The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Member, Petkoff and Feigelson, PLLC

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

Year licensed: 2007; BPR number: 026257

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Mississippi, 102374, 10/11/06, active.

Arkansas, 2009034, 4/8/09, active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Judicial law clerk, Hinds County Circuit Court, Hind County Mississippi, August 2006-July 2007.

Judicial law clerk, Mississippi Court of Appeals, August 2007-July 2008.

Associate attorney; McDonald Kuhn, PLLC; Memphis, Tennessee, August 2008-October 2010.

Associate attorney, Petkoff & Feigelson, October 2010-February 2015.

Member; Petkoff & Feigelson, PLLC; February 2015-present.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

My present law practice primarily consists of civil defense. The major areas of law in which I practice are the following: Aviation (30%), General insurance defense (20%), Insurance coverage (10%), breach of contract (5%), Federal Aviation Administration Administrative Actions (1%), Freight Claims (4%), and Tennessee Governmental Tort Liability Act litigation (30%).

My practice includes cases in both federal and state courts in states throughout the midsouth. With regard to my aviation practice, my firm represents commercial airlines, aviation insurers, airports, and aerial applicators. These cases range in complexity from a simple baggage claim to a multi-person death case. My firm has also defended trucking companies in automobile accidents and transportation brokers in freight cases. Our defense of the Memphis-Shelby County Airport Authority has involved premises liability cases and high profile Americans with Disabilities Act claims. In the area of general insurance defense, I have defended the Memphis Zoo, the Memphis Grizzlies, and various little league baseball teams.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I began my legal carrier as a judicial law clerk for the Hinds County, Mississippi Circuit Court. In this position, I researched and drafted memorandum opinions and orders analyzing various aspects of law including motions for summary judgment, arbitration, motions to dismiss, workers compensation, and petitions for post-conviction collateral relief. I also prepared the Court for weekly hearings in the busiest trial court in the state by reviewing pleadings, analyzing

facts, and drafting research memoranda.

Next, I served as a judicial law clerk for the Mississippi Court of Appeals, which is Mississippi's intermediate appellate court. In this position, I drafted and edited opinions and dissents, researched and analyzed complex legal issues spanning nearly all areas of Mississippi law, and conferred and negotiated with judges and other law clerks regarding their positions on issues before the Court. While serving as a clerk, I drafted 35 opinions and 1 dissent for the Court of Appeals. These decisions involved civil, criminal, administrative, and workers' compensations cases. I have listed below some of the civil opinions that I drafted:

Waters v. Allegue, 980 So.2d 314 (Miss. Ct. App. 2008),

Franklin v. BSL, Inc., 987 So. 2d 1050, 1051 (Miss. Ct. App. 2008),

Frazier v. Mississippi Dep't of Transp., 970 So. 2d 221, 222 (Miss. Ct. App. 2007),

Sacks v. Necaise, 991 So. 2d 615, 625 (Miss. Ct. App. 2007) (Griffis, J., dissenting), and

Andrews v. Ford, 990 So. 2d 820, 821 (Miss. Ct. App. 2008).

I began practicing law with McDonald Kuhn, PLLC. As an associate attorney, I litigated cases in the following areas: medical malpractice defense, automobile accident defense, collections, subrogation, bankruptcy, premises liability defense, plaintiff's suites on behalf of businesses, eviction proceedings, replevin actions, insurance coverage, ERISA, trucking litigation, social security disability litigation, and workers' compensation. I also tried cases in general sessions court and circuit court, I drafted and argued motions in federal, circuit, and chancery courts in Mississippi, Tennessee, and Arkansas.

Currently, I practice with Petkoff and Feigelson. I began as an associate attorney and have since become a partner. While at Petkoff and Feigelson, I have practiced in the areas of insurance defense, aviation, breach of contract, trucking litigation, FAA Administrative Proceedings, construction litigation, insurance coverage, automobile litigation, Tennessee Governmental Tort Liability actions, freight claims, appellate practice, and Americans with Disabilities Act Claims. The aviation practice, in particular, allows me to analyze complex issues involving preemption, whether various federal statutes create private rights of action, and the intermingling of state and federal law.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I have handled several cases worth noting, which include the following: *Campbell v. Memphis-Shelby Cty. Airport Auth.*, No. W2013-01641-COA-R3CV, 2014 WL 2810204, at *1 (Tenn. Ct. App. June 20, 2014) (affirming summary judgment in premises liability case); *Atl. Cas. Ins. Co. v. Cheyenne Country*, No. 11-2273-STA-DKV, 2012 WL 1637432, at *13 (W.D. Tenn. May 9, 2012), aff'd, 515 F. App'x 398 (6th Cir. 2013) (affirming summary judgment denying insurance coverage); *Cohen v. Transportation Security Administration,* 2:16-CV-02529 (District Court granting Summary Judgment for Americans with Disabilities Act claim); *Nat'l*

Bankers Tr. Corp. v. Total Quality Logistics, LLC, No. 12-CV-02208-TMP, 2013 WL 12100719, at *7 (W.D. Tenn. Sept. 30, 2013) (granting Motion for partial summary judgment allowing offset for pending invoices related to freight claim); *Vicky Love v. Memphis-Shelby County Airport Authority*, CT-004243-16 (Cir. Ct. Shelby Cty 2016) (obtained summary judgment in premises liability case); and *Bennet v. U.S. Airways, Inc.*, C3661 (Cir. Ct. Sullivan Cty 2015) (obtained summary judgment for U.S. Airways on Air Carrier Access Act claim).

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not applicable.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

While I attended Mississippi State University for my undergraduate degree, I interned at the National Cotton Council. While at the Cotton Council, I Analyzed, prepared and disseminated information to educate cotton farmers on the 2000 farm bill. This gave me firsthand experience with the wording of legislation, creation of regulations, and the legislative process. I also prepared summaries for members of congress and their staff to educate them on the Council's position regarding various bills before congress.

I also had the honor of interning for the White House's Senior Advisor's Office during the summer of 2001. During this internship, I helped plan White House functions by investigating potential White House guests, researching political contributions, compiling guest lists, and contacting guests. I also addressed guests' needs and managed scheduling issues. The average workday began at 8:00 a.m. and ended at 7:30 p.m. During this internship, I had to familiarize myself with various bills related to the entertainment industry as one of my assignments.

During the summer before law school, I worked on Haley Barbour's campaign for Governor of Mississippi. I was in charge of the campaign's absentee ballot and voter registration drives. In this position, I had to become familiar with Mississippi's voter registration requirements in order to register new voters. I also studied Mississippi's rules regarding

absentee ballots.

While in law school, I participated in the Duberstein Moot Court Competition in New York City, and I drafted and helped pass Mississippi's first version of the Human Trafficking Act, Miss. Code Ann. §97-3-54, *et seq*. I also served as a law clerk for the Tollison law firm in Oxford, Mississippi, and the United States Attorney's Office for the Western District of Tennessee.

From 2006 until 2009, I served on the Governor of Mississippi's Juvenile Justice Advisory Committee and began the process of creating the bylaws for this new group. While in law school, I also served as a law clerk for the United States Attorney's Office for the Western District of Tennessee.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not applicable.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

I attended Mississippi State University from August 2003 until May 2006. I graduated Summa Cum Laude with a Bachelor of Arts in Political Science. MSU President's List (1999-2003), Haley Barbour Scholar; MSU Society of Scholars; and Nation Truman Finalist.

I attended law school at the University of Mississippi School of Law from August 2003 until May 2006. I graduated Cum Laude. University of Mississippi School of Law's Dean's list (2004-2006); American Jurisprudence Award in Legislation; and University of Mississippi School of Law Dean's Scholar.

PERSONAL INFORMATION

15. State your age and date of birth.

38; [redacted]1980

16. How long have you lived continuously in the State of Tennessee?

10 years

17. How long have you lived continuously in the county where you are now living?

I have lived in Dyer County since 2015.

18. State the county in which you are registered to vote.

Dyer County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Member of Dyer County Recycles 2015-present

Participant Dyer County Chamber of Commerce Leadership program 2018- present

Board Member Dyer County Waste Advisory Board 2018- present

Chairman of Deaconate for Dyersburg Cumberland Presbyterian Church 2019

Physical Plant Committee Board Member for Dyersburg Cumberland Presbyterian Church 2019

Member of Deaconate for Dyersburg Cumberland Presbyterian Church 2018-present

Board Member for the New Life Union Mission in Dyersburg 2018-present

Volunteer Youth Leadership of Memphis 2013-2015

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

a. If so, list such organizations and describe the basis of the membership limitation.

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

Not applicable.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Mississippi Bar Association 2006-present
Memphis Bar Association 2009-present
Tennessee Defense Lawyers' Association 2009-present
DeSoto County Mississippi Young Lawyers Association 2009-2010
Tennessee Bar Association 2014-present
Claims and Litigation Management 2015- present
Defense Research Institute 2014-present
Lawyer Pilot Bar Association 2012-present
Aircraft Owner and Pilot Association Panel Counsel 2015-present
Transportation & Logistics Council 2019

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

In 2014, the SMU Air Law Symposium selected me to give a presentation related to sovereign immunity in airport litigation in front of approximately 2,500 aviation attorneys.

Super Lawyer Magazine has recognized me as a rising start in aviation and aerospace law in 2014, 2015, 2016, 2017, and 2018.

I have received a 4.3 out of 5 rating by Martindale-Hubbell.

30. List the citations of any legal articles or books you have published.

James L. Cresswell, Jr., *Applying the Discretionary Function Exception to the Waiver of Sovereign Immunity in Airport Litigation*, 79 J. Air L. & Com. 665, 666 (2014).

The Drake Journal of Agriculture Law is in the process of publishing another article that I wrote titled, "The Time Has Come to Reconsider the Issue of Liability in Aerial Application Cases."

NBI CLE materials regarding Tennessee's law related to damages awards and the implications of the collateral source rule.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

12/18/14 – NBI CLE seminar, Using the Affordable Care Act to Minimize Damages in Injury Settlements in Tennessee

4/3/14 – SMU Air Law Symposium CLE seminar, Applying the Discretionary Function Exception to the Waiver of Sovereign Immunity in Airport Litigation.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

As discussed above, Governor Haley Barbour appointed me to his Juvenile Justice Committee from 2005 to 2008.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

James L. Cresswell, Jr., *Applying the Discretionary Function Exception to the Waiver of Sovereign Immunity in Airport Litigation*, 79 J. Air L. & Com. 665, 666 (2014). The entire document is my own personal effort except for some minor changes the law journal editors made.

