Flood Damage and the Mississippi Tort Claims Act: Wading Through the "Quagmire of Confusion"

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Introduction

Recent cases suggest that Mississippi state and local governments are vulnerable to flood damage claims. As several members of the Mississippi Supreme Court have acknowledged, however, this area of law lacks perfect clarity and stability. Beginning in 2018, the Court has tried to contain a tightening policy restricting the liability of state and local governments. Government officials and property owners alike will be watching closely to see when and how the law develops in this area. This article will discuss the underlying law and recent cases relating to government liability due to flooding in Mississippi.

The Mississippi Tort Claims Act (MTCA)

For much of the state's history, it was nearly impossible to sue Mississippi state and local governments for damages (i.e., for money). This policy followed from the common law doctrine known as sovereign immunity, which means governments and government entities cannot be sued for civil claims. But in 1982, the Mississippi Supreme Court announced "the abolition" of state sovereign immunity, which the court described as "out of date in modern society and modern legal concepts." Still, despite that sweeping language, the Court left room for the state legislature to craft a more limited doctrine of state immunity. The Mississippi legislature responded by enacting the Mississippi Tort Claims Act (MTCA). It applies to "torts," a type of action causing harm or injury that is known as a civil offense rather than criminal.

The "Bedeviling" Discretionary Function Immunit

The MTCA broadly waives sovereign immunity in Section 11-46-5 of the Mississippi Code, meaning the state and its "political subdivisions" *can* be sued, they are no longer immune from suit. But a subsequent provision, Section 11–46–9(1), provides an extensive list of exemptions for when suit cannot occur. These exemptions re-establish immunity under certain circumstances. Of the exemptions, few if any have been more consequential than exemption (d), which affords so-called "discretionary function" immunity. It prevents bringing legal claims against a governmental entity "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…."

What is a "discretionary function"? This is a key question which Mississippi jurists have labored to answer. Generally, the purpose of making a government liable only for discretionary functions is to insulate it from liability for the activities it has to do, those that are compulsory and/or required by law, while making government liable for the ones that were optional, the ones it chose to do. The distinction is seldom straightforward.

Typically, when trying to make legal rules out of vague terms like "discretionary function," courts will adopt "tests." Yet discretionary function immunity has proven to be an elusive concept. In 1999 the Mississippi Supreme Court adopted a federal test based on analogous language in the Federal Tort Claims Act; abandoned that approach in a 2014 case; then returned to the *same* federal approach four years later, in 2018. That test, known as the public policy function test (PPFT), offers the current Mississippi approach to discretionary function immunity. Under the PPFT, a government entity may *not* be sued where both: (1) the challenged act or omission involves an element of choice or judgment, and (2) "that choice or judgment involved social, economic, or political policy considerations."[1]

A Basic Illustration

The basic idea of discretionary function immunity is simple enough. Political officials must constantly balance social and political variables, and adding legal calculations might unduly complicate their decision making. As the Mississippi Supreme Court explained in *Wilcher v. Lincoln County Bd. of Supervisors*, the courts try to avoid second-guessing the policy decisions made by the executive branch.

To illustrate, consider two hypotheticals where a fictional Property Owner sues Example City over a dam and reservoir project after his property was damaged by flooding:

A. GOVERNMENT IS IMMUNE FROM SUIT. Property Owner alleges that Example City should have spent an additional $10 million on its recent dam and reservoir project.
B. GOVERNMENT IS NOT IMMUNE. Property Owner alleges that Example City's employee should have followed a required basic industry procedure in maintaining or operating the recent dam and reservoir project.

Under a simplified version of the PPFT, to determine whether a discretionary function was performed, one could ask: which is the type of activity for the Example City Mayor to make part of her campaign: a dam and reservoir project or the maintenance procedures for the dam? Spending millions of dollars on a project is an inherently economic decision and a political one, therefore both fall under part two of the PPFT. Hence, that sort of decision (shown in hypothetical A) could not be challenged in a lawsuit. On the other hand, "basic maintenance decisions," the Court has repeated, "do not involve policy considerations,"[3] excusing Example City from suit under hypothetical B. Additionally, it could be argued that hypothetical B not only did not involve policy, but that it did not involve choice, and so would not be considered discretionary.

Still, the Mississippi Supreme Court has held that "merely saying that maintenance costs money does not make the failure to provide it an 'economic policy' decision."[4] So where can the line be drawn? Even when the Court returned to this test in 2018, it "admit[ted] the public-policy function test is not perfect," and acknowledged that earlier Mississippi cases had "stretched the bounds of 'policy' beyond credulity."[5] Recent flood damage cases, however, have been handled fairly consistently: the liability floodgates appear to be open.

Assumption of the Duty to Operate and Maintain

The Court's 2018 return to the PPFT was an effort to correct course. Nevertheless, within months, Justice Kitchens would describe the case law as a "quagmire of confusion."[6] In 2020 Justice Coleman lamented that the Court's "wide-ranging" decisions "fail to offer judges and lawyers practicing in Mississippi a reliable and understandable explanation" of what he called the "bedeviling" discretionary function exemption.[7]

In the 2019 case *Moses v. Rankin County*, several homes in a housing subdivision were flooded and damaged following severe rain.[8] Affected homeowners sued the county to recover for their losses. The homeowners alleged that the county's failure to properly maintain an adjacent creek caused the flood damage, to which the county responded by asserting discretionary function immunity. In turn, the homeowners claimed the facts were similar to a mid-century U.S. Supreme Court case in which the U.S. Coast Guard was sued for marine cargo losses that allegedly resulted from its negligent operation of a lighthouse.[9] In that case the U.S. Supreme Court kept it simple, reasoning that the Coast Guard was not required to undertake lighthouse maintenance, but once it did so, it could be liable for resulting injuries.

