius during the initial stop and their concerns about the blindspot and desire to quickly move the boats to a safer location. The court found the officers “possessed the discretion to request that Bernius pull out of the hazardous and high-traffic area of the river.” The court reversed the decision of the circuit court and concluded that the evidence failed to show the officers acted in reckless disregard.

Several justices dissented from the majority opinion. The dissenting justices argued the evidence supported a finding of reckless disregard due to the officers’ failure to take steps to determine whether Bernius was intoxicated and to properly control him after making contact.

Conclusion

Law enforcement officers routinely make split-second decisions. In hindsight, it can be easy to pass judgment. This is especially true when a traffic stop results in the death of an innocent person. The bar for defeating sovereign immunity, however, is set pretty high. As indicated by the dissenting opinion, these cases are not easy to resolve. The plaintiffs won the first round. The MDWFP won the second. It is unknown at this time whether the plaintiffs intend to appeal to the Mississippi Supreme Court and fight a third round. 🦋

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Endnotes

1. MISS. CODE ANN. § 11-46-9(1)(c).
2. Mississippi Department of Wildlife, Fisheries, and Parks v. Webb, 2017 WL 1396686 at *3 (Miss. Ct. App. Apr. 18, 2017).
3. *Id.*
4. *Id.* at *11.