Waters v. Allegue, 980 So. 2d 314, 316 (Miss. Ct. App. 2008). The entire document is my own personal effort with the approval of Justice T. Kenneth Griffis, who was a Court of Appeals Judge at that time.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I have always had an interest in public service, which is shown by my internships at the National Cotton Council, the White House, and the United States Attorney's Office.

Additionally, I have an interest in and talent for legal research, writing, and analysis. This is represented by my judicial clerkship with the Circuit Court of Hinds County, Mississippi, and my clerkship with the Mississippi Court of Appeals. My legal interests are also not isolated to one area of the law. I have handled cases involving the following types of matters: bankruptcy, criminal law, tort, contract, workers' compensation, insurance coverage, and professional liability. These interests and abilities make me uniquely qualified for this position.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

During law school, I had the honor of working with the law school's legislative clinic. While working for this clinic, I drafted and helped pass Mississippi's first version of the Human Trafficking Act, Miss. Code Ann. §97-3-54, *et seq*. This act, for the first time, criminalized human trafficking in Mississippi and helped bring awareness to the victims of this horrendous crime. I also volunteered weekly with the legal clinic's help line. While answering the help line, I gave free legal advice to the under privileged.

From 2005-2008, I served on the Mississippi Governor's Juvenile Justice Committee, which ensured that Mississippi's juvenile detainment centers complied with federal mandates.

In 2010, I volunteered with the Mississippi Bar Association's disaster relief effort related to the 2010 tornados that damaged much of central Mississippi.

I recently used my legal skills to help reorganize portions of my church's physical plant committee.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

The Tennessee Court of Appeals is Tennessee's intermediate, civil appellate court. It was created by the Tennessee legislature in 1925 and consists of 12 judges. The Court of Appeals is divided into the western, central, and eastern sections. Each section consists of four judges. Until recently, the judges only heard appeals from within their respective section. Now, the judges rotate in order to make the opinions of the court as a whole more uniform. The Court usually hears appeals in panels of three. The parties may appeal the Court's decisions to the Tennessee Supreme Court.

My selection to the court would add a conservative jurist that believes in judicial restraint and the separation of powers. Additionally, I will continue the Court's tradition of drafting thoughtful and timely opinions.

38. Describe your participation in community services or organizations, and what community

involvement you intend to have if you are appointed judge? ***(250 words or less)***

While I lived in Memphis, I was a Rotarian. I also volunteered with Youth Leadership of Memphis. This organization strives to teach under privileged boys a strong work ethic and Christian values. While I volunteered for this organization, I would get up on Saturday at 5:00 a.m. in order to gather and prepare lawncare equipment. Then, I would pick up the boys and take them to a restaurant for breakfast and a devotional. We would then organize into teams and landscape yards. The boys were allowed to keep the money that the organization earned.

I am active in my church, the Dyersburg Cumberland Presbyterian Church. I am chairman of the diaconate and a member of the physical plant committee.

I am also a board member for the New Life Union Mission in Dyersburg. This organization focuses on the development of underprivileged youth and their families. The goal of this organization is to break the chain of poverty in our community by instilling Christian values into these children and helping them with educational and life choices through its programs. Since joining the board, we have revised the Mission's bylaws and streamlined the focus of the organization.

I am also a board member for the Dyer County Solid Waste Advisory Committee. This board is appointed by the Mayor of Dyersburg. Its goal is to increase recycling opportunities in Dyer County through the procurement of grants.

If appointed, I will continue volunteering with these organizations if allowed by the Code of Judicial Conduct.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I am very passionate about legal research and writing. I have clerked for trial and appellate courts in Mississippi, and I have practiced law in Mississippi, Tennessee, Arkansas, and Kentucky, which gives me experience with several different court systems. This experience, along with my current practice, have sharpened my legal research and writing skills, which I have also used to publish law journal articles and CLE presentations.

I have lived in a town of 54 people and in a City of approximately 1.3 million. Thus, I have experienced both rural and urban life, and I have the ability to identify with people from both backgrounds. This ability is useful for this position because the western section is both rural and urban.

I have been involved in public service because I believe in using my talents to help my community. My greatest asset is my work ethic. While working on my father's farm, I often had to get up before dawn to go to work, and I did not get off of work until 9:00 p.m. Whether it is getting up early to help children landscape yards or staying up late to draft a law journal article in an area of the law that interests me, none of this would have been possible without the work ethic that my father instilled in me at an early age.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. In *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008), the Tennessee Supreme Court held that a party moving for summary judgment must either "affirmatively negate an essential element of the nonmoving party's claim or establish an affirmative defense." *Id.* This holding was contrary to the federal summary judgment standard and the standard adopted by a majority of other jurisdictions. This standard often required the movant to prove the absence of evidence, which is extremely difficult. Despite disagreeing with this standard, I often had to work within this standard to assist my clients because it was binding precedent until the Tennessee Supreme Court overturned it.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Associate Justice T. Kenneth Griffis, Mississippi Supreme Court, P.O. Box 249, Jackson, MS 39201, [redacted]

B. Neal Chatham, Director New Life Union Mission, P. O. BOX 179, Dyersburg, TN 38025, [redacted]

C. Leo Arnold, partner Ashley & Arnold, P. O. Office Box H, Dyersburg, TN 38024, [redacted]

D. T.J. Harvey, Executive Director Alzheimer's Mississippi, Inc., 855 S Pear Orchard Rd #501, Ridgeland, MS 39157 [redacted]

E. Brian Kelsey, State Senator, 425 5th Avenue North, Suite 742, Cordell Hull Bldg., Nashville, TN 37243, [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Court of Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 13, 2019.

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

James L. Cresswell, Jr.
Type or Print Name

Signature

2/13/19
Date

026257
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Mississippi Bar 102374

Arkansas Bar 2009034

79 J. Air L. & Com. 665

Journal of Air Law and Commerce
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Article

James L. Cresswell, Jr. [a1]

APPLYING THE DISCRETIONARY FUNCTION EXCEPTION TO THE WAIVER OF SOVEREIGN IMMUNITY IN AIRPORT LITIGATION

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*666 I. INTRODUCTION

CONGRESS PASSED the Federal Tort Claims Act in 1946, which waived sovereign immunity for certain tort claims filed against the United States. Many states have also passed their own acts that waive sovereign immunity for tort claims filed against them.

One of the most litigated exceptions to these acts has been the "discretionary function" exception. Under this exception, the government's actions are immune from suit if they are based upon the "performance or the failure to exercise or perform a ***667** discretionary function . . . ." [1] Courts have struggled to determine what is and what is not a discretionary function and have developed several tests to determine the types of government actions that fall within this exception.

This article will address several issues, including: (1) the history of sovereign immunity and its impact on airport litigation in the United States; (2) the waiver of sovereign immunity by the federal and state governments; (3) the various tests that courts have developed related to the discretionary function exception; and (4) the courts' inconsistent application of the discretionary function exception. Then, this article concludes with a proposed solution to the courts' inconsistent application of the discretionary function exception.

II. THE HISTORY OF SOVEREIGN IMMUNITY IN THE UNITED STATES

The doctrine of sovereign immunity developed from the common law maxim, "the King can do no wrong . . . ." [2] In other words, the sovereign "cannot be summoned to appear before himself in his own courts--a doctrine which was transplanted in modified form from the common law of England to this country." [3]

One of the first U.S. Supreme Court cases to mention the applicability of sovereign immunity to this country's jurisprudence is The Siren. [4] In The Siren, Justice Stephen Field emphasized that the United States "cannot be subjected to legal proceedings at law or in equity without [its] consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress." [5] By the middle of the nineteenth century, the courts in this country readily accepted this doctrine. [6]

*668 III. APPLICATION OF SOVEREIGN IMMUNITY TO PUBLIC AIRPORTS PRIOR TO THE PASSAGE OF THE FEDERAL TORT CLAIMS ACT AND THE CORRESPONDING STATE STATUTES

Courts in this country were not as willing to find municipal governments immune under the doctrine of sovereign immunity as compared to their broad application of this doctrine to the federal and state governments. In Wendler v. City of Great Bend, the Kansas Supreme Court recognized this distinction and noted that "our courts have almost from the beginning denied tort immunity to municipal governments performing 'proprietary' or 'permissive' functions. The State is usually deemed immune regardless of the kind of function it is performing. What justifies the difference between the State and its municipal subdivisions is baffling." [7]

Justice William Brennan elaborated on this distinction in Owen v. City of Independence as follows:

> The governmental-proprietary distinction owed its existence to the dual nature of the municipal corporation. On the one hand, the municipality was a corporate body, capable of performing the same "proprietary" functions as any private corporation, and liable for its torts in the same manner and to the

> same extent, as well. On the other hand, the municipality was an arm of the State, and when acting in that "governmental" or "public" capacity, it shared the immunity traditionally accorded the sovereign. [8]

Many public airports did not enjoy the protection of sovereign immunity during the first half of the twentieth century because courts considered the operation of a public municipal airport to be a proprietary endeavor. [9] By 1957, at least seventeen states had determined that the operation of a municipal airport was a proprietary function, which could subject the municipality to liability. [10]

***669** The Kansas Supreme Court came to this conclusion in Wendler v. City of Great Bend. [11] In Wendler, the plaintiff owned an aircraft that was destroyed in a hangar fire at the Great Bend Municipal Airport. [12] The plaintiff sued the City of Great Bend, alleging that the fire resulted from the City's negligence. [13] The City argued that it was immune under the doctrine of sovereign immunity. [14]

In its analysis, the Kansas Supreme Court emphasized:

> Persuasive is the fact that we have found no decision, and the defendant has cited none, in which any court of last resort in this country has held the operation and maintenance of an airport by a municipality to be a governmental function affording the municipality governmental immunity from tort liability in such operations, except where the municipality has been expressly exempt from such liability by statute. [15]

The court found that the City was acting in its proprietary capacity by operating a public airport. [16] Therefore, the doctrine of sovereign immunity did not apply, and the airport was subject to liability. [17]