The Mississippi Supreme Court agreed with the homeowners. It held that because the county "undertook the duty to inspect and maintain" the creek, the county was then "obligated to use due care to make certain that [the creek] was properly maintained." The case was returned to the trial court. While the homeowners would still have to prove their case, the homeowners were allowed to continue their lawsuit against the county.

Expanding the Scope of the Duty to Maintain

In *Williams v. City of Batesville*, the Mississippi Supreme Court appears to have extended the *Moses* holding.[10] There, a homeowner notified the city that her property was being flooded by a sewage backup. The city tried several solutions over the next year. After those measures consistently failed, it eventually decided to install a $10,000 pump station near the homeowner's property. The homeowner alleged that the city was negligent for waiting a year to install the pump station, asserting that the basis for her loss was "the complete initial failure and subsequent failures of the City to properly maintain its sewage lines." In turn, the city argued that its

decision of whether and when to pay $10,000 for a pump station was shielded by discretionary function immunity.

The Court disagreed with the city, finding that no discretionary function had occurred: "merely saying maintenance costs money does not make the failure to provide it an 'economic policy' decision." Notwithstanding the pump station's price tag and the fact that it was hard infrastructure, the Court held that the city's decision-making process was not immune from the negligence suit because the disputed issue was the city's basic maintenance decision, which did not involve public policy. The case was remanded for the homeowner to continue pursuing her claims.

Finding the Challenged Act or Omission

A 2021 Mississippi appellate court case, *Hood v. City of Pearl*, demonstrates the importance of correctly identifying the allegedly tortious act that is the reason for the claim, before turning to the PPFT to assess whether immunity applies.[11] In *Hood* a house was flooded after a heavy rainfall. The homeowners sued the city for negligence. The trial court ruled for the city, finding that the homeowners' lawsuit was barred by discretionary function immunity. But the Mississippi Court of Appeals disagreed, and it reversed the trial court. It found that the lower court had "mischaracterized" the homeowners' complaint. The trial court read the complaint as having challenged the city's decision to approve recent development projects that allegedly contributed to the flooding. While the Court of Appeals agreed that development approval decisions would be immune from suit, it found that the bases of this suit were other "tortious activities" – namely, maintenance or a lack thereof – that were *not* immune from suit.

In *Moses*, the Supreme Court applied an assumption-of-duty approach to discretionary function immunity. This approach appears frequently in flooding cases. It means that once a city or county undertakes a flood-mitigation responsibility, it also assumes legal liability for inspection and maintenance. To the extent that a maintenance decision is cost-intensive, implicating economic concerns, the *Williams* decision could be read as extending the scope of what constitutes a nondiscretionary "maintenance" decision by subjecting a city's cost-benefit analysis – of expenditures for actual infrastructure improvements – to the court's second-guessing. Or the *Williams* decision could be read as consistent with *Moses*'s holding that a government entity, once it undertakes maintenance, has an obligation for damages caused by that effort. Given the razor-thin distinctions employed with this "bedeviling" rule, the precise nature of the challenged government action is a critical detail.

Conclusion: A Contested Area of Law

In a 2020 case challenging the safety of state traffic signage, the Mississippi Supreme Court held that the placement of traffic-control devices involves "economic, political, or social concerns," and is therefore immune from suit, but that the actions of individual flagmen (i.e., on-site state traffic employees) are *not* immune.[12] This distinction, the court reasoned, comes from the purpose of the PPFT, described there as the effort "to discern between actual policy decisions of government made by policymakers versus simple acts of negligence by government employees or agents." The important question, according to the Court, is whether the challenged decision was made by a policymaker considering social, economic, or political concerns. The essential questions raised in flooding cases have been (1) whether the city or county assumed responsibility for the relevant area, and (2) whether the allegedly negligent act or omission can fairly be described as "maintenance."

Endnotes

1. Pruett v. City of Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982).
2. Wilcher v. Lincoln Cnty. Bd. of Supervisors, 243 So. 3d 177, 187 (Miss. 2018).
3. Moses v. Rankin Cnty., 285 So. 3d 620, 625-26 (Miss. 2019).
4. Williams v. City of Batesville, 313 So. 3d 479, 485 (Miss. 2021) (citations and internal quotations marks omitted).
5. *Wilcher*, 243 So. 3d at 188.
6. Hudson v. Yazoo City, 246 So. 3d 872, 883 (Miss. 2018).
7. Smith v. Mississippi Transportation Comm'n, 292 So. 3d 231, 235 (Miss. 2020).
8. *Moses*, 285 So. 3d at 621.
9. Indian Towing Co. v. United States, 350 U.S. 61 (1955).
10. Williams v. City of Batesville, 313 So. 3d 479 (Miss. 2018).
11. Hood v. City of Pearl, No. 2020-CA-00936, *10 (Miss. Ct. App. Nov. 9, 2021) (citations and internal quotations marks omitted).
12. *Smith*, 292 So. 3d at 234-235.