IV. THE WAIVER OF SOVEREIGN IMMUNITY BY THE FEDERAL GOVERNMENT AND THE STATES

In 1946, Congress waived immunity for all torts committed by the U.S. government, except for certain enumerated exceptions, by passing the Federal Tort Claims Act. [18] This Act resulted from "a feeling that the Government should assume the obligation to pay damages for the misfeasance of [[its] employees in carrying ***670** out its work." [19] Congress, however, chose not to waive immunity for:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. [20]

The states soon followed Congress's example, and "[i]n 1957 Florida became the first American jurisdiction to abolish the rule that government entities are immune from tort liability when acting in a governmental, rather than a proprietary, capacity." [21] Since that time, most other states have also waived sovereign immunity except in certain limited circumstances and have included an exception to this waiver for actions that constitute a discretionary function. [22]

The discretionary function exception to the general waiver of sovereign immunity has been a major source of litigation in most jurisdictions in this country. [23] Courts have struggled to determine what actions are discretionary. [24] One commentator noted that "it is notoriously difficult to translate ordinary words into legal dictates. Doing so with 'discretion' has been an effort of near-Herculean proportions." [25] The state and federal courts have developed several tests to determine whether an action is immune because it is a discretionary function. [26] Commentators and courts have distilled these tests into the following categories: (1) the semantic approach; (2) the Good Samaritan approach; (3) the policy-balancing approach; and (4) the planning/operational approach. [27]

***671 A. The Semantic Approach**

Under the semantic approach, the court defines what is or is not a discretionary act and then applies this definition to the facts before it. [28] These cases often depend on the dictionary definition of discretion, generally finding that any "decision involving some exercise of judgment is worthy of immunity." [29]

Although many courts have discussed this approach in their opinions, it is seldom used because all actions at some level involve the use of discretion. [30] The California Supreme Court described this problem as follows:

> [I]n rejecting the state's invitation to enmesh ourselves deeply in the semantic thicket of attempting to determine, as a purely literal matter, "where the ministerial and imperative duties end and the discretionary powers begin. . . . [I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail." [31]

Thus, the semantic approach is overly broad because at some level, a court could find that any action involves some form of discretion and is, therefore, immune. [32]

In the context of lawsuits involving public airports, one could consider almost any action taken by an airport as discretionary: from the design of the taxi cab loading area to the decision of when and where to inspect the airport terminal building floors for slip hazards. As a result, the semantic approach, when taken to the extreme, can quickly become the exception that swallows the general waiver of sovereign immunity. Consequently, very few states still apply the semantic approach. [33]

B. The Good Samaritan Approach

The Good Samaritan approach is derived from the U.S. Supreme Court case of Indian Towing Co. v. United States. [34] In that ***672** case, the Indian Towing Company was towing a barge loaded with cargo that was damaged when the barge ran aground. [35] The Indian Towing Company alleged that the barge ran aground because the U.S. Coast Guard had negligently maintained a nearby lighthouse. [36]

On appeal, the United States argued that the Coast Guard could not be held liable for its negligent maintenance of the lighthouse because a private individual cannot maintain a lighthouse, and the Federal Tort Claims Act provided that "'[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . .'" [37] In other words, the United States argued that the Federal Tort Claims Act did not remove

immunity for activities that are uniquely governmental. [38] The United States, however, conceded that its maintenance of the lighthouse did not involve a discretionary function. [39]

The Supreme Court emphasized that "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner." [40] Using this logic, the Supreme Court held:

> The Coast Guard need not undertake the lighthouse service. But 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. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act. [41]

Despite the fact that the discretionary function exception was not at issue in Indian Towing, state and federal courts have used this opinion to develop the Good Samaritan approach to determine whether a governmental action constitutes a discretionary ***673** function. [42] These courts have held that sovereign immunity should only bar claims for "the initial act of governmental discretion, 'such as a decision to undertake a project,' but does not extend the immunity to lower levels of decisionmaking, such as the 'the establishment of plans and specifications by administrators on an intermediate level of government.'" [43] Thus, this approach tends to narrow the discretionary function exception and, in turn, expand the government's liability for all actions taken after the initial planning phase. [44]

In the context of a public airport, the initial plan to establish an airport or to alter the operations at the airport would be protected by sovereign immunity; however, any decision regarding the maintenance or subsequent functioning of the airport might be subject to liability. [45] Therefore, the judicial branch may question many actions involving the consideration of public policy at an airport such as when to use airport funds to repair, maintain, or improve the airport.

C. The Policy-Balancing Approach

In the late 1970s and early 1980s, many federal courts began applying the policy-balancing approach. [46] Under this approach, the government's actions are immune if the subject "action involved the balancing of policy factors." [47] Many courts supported this approach because it "protects courts from 'involve(ment) in making . . . decisions(s) entrusted to other branches of the government.'" [48]

This approach appears to strike a balance between the semantic approach and the Good Samaritan approach because it allows discretion beyond the initial government decision, but the everyday activities carrying out these decisions are not immune unless the government employee actually weighs policy factors.

*674 D. The Planning/Operational Approach

The U.S. Supreme Court created the planning/operational approach in Dalehite v. United States. [49] The plaintiffs in Dalehite sued the United States alleging that it negligently manufactured and transported fertilizer under a government program, and that this negligence resulted in the explosion that killed Henry Dalehite. [50]

The Supreme Court found that the plaintiffs did not have a cause of action against the United States because the government's actions were a discretionary function. [51] The Court determined:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of [§] 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion. [52]

In short, the Court held that "the alleged 'negligence' does not subject the Government to liability. [53] The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program." [54]

This last statement by the Court has led to much confusion regarding the application of the planning/operational approach. As one commentator described:

> The Planning/Operational Standard was supposed to be a relatively simplistic and effective means of granting discretionary immunity to activities truly worthy of it. However, the surrender of the Semantic Standard's relative ease of administration and the ***675** requirement to determine whether the nature of an activity fell under the Planning/Operational Standard's aegis led to ad hoc implementation and inconsistent, even strange, results as courts struggled to determine what acts were or were not the creation of policy. [55]

Courts that want to decrease the scope of the exception in order to limit immunity will apply the exception to decisions that are made solely at the planning phase. In contrast, courts that want to increase the scope of the exception and increase immunity will apply the exception to actions that implement the decision made at the planning level. Thus, courts have not consistently applied the planning/operational approach.

V. EVOLUTION OF THE PLANNING/OPERATIONAL APPROACH

The Supreme Court's next plunge into the quagmire of the discretionary function analysis occurred in Varig Airlines. [56] In Varig Airlines, the Supreme Court addressed two consolidated cases to determine if the United States could be held liable for the Federal Aviation Administration's (FAA) alleged negligence "in certificating certain aircraft for use in commercial aviation." [57] In the first lawsuit, a Boeing 707 was certified in 1958 by the Civil Aeronautics Agency (the FAA's predecessor) as having met the agency's minimum safety requirements. [58] In 1973, a fire broke out in one of the Boeing 707's aft lavatories during a flight from Rio de Janeiro to Paris. [59] The pilots landed the airplane, but 124 of the passengers died from smoke inhalation. [60] The owner of the Boeing 707, Varig Airlines, and the families of the deceased passengers sued the United States, alleging that it was negligent when it issued the safety certificate for the airplane. [61]

In the second of the two consolidated lawsuits, a DeHavilland Dove aircraft, owned by John Dowdle, caught fire, crashed, and burned near Las Vegas, Nevada. [62] Prior to the crash, one of the ***676** aircraft's previous owners obtained a supplemental-type certificate from the FAA that authorized him to install a cabin heater as a major change in the type and design of the aircraft. [63] After the crash, Dowdle sued the United States for property damage, alleging that the FAA was negligent in issuing the certificate for the installation of the heater. [64]

The plaintiffs in both cases argued that Indian Towing had overruled Dalehite. [65] The Supreme Court rejected this argument and reaffirmed the logic in Dalehite, even though the Court admitted that "[its] reading of the Act . . . has not followed a straight line . . . ." [66] The Court reasoned that Indian Towing did not overturn Dalehite because the government in Indian Towing "conceded the discretionary function exception was not implicated [in that case]." [67]

Although the Supreme Court concluded that it is impossible to specifically define the discretionary function exception, it provided some guidance on what to consider when determining whether to apply the exception: (1) one should examine the conduct of the government actor and determine if it is the type of act Congress intended to protect, instead of merely examining the government actor's position; and (2) determine whether the acts of regulatory agencies within their role as a regulatory agency are covered by the exception. [68]

Using these factors, the Court determined that the FAA's policy to spot-check manufacturers' compliance with its regulatory guideline was "the sort of governmental conduct protected by the discretionary function exception to the Act." [69] Specifically, the Court found that "[t]he FAA has a statutory duty to promote safety in air transportation, not to insure it. . . . [[Therefore, the plaintiffs' claims] against the FAA for its alleged negligence in certificating aircraft for use in commercial aviation are barred by the discretionary function exception of the Federal Tort Claims Act." [70]

***677** A more recent Supreme Court case to analyze the discretionary function exception is Berkovitz v. United States. [71] In this case, an infant contracted polio after ingesting an oral polio vaccine that the Food and Drug Administration (FDA) had approved for release to the public. [72] The plaintiffs alleged that the FDA was negligent because it "violated federal law and policy regarding the inspection and approval of polio vaccines." [73]

The Supreme Court determined that federal courts should apply the following two-prong test when analyzing whether the discretionary function exception applies:

> [A] court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. . . . [The] exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. [74]

If the challenged conduct is a matter of choice, "a court must [then] determine whether that judgment is of the kind that the discretionary function exception was designed to shield[:] . . . governmental actions and decisions based on considerations of public policy." [75]

The plaintiffs asserted two claims against the government: (1) the government "violated a federal statute and accompanying regulations in issuing a license" to the manufacturer to produce the vaccine; and (2) the government violated "federal regulations and policy in approving the release of the particular lot" of the vaccine containing plaintiff's dose. [76]

The Court determined that the discretionary function exception did not bar the plaintiffs' claims that the federal government did not comply with federal law in licensing and approving the vaccine. [77] It remanded the case for further fact-finding regarding the plaintiffs' claims that the government determined that the vaccine "complied with regulatory standards, but that the determination was incorrect"; the Court found that such decisions ***678** would involve the government's exercise of a policy choice. [78]

The Supreme Court determined, however, that the discretionary function exception barred the plaintiffs' claim that the government was negligent in allowing the manufacturer to release that particular dose of vaccine because the FDA's spot-check program was similar to the FAA's program in Varig Airlines. [79]

Another Supreme Court case in the evolution of the planning/operational approach is United States v. Gaubert. [80] In Gaubert, the United States, pursuant to the Home Owners' Loan Act of 1933, "undertook to advise about and oversee certain aspects of the operation of a thrift institution," the Independent American Savings Association (IASA). [81] The Supreme Court had to determine if these actions were within the discretionary function exception. [82]

The United States, through the Federal Home Loan Bank Board, "sought to have IASA merge with Investex Savings, a failing Texas thrift." [83] As part of the merger, the government requested that IASA's chairman, Thomas Gaubert, enter an agreement removing him from IASA's management because of Gaubert's other financial dealings. [84] The government did not institute formal proceedings against IASA because "they relied on the likelihood that IASA and Gaubert would follow their suggestions and advice." [85]

Three years after the merger, Gaubert sued the federal government for "$100 million in damages for the alleged negligence of federal officials in selecting the new officers and directors and in participating in the day-to-day management of IASA." [86]

The Court summarized its discretionary function analysis as follows:

> [I]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to ***679** the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations. [87]

In what appears to be a deviation from the language in Dalehite, the Court emphasized that an act does not necessarily have to involve policy making at the planning level to receive immunity. [88] The Court emphasized that "[d]ay-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level." [89] In short, the Court stressed that none of its prior holdings suggested that "decisions made at an operational level could not also be based on policy." [90]

Furthermore, the Court refined the second prong of the two-prong test from Berkovitz by emphasizing that "[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." [91] Stated another way, the Supreme Court told the lower courts that they no longer had to determine if the government employee actually exercised the type of discretion that is protected by the exception, if the employee's actions could have been based upon policy decisions or implied by policy espoused in a statute, regulation, or guideline. [92]

Gaubert argued that the government's actions were not covered because they involved the government controlling the day-to-day activities of IASA, including the hiring of consultants, the conversion of IASA from a state-charted savings and loan to a federally charted savings and loan, the placement of IASA subsidiaries ***680** in bankruptcy, the mediation of salary disputes, and review of a complaint that IASA had considered filing. [93]

The Supreme Court determined that "[t]here [were] no allegations that the regulators gave anything other than the kind of advice that was within the purview of the policies behind the statutes." [94] Therefore, the Court found that the discretionary function exception barred Gaubert's claims. [95]

One commentator determined that the U.S. government, since Gaubert, has succeeded on 76.30% of its motions for summary judgment based upon the discretionary function exception. [96]

VI. THE DISCRETIONARY FUNCTION EXCEPTION IN THE CONTEXT OF AIRPORT LITIGATION IN STATE COURTS

A. Mississippi's Liberal Use of the Planning/Operational Approach

In 2012, the Mississippi Supreme Court in Pratt v. Gulfport-Biloxi Regional Airport Authority handed down a decision under the guise of the planning/operational approach. [97] The court's application of this approach, however, appears similar to the semantic approach. [98] Under the court's reasoning, almost any act by a Mississippi airport authority could be considered immune.

In Pratt, Dr. Jerry Pratt sued the Gulfport-Biloxi Regional Airport Authority after he "slipped and fell down a set of stairs at the Gulfport-Biloxi Regional Airport." [99] The airport used the metal stairs "as a temporary means of accessing the tarmac from the terminal" while the airport was under construction. [100] As an additional safety precaution, the airport's employees added anti-slip tape to the stairs. [101] Prior to falling, Dr. Pratt began to climb down the stairs. [102] The stairs were wet from the rain, which ***681** caused Dr. Pratt to slip and fall down the stairs onto the tarmac. [103]

The Mississippi Supreme Court determined that in order to find that the airport's actions were within the discretionary function exception, it "must ascertain whether the activity in question involved an element of choice or judgment. If so, [the court] also must decide whether that choice or judgment involved social, economic, or political-policy considerations." [104] To determine if the activity involved an element of choice or judgment, "the [c] ourt must first ascertain whether the activity was discretionary or ministerial." [105] An act "is discretionary if 'it is not imposed by law and depends upon the judgment or choice of the government entity or its employee[s].'" [106] Conversely, "[a] ministerial function is one positively imposed by law and required to be performed at a specific time and place, removing an officer's or entity's choice or judgment." [107]

In its analysis, the court radically departed from the argument framed by the parties by stating:

> [T]he parties agreed that the activity at issue--placing anti-slip tape on the temporary airstairs--was not a ministerial function, as there are no laws or regulations pertaining to this activity. . . . However, that is not the "function" at issue. The function with which we are concerned is the operation of the airport. The state does not have a statutory obligation to provide and operate airports for its citizens. A decision by the state, county, municipality, or other governmental entity to operate an airport is discretionary. Therefore, barring a rule or regulation pertaining to a certain activity, decisions that are part of the airport's day-to-day operations are also discretionary. [108]

Then, the court found that the Airport Authority was immune because "the airport authority's decision to make improvements to the facility took economic factors into consideration. The use of the airstairs . . . [and] adding anti-slip tape to the stairs . . . are daily operational decisions that fall under the overall operation of the airport." [109]

***682** Under Mississippi's application of the planning/operational approach, it appears that almost any action by an airport authority employee in running an airport is immune because a court could easily find that it is supported by the city's discretionary decision to have a public airport.

B. Alaska's Conservative Use of the Planning/Operational Approach

In Japan Air Lines Co. v. State, Alaska applied the planning/operational approach in a lawsuit involving an airport. [110] A Boeing 747 owned by Japan Air Lines was damaged while taxiing at Anchorage International Airport because the taxiway was covered with black ice. [111] Japan Air Lines' insurer sued the State for the property damage to the Boeing 747 that resulted from the aircraft sliding on the taxiway. [112]

The Alaska Supreme Court determined that "decisions that rise to the level of planning or policy formulation will be considered discretionary acts which are immune from tort liability, whereas decisions that are merely operational in nature, thereby implementing policy decisions, will not be considered discretionary and therefore will not be shielded from liability." [113]

The court found that the plaintiff's claim was not barred by the discretionary function exception because "[o]nce the basic policy decision to build . . . a taxiway at Anchorage International Airport was made, the state was obligated to use due care to make certain that the taxiway met the standard of reasonable safety for its users." [114]

More recently, the Alaska Supreme Court revisited the planning/operational approach in airport litigation in State Department of Transportation and Public Facilities v. Sanders. [115] In Sanders, the plaintiff struck a baggage train operated by United Airlines while driving his motorcycle on a public road. [116] The plaintiff sued the state of Alaska because "the Airport had adopted a practice of allowing aircraft support vehicles, including baggage trains, to operate on [the public road] without complying with ***683** certain motor vehicle regulations promulgated by the Department of Public Safety." [117]

The court emphasized that "[u]nder the planning/operational test, liability is the rule, immunity the exception." [118] This court, like the court in Japan Air Lines, determined that the State's decision to allow baggage trains to operate on the public road was immune under the discretionary function exception; however, "once the State decided to open the road to such vehicles, it was obligated to do so in a non-negligent manner." [119]

C. Idaho's Use of the Planning/Operational Approach

In Tomich v. City of Pocatello, the Idaho Supreme Court's application of the planning/operational approach in an airport case produced results similar to the Good Samaritan approach. [120] In Tomich, Todd and Max Tomich jointly owned a 1967 Citabria 7ECA, which they tied down and parked at an airport owned by the City of Pocatello, Idaho. [121] The City did not charge them a tie-down fee, and they continued to park and tie down the airplane at this airport from 1984 to 1991. [122]

Eventually, a windstorm caused the tie-downs to fail, and "the plane tumbled down the runway and [was] destroyed." [123] The Tomiches sued the City, alleging that the City failed to "provide and maintain a safe area in which to tie down aircraft." [124]

On appeal, the City argued it was immune under the discretionary function exception to the Idaho Tort Claims Act because "it passed an ordinance embodying the policy decision not to maintain the airport's tie-downs because of budget constraints." [125]

Under Idaho's version of the planning/operational test, "[r]outine matters not requiring evaluation of broad policy factors will likely be 'operational,' whereas decisions involving a consideration of the financial, political, economic, and social effects ***684** of a particular plan are likely 'discretionary' and will be accorded immunity." [126]

The court determined:

> The ordinance reflects a desire to limit the city's liability . . . not a decision to reduce or eliminate maintenance at the airport. . . . Here, rather than reach a policy decision on airport maintenance, the city tried to make a policy decision that it would not be liable for anything that happened at the airport. Therefore, the discretionary function exception does not immunize the city. [127]

Thus, Idaho's application severely limits the discretionary function exception and appears to be similar to the Good Samaritan approach because the court second-guessed the City's decision not to repair the tie-downs. [128] Furthermore, the court found that the City had a duty to run the airport reasonably despite the City basing its decision to not replace the tie-downs on budgetary considerations. [129]

D. Louisiana's Planning/Operational Approach

In Alpha Alpha, Inc. v. Southland Aviation, the Louisiana Court of Appeals used what appears to be the Good Samaritan approach in an airport case. [130] In that case, Alpha Alpha purchased a twin-engine aircraft, the Merlin, from Associated Aircraft Sales and leased it to Travelair Charters. [131] In order to avoid Texas ad valorem taxes, a representative of Associated Aircraft Sales, Steven Weintraub, arranged to temporarily park the Merlin at Southland Field, a public airport in Sulphur, Louisiana. [132] Mr. Weintraub requested hangar space for the Merlin, but the airport manager told him, "the hangars were being remodeled and were not available." [133] The airport manager also told him that the Merlin would be safely parked on the ramp. [134] According to Mr. Weintraub, he and the airport manager ***685** agreed that "he would pay [the manager] for the tie-down fees when [he] returned to fly the aircraft back to Texas . . . ." [135]

Unknown individuals vandalized the Merlin at the airport on two separate occasions. [136] Alpha and Travelair sued the West Calcasieu Port, Harbor, and Terminal District; the Industrial Development Board of the City of Sulphur, who owned the airport; and the West Calcasieu Airport Managing Board d/b/a Southland Aviation, who managed the airport, alleging that these defendants were negligent in their duties as compensated depositaries. [137]

The defendants argued that "the decision on the need for security provided [for] the aircraft at Southland Field was a decision made at the ministerial level by Southland Aviation, the airport managing board, and that the board is immune from liability under the discretionary function doctrine . . . ." [138]

The court of appeals set forth Louisiana's version of the planning/operation approach as follows:

> First, the court must determine whether the government's action was a matter of choice. If the action was not a matter of choice because some statute, regulation, or policy prescribed a specific course of action to follow, then the exception does not apply and there is no immunity. If, on the other hand, the action involved an element of choice or discretion, then the court must determine whether that discretion is the type that is shielded by the exception because it is grounded in social, economic, or political policy. It is only those actions that are based on public policy that are protected by La.R.S. 9:2798.1. [139]

The court held that the discretionary function exception did not apply and that the defendants were not immune from suit because once the airport decided to become a public-use airport and to become "a depositary of the Merlin . . . the defendants had no choice but to abide by applicable legal standards in discharging that function." [140]

Yet again, a state court ostensibly applied the planning/operational approach, but in effect, it applied the Good Samaritan approach. Despite the fact that the city had a valid argument that the exception did not apply, i.e. its diescretion to accept ***686** incoming aircraft, the court determined that the airport had a duty to act reasonably once it decided to allow the plaintiffs to park the Merlin at the airport. [141]

E. Kansas's Application of the Good Samaritan Approach

The Kansas Court of Appeals employed a version of the Good Samaritan approach, although not titling it as such, in Cessna Aircraft Co. v. Metropolitan Topeka Airport Authority. [142] In that case, "Cessna Aircraft Company (Cessna) and Sun Life Insurance Company of America (Sun Life) [sued] the Metropolitan Topeka Airport Authority (MTAA) to recover damages for aircraft destroyed in a hangar fire at Forbes Field Airport." [143]

The fire began because a contractor was using a propane torch to replace the hangar's roof. [144] The fire destroyed the hangar along with "13 airplanes--10 owned by Cessna and 3 which Cessna leased from Sun Life." [145] The case proceeded to trial, and the jury returned a verdict against the airport and several other defendants. [146]

The court of appeals noted that the airport:

> [U]ndertook to provide its tenants . . . with fire and police protection. Moreover, [it] adopted rules and regulations restricting persons from entering hangars without permission and from performing work on a hangar without written permission from airport management. Other regulations restricted the use of flame

operations and the storage of flammable materials in hangars. MTAA further represented that it would provide Cessna with the same type of services offered its other tenants. [147]

In its amicus curiae brief, the League of Kansas Municipalities argued that the airport was immune because the airport's act of providing fire protection to its lessees was discretionary. [148]

The court rejected this argument and held that "once a governmental entity undertakes to provide those services, and to adopt mandatory regulations and policies in connection with those services, discretionary immunity does not protect the governmental ***687** entity from liability for a failure to provide services in accord with those regulations and policies." [149]

F. New York's Application of the Good Samaritan Test

In Forrester v. Port Authority of New York and New Jersey, Graeme Forrester's flight landed at Kennedy Airport. [150] He went to the taxi loading area at the airport, and the taxi dispatcher directed him to a cab. [151] As he walked around the cab to get into the front passenger seat, he was hit by another cab. [152]

He "sued [Trans World Airlines] and the Port Authority, which operates Kennedy Airport and subleases certain areas of the Airport to airlines, [including the taxi loading area], premised upon their negligent design and maintenance of the taxi loading area." [153]

The Port Authority argued that it was immune because its design of the taxi loading area constituted a discretionary function. [154] The court rejected this argument and held that "[r]egardless of whether the operation of a taxi loading zone constitutes a governmental function, such immunity would not absolve the Port Authority from liability for a design devised without adequate study or one lacking a reasonable basis." [155]

The Forrester court appears to use the Good Samaritan test because, even if the design of the taxi loading areas involved the types of decisions that were meant to be protected by the exception, the court is unlikely to find the airport immune if it did not act reasonably in carrying out such decisions.

G. Oregon's Policy Ranking Approach

The Oregon Court of Appeals applied the discretionary function exception to a case involving a crash at the Flying M Ranch. [156] In that case, the plaintiffs sued the state of Oregon for wrongful death after their decedent died as a passenger in an ***688** aircraft that crashed as it took off from the Flying M Ranch Airport. [157]

The plaintiffs alleged that the state's Aeronautics Division negligently classified the Flying M Ranch Airport as a personal use airport, which "exempt[[ed] it from the dimensional standards, including standards governing runway length and 'glide slope,' applicable to 'public use' airports . . . ." [158] They further alleged that this misclassification contributed to the decedent's death. [159]

The State argued that the act of classifying an airport as a personal use airport versus a public use airport was immune from liability because it was a discretionary function. [160]

The court of appeals determined that for the Division's actions to fall within the discretionary function exception, the actions must involve an "'assessment and ranking of the policy objectives explicit or implicit in the statute' and for the judgment that one or more of these objectives will be served by a given action." [161]

Using this approach, the court found that based upon the record before it, it could not tell whether the Division's decision to classify the Flying M Ranch as a "private use" airport was necessarily based upon the ranking and assessment of policy objectives. [162] This approach appears closer to what the Supreme Court's planning/operational approach has evolved into because a court must assess the government's immunity based upon whether the action in question involved the balancing and ranking of policy objectives.

VII. THE DISCRETIONARY FUNCTION EXCEPTION IN THE CONTEXT OF AIRPORT LITIGATION IN FEDERAL COURTS

Because of the limited guidance given by the U.S. Supreme Court, lower federal courts have also had difficulty determining what sorts of actions fall within the discretionary function exception of the Federal Tort Claims Act.

***689** In AIG Aviation Insurance Services, Inc. v. United States, the U.S. District Court for the District of Utah analyzed the discretionary function exception under both the Federal Tort Claims Act and the Utah Governmental Immunity Act. [163] In that case, South Coast Helicopter landed a Bell helicopter at the Brigham City, Utah, airport for refueling. [164] The airport's manager told the helicopter's pilot that he could buy fuel from Flying J, "a private corporate operator . . . ." [165] As the helicopter flew from the ramp area to the Flying J Hangar, it "struck two unmarked power lines suspended approximately 30 feet above the taxiway. The helicopter crashed and was a total loss, less salvage." [166]

South Coast and AIG Aviation Insurance Services, South Coast's insurer, sued the United States and the Brigham City Corporation. [167] Specifically, the plaintiffs alleged that the United States, through the actions of the FAA, "was negligent in specifying, approving, operating, maintaining, and inspecting the airport facilities, and in not requiring that the power lines in question be buried," and that the City was negligent because it failed to bury or mark the power lines. [168] The United States moved to dismiss the case under the Federal Tort Claims Act, and the City moved for dismissal under the Utah Governmental Immunity Act. [169]

The plaintiffs argued that the discretionary function exception did not apply to their claims against the United States because two federal directives mandated that the FAA correct the hazardous power line. [170] Therefore, the FAA's decision regarding the power lines did not involve a choice or judgment and should not be immune under the Act. [171] First, they argued that the FAA Airport Safety Data Program Order 5010.4 required the FAA to inspect the airport and to "'[l]ook for and report all items on the airport that could be hazardous, such as unmarked obstructions . . . and other safety hazards on or near the runway.'" [172] The plaintiffs relied upon the fact that the FAA had ***690** inspected the airport five times prior to the incident and did not list the power lines in any of its reports from these inspections. [173]

The district court found that the FAA's actions, however, fell within the discretionary function exception because the FAA's inspector was impliedly vested "with discretion to determine which items 'could be' hazardous." [174] Thus, the court reasoned that this act involved choice or judgment on the part of the inspector. [175] Then, it determined that "the inspector's decision not to report the power lines" was immune from suit under the discretionary function exception because the inspector's judgment was "grounded in the relevant policy scheme." [176]

The plaintiffs also argued that the FAA violated "FAA Advisory Circular 150/5300-13, dated September 29, 1989," because it failed to "'report the obstructing power lines following the construction and marking of the taxiway' and . . . 'fail[ed] to clear or require the clearance of the taxiway.'" [177] The court determined that the circular's requirements did not apply, and the court dismissed the case against the United States. [178]

Next, the court addressed the City's motion to dismiss under the Utah Act. [179] Under the Act, a court must answer the following questions in the affirmative for the exception to apply:

(1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?

(2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?

(3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?

(4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty ***691** to do or make the challenged act, omission, or decision? [180]

The court answered these questions in favor of the City and determined that the City was immune from the plaintiffs' claims because the City's decision not to bury the power lines was balanced with its budgetary restrictions against the danger posed by the power lines. [181]

The federal courts have also inconsistently applied the discretionary function exception to lawsuits involving customs agents detaining passengers at public airports. [182] In DePass v. United States, Derrick Anthony DePass sued the United States under the Federal Tort Claims Act, alleging that he was improperly detained at the Baltimore-Washington International Airport by "the United States Customs Service, the Maryland Aviation Administration, the Maryland Department of Transportation, Eastern Airlines, Inc., and Burns Security, Inc." [183] Mr. DePass also alleged that the defendants' detainment was an assault and battery. [184]

The defendants argued that Mr. DePass did not provide "satisfactory proof of United States citizenship upon his arrival at BWI from Montego Bay, Jamaica on an Eastern Airlines flight." [185]

After dismissing all of the defendants except the United States, the district court addressed the United States' motion to dismiss based upon the discretionary function exception under the Federal Tort Claims Act. [186] Because of the seemingly contradictory results in Dalehite and Indian Towing, the court determined that "the Supreme Court has failed to set clear guidelines to determine when this exception applies." [187] Therefore, it rejected the planning/operational approach recommended by the plaintiff because under the plaintiff's version of the test, ***692** only discretionary acts of the government made at the planning level are immune from suit. [188]

The court determined that Congress intended the exception to include those actions that involve governmental policy, no matter the rank of the governmental official involved. [189] The court held that DePass's claims against the United States were barred by the discretionary function exception because the applicable statutes and regulations do not dictate to immigration inspectors how they must determine that someone is a U.S. citizen. [190] Furthermore, the court found that the inspector's actions were the types of actions that Congress intended to protect under the discretionary function exception because "each time an immigration inspector examines someone to determine whether he is a United States

citizen, the inspector is in effect setting a policy that affects our international relations and which has social, economic, and political repercussions in this country as well." [191]

Three years later, the Second Circuit contradicted DePass in Caban v. United States. [192] In Caban, Salvador Caban alleged that he was damaged when the Immigration and Naturalization Service (INS) improperly detained him at John F. Kennedy International Airport. [193] Despite Mr. Caban producing a Puerto Rican birth certificate, a New York driver's license, a social security card, and other documentation, INS detained Mr. Caban and took him to an INS detention center. [194] After Mr. Caban filed suit, the government moved for summary judgment and argued that Mr. Caban's claim was barred by the discretionary function exception. [195]

In its analysis, the Second Circuit Court of Appeals lamented that "[t]he discretionary function exception to the FTCA has presented courts with problems almost from the time of its enactment in 1946. The principal difficulty is simply that all federal employees exercise a certain amount of discretion in the discharge of their responsibilities." [196] The court warned that a ***693** literal interpretation of the exception, such as under the semantic approach, would lead to the exception swallowing "the general rule that waives the United States' immunity to suits arising out of its employees' actions." [197]

After discussing the history of the various discretionary function tests, the court adopted and used the "policy balancing test," which requires a court to find that a governmental official's actions fall within the exception if the action requires the official to "consider and weigh competing policies in arriving at his decision . . . ." [198] Using this test, the court determined that Caban's claim against the United States was not barred by the discretionary function exception because the INS agents' actions in detaining Mr. Caban did not require the agents "to consider and weigh competing polices." [199] The court emphasized that "if Caban were suing the INS for adopting [the regulation regarding an applicant's entry rights into the United States], he would find his case properly dismissed" because this involved the weighing of competing policies. [200]

Nearly two decades later, the federal courts again addressed a case similar to DePass and Caban in Bradley v. United States. [201] After she returned from Jamaica, Yvette Bradley "was stopped [by] United States Customs Inspectors at Newark International Airport." [202] She alleged she "was singled out for a luggage search, subjected to a pat down search, and ultimately released by Customs officers." [203]

Bradley sued the United States, the Customs Service, and the customs agents, alleging that she was searched "because she is a black woman." [204] The defendants argued that their actions were immune under the discretionary function exception. [205] Applying the Supreme Court's test from Gaubert, the court determined that the customs agents' actions were immune from suit under the discretionary function exception because the customs ***694** agents' decision to search Ms. Bradley was a discretionary act that implicated public policy. [206]

VIII. WHERE AIRPORT LITIGATION CURRENTLY STANDS WITH RESPECT TO THE DISCRETIONARY FUNCTION EXCEPTION

The case law interpreting the discretionary function exception to the general waiver of sovereign immunity is legion. However, courts, practitioners, and commentators seem to be as confused today about the proper scope of the discretionary function exception as they were when Dalehite was decided in 1953. While analyzing the discretionary function exception under the Federal Tort Claims Act, one commentator noted that the exception is confusing to both scholars and federal judges, and it is "the most criticized and litigated exception" to the Federal Tort Claims Act. [207]

Likewise, "[s]tate court judges have struggled as hard as their federal brethren to strike the right balance between plaintiffs and policy makers" when interpreting this exception. [208]

This confusion is readily apparent in the context of airport litigation. Mississippi courts have declared that the day-to-day operations of a public airport are discretionary and should be afforded immunity. [209] Justice Robert Jackson summarized the policy of the courts that have liberally applied the discretionary function exception when he commented that "[o]f course, it is not a tort for government to govern . . . ." [210]

On the other hand, Alaska, Kansas, Louisiana, and New York courts have determined that airports must act reasonably after the initial planning phase. [211] The Louisiana Court of Appeals aptly described the policy behind these courts' decisions when it ***695** declared that "there is a difference between exercising discretion and abdicating responsibility." [212]

Even the federal courts have failed to consistently apply the Supreme Court's planning/operational approach. The exact same case can come before two different district courts, the United States can argue that it is immune under the discretionary function exception in both cases, and one court might find that the United States is immune while the other court finds that the United States is liable.

In addition, it appears that some states, because of their expansive interpretation of the discretionary function exception, may have actually decreased their public airports' liability as compared to such liability prior to the states' waiver of sovereign immunity. [213]

IX. A WORKABLE SOLUTION

Because the courts have had approximately sixty-eight years to develop a feasible test for consistently deciding what is a discretionary function and have failed to do so, this article recommends that Congress and the state legislatures step in and actually define the term "discretionary function." By defining what is and what is not a discretionary function, the legislative branch can send a message to the courts that the current system does not work. Furthermore, the legislative branch can act quickly and need not wait for a case to come before it in order to alter the state of the law.

For example, 28 U.S.C. § 2671 contains the definitions section of the Federal Tort Claims Act. [214] This section defines terms used in the Act such as "employee of the government" and "acting within the scope of his office or employment." [215] Congress and the state legislatures can clear up the confusion created by the discretionary function exception, as currently written, by simply defining what "a discretionary function or duty" is in the definitions sections of their respective tort claims acts.

The definition, however, must be carefully crafted to strike a balance between the legislative purpose of the tort claims acts, ***696** which is to give wronged parties redress from the government for torts it commits, and the purpose of the discretionary function exception, which is to prevent the judiciary from second-guessing the policy decisions of the other branches of government. [216]

Based upon tests created by other commentators for courts to apply and a test previously adopted by the Utah Supreme Court under Utah's discretionary function test, Congress and the state legislatures should add the following definition to their respective tort claims acts in order to strike the proper balance mentioned above.

A discretionary function is an act, omission, or decision that:

1. involves a matter of choice by a government employee;

2. is essential to the realization of a governmental policy, program, or objective;

3. involves the actual and legitimate evaluation of a policy decision on the part of the government employee with the requisite constitutional, statutory, or lawful authority to direct policy. [217]

A. An Act, Omission, or Decision That Involves a Matter of Choice

This element is already part of the planning/operation approach. However, it should also be incorporated into any statutory definition of discretionary function because it would be a poor policy decision if governmental actors could be immune for violating a statute or regulation. Without this language, a court might reward the government for committing negligence by ignoring a deliberative policy decision.

B. An Act, Omission, or Decision That is Essential to the Realization of A Governmental Policy, Program, or Objective

To ensure that plaintiffs are made whole if the government acted negligently, and to inhibit the judiciary from second-guessing another branch of government, the government employee's act or omission should not only involve a governmental policy, program, or objective, but such act or omission should ***697** also be essential to the realization of this policy, program, or objective. For example, the government should not be immune from an employee's negligent driving or an employee ignoring an obvious trip hazard on government property because such actions do not typically involve the realization of a governmental policy, program, or objective.

C. An Act, Omission, or Decision That Involves the Actual and Legitimate Evaluation of a Policy Decision on the Part of a Government Employee with the Requisite Constitutional, Statutory, or Lawful Authority to Direct Policy

This element is designed to correct many of the problems with the policy/balancing approach. Several commentators have criticized the policy/balancing approach because under recent application of the test by the U.S. Supreme Court, the government employee's conduct does not actually have to involve the weighing of policy choices. [218] Instead, the employee's conduct must merely be "susceptible to" the weighing of policy consideration. [219] By including the word "actual" in the definition, the legislature would emphasize that this is a subjective test where the court should examine whether the employee actually balanced policy factors in reaching the employee's decision to act (or not act) instead of creating a legal fiction where the court invents hypothetical scenarios in which the employee could have weighed policy factors.

The word "legitimate" is included to avoid the government attempting to create a fictitious policy decision. For example, the municipal government in Tomich passed an ordinance to avoid maintaining the tie-downs at its municipal airport. [220] Obviously, as the Tomich court noted, the airport attempted to avoid liability by acting like it weighed legitimate policy decisions. [221]

By including the word "legitimate" in the definition, a court should examine the government's weighing of policy factors. It should not second-guess the government's decision, but it also should not allow the government to try to abdicate responsibility by creating a fictitious weighing of policy factors.

***698** For example, if a municipal airport argues that it could not afford to repair its tie-downs due to budgetary constraints, the court would examine the government's budget in order to determine if the government actually had the

funds for repairs or if all of the airport's funds were already allocated. If the airport's funds were allocated, then the airport would be immune.

Finally, the phrase "employee with the requisite constitutional, statutory, or lawful authority to direct policy" ensures that the government will not attempt to use the discretionary function exception to shield everyday decisions by rank and file employees. For example, the maintenance crew in Pratt most likely made the decision to use the air stairs to exit the gate and reach the tarmac. [222] Thus, the definition addresses Justice Antonine Scalia's concern that "the level at which the decision is made is often relevant to the discretionary function inquiry, since the answer to that inquiry turns on both the subject matter and the office of the decisionmaker." [223]

X. APPLICATION OF THE DEFINITION UNDER A HYPOTHETICAL

With the advent of digital recording, many airports are dramatically increasing the number of video cameras that record video of the airport's premises. In light of this, plaintiffs in trip and fall cases whose falls occurred at public airports are beginning to argue that the airports had actual notice of a dangerous condition because of their ability to monitor the video cameras. [224] Most airports, however, cannot constantly monitor their security cameras without significantly increasing the number of airport employees dedicated to this task.

During a trip and fall case, the airport will inevitably argue that the decision regarding the number of employees it dedicates to monitoring its surveillance cameras is immune because it is a discretionary function. By applying the proposed definition to this scenario, one can see that it strikes the proper balance between the concerns of both the government and plaintiffs.

***699** First, deciding how many employees to hire to monitor an airport's surveillance system involves a matter of choice because there is no statute, rule, or regulation that mandates how many employees to dedicate to monitoring the surveillance system. When, where, and how to monitor the cameras is essential to the government's safety objectives and to promote national security. Ultimately, the court must decide if the decision regarding monitoring the cameras involves the actual and legitimate evaluation of a policy decision on the part of a government employee with the requisite constitutional, statutory, or lawful authority to direct policy. The court must examine an airport officer or its board members' decision on how many employees to hire to monitor the cameras. If the airport's board or officers weighed the decision and considered such things as budgetary constraints, a court should find the airport's actions immune under the discretionary function exception.

XI. CONCLUSION

It appears that many jurisdictions are now using some form of the planning/operational approach. The application of this approach, however, differs from jurisdiction to jurisdiction. Some jurisdictions apply it very conservatively, and it appears similar to the Good Samaritan approach derived from Indian Towing. Conversely, other jurisdictions have applied it liberally, which appears more like the approach described in Pratt and results in something more akin to the semantic approach.

It is time for the legislative branch to solve the issues created by the current discretionary function exception found in most tort claims acts. By focusing its definition on actual and legitimate policy evaluations by government employees with the requisite constitutional, statutory, or lawful authority to direct policy, the legislature can solve many of the pitfalls of the current tests adopted by the various courts to determine what is a discretionary function.

Footnotes

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1 Federal Tort Claims Act, 28 U.S.C. § 2680(a) (2012).

2 Wendler v. City of Great Bend, 316 P.2d 265, 270 (Kan. 1957).

3 Id.

4 The Siren, 74 U.S. (7 Wall.) 152, 154 (1868).

5 Id.

6 Marcia Swihart Orgill & Bellane Meltzer Toren, Comment, Sovereign Immunity and the Discretionary Function Exception of the Alaska Tort Claims Act, 2 ALASKA L. REV. 99, 100 (1985).

7 Wendler, 316 P.2d at 270 (internal citations omitted).

8 Owen v. City of Independence, 445 U.S. 622, 644-45 (1980).

9 Wendler, 316 P.2d at 273.

10 Id.; see also Mayor of Baltimore v. Crown Cork & Seal Co., 122 F.2d 385, 391 (4th Cir. 1941); Patton v. Adm'r of Civil Aeronautics, 112 F. Supp. 817, 825 (D.C. Alaska 1953), rev'd on other grounds, 217 F.2d 395 (9th Cir. 1954); City of Mobile v. Lartigue, 127 So. 257, 260 (Ala. Ct. App. 1930); Peavey v. City of Miami, 1 So. 2d 614, 636-37 (Fla. 1941); Caroway v. City of Atl., 70 S.E.2d 126, 130 (Ga. Ct. App. 1952); Dep't of Treasury v. City of Evansville, 60 N.E.2d 952, 956 (Ind. 1945); Godfrey v. City of Flint, 279 N.W. 516, 517-18 (Mich. 1938); Heitman v. Lake City, 30 N.W.2d 18, 21-22 (Minn. 1947); Brummett v. City of Jackson, 51 So. 2d 52, 53 (Miss. 1951); Behnke v. City of Moberly, 243 S.W.2d 549, 553 (Mo. Ct. App. 1942); Granite Oil Sec. v. Douglas Cnty., 219 P.2d 191, 198 (Nev. 1950); Rhodes v. City of Asheville, 52 S.E.2d 371, 376 (N.C. 1949); City of Blackwell v. Lee, 62 P.2d 1219, 1220 (Okla. 1936); Mollencop v. City of Salem, 8 P.2d 783, 785 (Or. 1932); McLaughlin v. City of Chattanooga, 177 S.W.2d 823, 825 (Tenn. 1944); Johnson v. City of Corpus Christi, 243 S.W.2d 273, 275 (Tex. Civ. App.--El Paso 1951, no writ).

11 Wendler, 316 P.2d at 273-75.

12 Id. at 267-68.

13 Id. at 268.

14 Id. at 267.

15 Id. at 272.

16 Id. at 274-75.

17 Id.

18 Dalehite v. United States, 346 U.S. 15, 27-30 (1953); Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812, 842-44 (codified at 28 U.S.C. §§ 1346(b), 1402(b), and 2671-2680).

19 Dalehite, 346 U.S. at 24.

20 Id. at 18 (quoting 28 U.S.C. § 2680(a) (1948)).

21 Mary F. Wyant, Comment, The Discretionary Function Exception to Government Tort Liability, 61 MARQ L. REV. 163, 163 (1977).

22 Id. at 167-68.

23 Orgill & Toren, supra note 6, at 103.

24 Id. at 104.

25 John Cannan, Are Public Law Librarians Immune from Suit? Muddying the Already Murky Waters of Law Librarian Liability, 99 LAW LIBR. J. 7, 14 (2007).

26 Orgill & Toren, supra note 6, at 104

27 Id. at 104-09; Caban v. United States, 671 F.2d 1230, 1232 (2d Cir. 1982).

28 State v. Abbott, 498 P.2d 712, 720 (Alaska 1972); Johnson v. State, 447 P.2d 352, 356-58 (Cal. 1968); Dep't of Health & Rehab. Servs. v. Yamuni, 529 So.2d 258, 260 (Fla. 1988); Hudson v. Town of E. Montpelier, 638 A.2d 561, 564 (Vt. 1993).

29 Cannan, supra note 25, at 15.

30 Abbott, 498 P.2d at 720; Johnson, 447 P.2d at 356-57; Yamuni, 529 So.2d at 260; Hudson, 638 A.2d at 564.

31 Johnson, 447 P.2d at 357.

32 Orgill & Toren, supra note 6, at 105.

33 Cannan, supra note 25, at 17.

34 Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955).

35 Id. at 62.

36 Id.

37 Id. at 63 (quoting 28 U.S.C. § 2674 (1948)) (emphasis added).

38 Id. at 64.

39 Id.

40 Id. at 64-65.

41 Id. at 69.

42 Cessna Aircraft Co. v. Metro. Topeka Airport Auth., 940 P.2d 84, 94 (Kan. Ct. App. 1997); Alpha Alpha, Inc. v. Southland Aviation, 697 So. 2d 1364, 1372 (La. Ct. App. 1997); Forrester v. Port Auth. of N.Y. & N.J., 527 N.Y.S.2d 224, 227 (N.Y. App. Div. 1988).

43 Orgill & Toren, supra note 6, at 106.

44 Id.

45 Id. at 106-07.

46 Caban v. United States, 671 F.2d 1230, 1232 (2d Cir. 1982).

47 Id.

48 Id. at 1233 (alterations in original) (quoting Canadian Trans. Co. v. United States, 663 F.2d 1081, 1087 (D.C. Cir. 1980)).

49 Dalehite v. United States, 346 U.S. 15, 42 (1953).

50 Id. at 18-23.

51 Id. at 41.

52 Id. at 35-36 (emphasis added) (citations omitted).

53 Id. at 42.

54 Id. (emphasis added).

55 Cannan, supra note 25, at 20.

56 United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813 (1984).

57 Id. at 799.

58 Id. at 800.

59 Id. at 799-800.

60 Id. at 800.

61 Id.

62 Id. at 802.

63 Id. at 802-03.

64 Id. at 803.

65 Id. at 811.

66 Id. at 811-12.

67 Id. at 812.

68 Id. at 813-14.

69 Id. at 815-16.

70 Id. at 821.

71 Berkovitz v. United States, 486 U.S. 531, 536 (1988).

72 Id. at 533.

73 Id.

74 Id. at 536 (emphasis added).

75 Id. at 536-37 (citing Dalehite v. United States, 346 U.S. 15, 35 (1953)).

76 Id. at 539-40.

77 Id. at 542-45, 548.

78 Id. at 544-45.

79 Id. at 546-547.

80 United States v. Gaubert, 499 U.S. 315, 322 (1991).

81 Id. at 317-18.

82 Id.

83 Id. at 319.

84 Id.

85 Id.

86 Id. at 320.

87 Id. at 324 (emphasis added) (citations omitted).

88 Id. at 325.

89 Id.

90 Id. at 325-26.

91 Id. at 324 (emphasis added). See Berkovitz v. United States, 486 U.S. 531, 536 (1988).

92 See Gaubert, 499 U.S. at 324-25.

93 Id. at 327-28.

94 Id. at 333 (emphasis added).

95 Id. at 332, 334.

96 Stephen L. Nelson, The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act, 51 S. TEX. L. REV. 259, 292-93 (2009).

97 Pratt v. Gulfport-Biloxi Reg'l Airport Auth., 97 So. 3d 68, 73 (Miss. 2012).

98 See id. at 72-76.

99 Id. at 70.

100 Id.

101 Id.

102 Id. at 71.

103 Id.

104 Id. at 72 (emphasis added) (quoting Miss. Transp. Comm'n v. Montgomery, 80 So. 3d 789, 795 (Miss. 2012)).

105 Id. (citing Dancy v. E. Miss. State Hosp., 944 So. 2d 10, 16-18 (Miss. 2006)).

106 Id. (quoting Montgomery, 80 So. 3d at 795).

107 Id.

108 Id. at 72.

109 Id. at 75.

110 Japan Air Lines Co. v. State, 628 P.2d 934, 936 (Alaska 1981).

111 Id. at 935.

112 Id. at 935-36.

113 Id. at 936.

114 Id. (emphasis added).

115 State Dep't of Transp. & Pub. Facilities v. Sanders, 944 P.2d 453, 456 (Alaska 1997).

116 Id. at 455.

117 Id.

118 Id. at 456 (internal quotation marks omitted).

119 Id. at 460.

120 Tomich v. City of Pocatello, 901 P.2d 501, 503 (Idaho 1995).

121 Id.

122 Id.

123 Id.

124 Id.

125 Id. at 504.

126 Id. (quoting Lawton v. City of Pocatello, 886 P.2d 330, 336 (Idaho 1994)).

127 Id. at 505.

128 See id.; see also Indian Towing Co. v. United States, 350 U.S. 61, 64-65 (1955).

129 See Tomich, 901 P.2d at 505.

130 Alpha Alpha, Inc. v. Southland Aviation, 697 So. 2d 1364, 1372 (La. Ct. App. 1997).

131 Id. at 1366.

132 Id.

133 Id.

134 Id. at 1366-67.

135 Id. at 1367.

136 Id.

137 Id. at 1367-68.

138 Id. at 1371.

139 Id. at 1372 (internal citations omitted).

140 Id.

141 Id.

142 Cessna Aircraft Co. v. Metro. Topeka Airport Auth., 940 P.2d 84, 94 (Kan. Ct. App. 1997).

143 Id. at 90.

144 Id.

145 Id.

146 Id.

147 Id. at 92.

148 Id. at 94.

149 Id.

150 Forrester v. Port Auth. of N.Y. & N.J., 527 N.Y.S.2d 224, 225 (N.Y. App. Div. 1988).

151 Id. at 225-26.

152 Id. at 226.

153 Id.

154 Id. at 227.

155 Id.

156 Walker v. Mitchell, 891 P.2d 1359, 1360 (Or. Ct. App. 1995).

157 Id.

158 Id. at 1360-61.

159 Id.

160 Id.

161 Id. at 1365.

162 Id.

163 AIG Aviation Ins. Servs., Inc. v. United States, 885 F. Supp. 1496, 1502 (D. Utah 1995).

164 Id. at 1497.

165 Id.

166 Id.

167 Id. at 1497-98.

168 Id. at 1498.

169 Id.

170 Id.

171 Id.

172 Id. at 1498-99.

173 Id. at 1499.

174 Id.

175 Id.

176 Id. at 1500.

177 Id.

178 Id. at 1500-02.

179 Id. at 1502.

180 Id. at 1503-04.

181 Id. at 1504-05.

182 Compare DePass v. United States, 479 F. Supp. 373 (D. Md. 1979), with Caban v. United States, 671 F.2d 1230 (2d Cir. 1982).

183 DePass, 479 F. Supp. at 374.

184 Id.

185 Id.

186 Id.

187 Id. at 375; see Dalehite v. United States, 346 U.S. 15 (1953); Indian Towing Co. v. United States, 350 U.S. 61 (1955).

188 DePass, 479 F. Supp. at 375. It should be noted that this case preceded the Supreme Court opinions in Varig Airlines, Berkowitz, and Gaubert.

189 Id. at 375.

190 Id. at 376-77.

191 Id. at 377.

192 Caban v. United States, 671 F.2d 1230, 1233 (2d Cir. 1982).

193 Id. at 1230.

194 Id. at 1231.

195 Id. at 1232.

196 Id.

197 Id.

198 Id. at 1232-33.

199 Id. at 1233.

200 Id.

201 Bradley v. United States, 164 F. Supp. 2d 437, 441-42 (D. N.J. 2001), aff'd, 299 F.3d 197 (3d Cir. 2002).

202 Id. at 442.

203 Id.

204 Id.

205 Id. at 454.

206 Id.; see United States v. Gaubert, 499 U.S. 315, 323 (1991).

207 Nelson, supra note 96, at 262.

208 Bruce A. Peterson & Mark E. Van Der Weide, Susceptible to Faulty Analysis: United States v. Gaubert and the Resurrection of Federal Sovereign Immunity, 72 NOTRE DAME L. REV. 447, 489 (1997).

209 See Pratt v. Gulfport-Biloxi Reg'l Airport Auth., 97 So. 3d 68, 75-77 (Miss. 2012).

210 Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J. dissenting).

211 See Japan Air Lines Co. v. State, 628 P.2d 934, 938 (Alaska 1981); Cessna Aircraft Co. v. Metro. Topeka Airport Auth., 940 P.2d 84, 94 (Kan. Ct. App. 1997); Alpha Alpha, Inc. v. Southland Aviation, 697 So. 2d 1364, 1371-72 (La. Ct. App. 1997); Forrester v. Port Auth. of N.Y. & N.J., 527 N.Y.S.2d 224, 226 (N.Y. App. Div. 1988).

212 Alpha Alpha, 697 So. 2d at 1372.

213 Compare Brummett v. City of Jackson, 51 So. 2d 52, 53 (Miss. 1951) (holding that airport could be held liable for negligently maintaining tie downs), with Pratt, 97 So. 3d at 72 (holding that airport was immune for negligently maintaining ladder to exit terminal onto tarmac).

214 28 U.S.C. § 2671 (2012).

215 Id.

216 See Dalehite v. United States, 346 U.S. 15, 32-33 (1953).

217 See Peterson & Van Der Weide, supra note 208, at 486; AIG Aviation Ins. Servs., Inc. v. United States, 885 F. Supp. 1496, 1504 (D. Utah 1995).

218 See Peterson & Van Der Weide, supra note 208, at 487-90; Andrew Hyer, Comment, The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis, 2007 B.Y.U. L. REV. 1091, 1107 (2007).

219 United States v. Gaubert, 499 U.S. 315, 324-25 (1991).

220 Tomich v. City of Pocatello, 901 P.2d 501, 504-05 (Idaho 1995).

221 Id. at 505.

222 Pratt v. Gulfport-Biloxi Reg'l Airport Auth., 97 So. 3d 68, 71-72 (Miss. 2012).

223 Gaubert, 499 U.S. at 335 (Scalia, J., concurring) (emphasis in original).

224 See Jain v. Memphis Shelby Cnty. Airport Auth., No. 08-2119, 2010 WL 711319 (W.D. Tenn. 2010).

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980 So.2d 314
Court of Appeals of Mississippi.

Cody W. WATERS and Kacee T. Waters, Appellant
v.
Albert ALLEGUE, Appellee.

No. 2006-CA-01975-COA.
|
March 25, 2008.

Synopsis

Background: Purchasers brought action against real estate agent based on claims of fraud, negligent misrepresentation, and negligent and intentional infliction of emotional distress. The Circuit Court, Jackson County, Dale Harkey, J., entered summary judgment in favor of agent, and purchasers appealed.

Holdings: The Court of Appeals, Griffis, J., held that:

[1] purchasers did not rely on truth of disclosure statement that house had 3,000 square feet when they closed on home, as required to support claims for fraud and negligent misrepresentation;

[2] allegations did not support claim for negligent infliction of emotional distress; and

[3] agent did not cause purchasers severe emotional distress by failing to disclose that home did not have 3,000 square feet.

Affirmed.

West Headnotes (9)

[1] Appeal and Error
Form and Requisites in General
Appeal and Error
Points and Arguments

Purchasers failed to preserve for appellate review claim that vendors' real estate agent owed duty to disclose fact that house was not 3,000 square feet as originally asserted, where argument in brief in support of claim contained incorrect and improper citations, and purchasers failed to argue how cases or statutes cited to supported their claim.

Cases that cite this headnote

[2] Brokers
Misrepresentation or Fraud of Broker

Purchasers did not rely on truth of disclosure statement that house had 3,000 square feet when they closed on home, as required to support claim of fraud against vendors' real estate agent; purchasers obtained information prior to closing indicating that home was less than 3,000 square feet and attempted to negotiate lower price as result, but instead refused vendor's offer to cancel contract and continued to closing.

1 Cases that cite this headnote

[3] Fraud
Elements of Actual Fraud
Fraud
Weight and Sufficiency

To establish fraud, the plaintiff must prove the following elements by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

1 Cases that cite this headnote

[4] Brokers
Misrepresentation or Fraud of Broker

Purchasers did not rely on truth of disclosure statement that house had 3,000 square feet

when they closed on home, as required to support claim against vendor's real estate agent for negligent misrepresentation; purchasers obtained information prior to closing indicating that home was less than 3,000 square feet and attempted to negotiate lower price as result, but instead refused vendor's offer to cancel contract and continued to closing.

1 Cases that cite this headnote

[5] **Fraud**
Statements Recklessly Made;Negligent Misrepresentation

Fraud
Fraudulent Concealment

To establish a claim for negligent misrepresentation, the plaintiff must establish the following elements: (1) a misrepresentation or omission of a fact; (2) that the representation or omission is material or significant; (3) that the defendant failed to exercise that degree of diligence and expertise the public is entitled to expect of it; (4) that the plaintiff reasonably relied on the defendant's representations; and (5) that the plaintiff suffered damages as a direct and proximate result of his reasonable reliance.

1 Cases that cite this headnote

[6] **Damages**
Other Particular Cases

Purchasers' assertion that real estate agent should have disclosed that home did not have 3,000 square feet as marketed by agent and as noted in disclosure statement did not support claim of negligent infliction of emotional distress, where they neither alleged nor demonstrated that they suffered any physical injury from purchasing home.

5 Cases that cite this headnote

[7] **Damages**
Physical Illness, Impact, or Injury;Zone of Danger

A plaintiff may not recover for a claim of negligent infliction of emotional distress without showing that he or she suffered a physical injury.

6 Cases that cite this headnote

[8] **Damages**
Other Particular Cases

Real estate agent did not cause purchasers emotional distress by allegedly failing to disclose that home did not have 3,000 square feet, as originally asserted by agent and noted in disclosure statement, as required to support claim for intentional infliction of emotional distress; purchasers learned that home did not have 3,000 square feet before closing but refused vendors' offer to be released from contract and continued to closing.

Cases that cite this headnote

[9] **Damages**
Nature of Conduct

Damages
Nature of Injury or Threat

To establish a claim for intentional infliction of emotional distress, the plaintiff must show that the defendant, through extreme and outrageous conduct, intentionally or recklessly caused severe emotional distress to another.

9 Cases that cite this headnote

Attorneys and Law Firms

***316** Calvin D. Taylor, attorney for appellants.

Patrick R. Buchanan, W. Fred Hornsby, Pascagoula, attorneys for appellee.

Before MYERS, P.J., GRIFFIS and CARLTON, JJ.

Opinion

GRIFFIS, J., for the Court.

¶ 1. Cody and Kacee Waters brought a claim for fraudulent misrepresentation against Albert Allegue. The circuit court granted summary judgment in favor of Allegue. On appeal, the Waters argue that Allegue owed a duty to disclose all material facts that adversely affected the property value and that the trial court erred in granting summary judgment to the defendants.

FACTS

¶ 2. After Hurricane Katrina, the Waters sought to purchase a home on the Mississippi Gulf Coast. They found a house that they wanted to buy. The sellers of this house, Manuel and Lisa Pina, used Allegue as their real estate agent. The sellers and Allegue marketed the house as having 3,000 square feet. The Waters and the Pinas entered into a contract for the sale of the house. The disclosure statement stated that the house had 3,000 square feet, and the contract for sale also stated that the house contained 3,000 square feet.

¶ 3. Before closing on the house, the Waters learned that the house did not have 3,000 square feet; but instead, the size of the house was somewhere between 2,500 to 2,580 square feet. Camille Thomas and Jack Thomas, two independent appraisers hired by the bank involved in this transaction, informed Cody Waters that the house had less than 3,000 square feet. Cody Waters asked the Thomases to measure the house again. They did. Once again, the Thomases told Cody Waters that the house had under 3,000 square feet.

¶ 4. The Waters attempted to renegotiate the price with the Pinas, but the Pinas would not lower their price. Instead, they offered to let the Waters out of the contract. The Waters chose not to get out of the contract and closed on the house, without pursuing any pre-closing remedies regarding the discrepancy in square footage.

***317** ¶ 5. A few months later, the Waters filed this action after they learned that Allegue's wife was the agent for the Pinas when they originally purchased the house.

STANDARD OF REVIEW

¶ 6. This Court employs a de novo standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. *McMillan v. Rodriguez,* 823 So.2d 1173, 1176-77(¶ 9) (Miss.2002). The evidence must be viewed in the light most favorable to the party against whom the motion has been made. *Id.* at 1177(¶ 9). If, in this view, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his or her favor. *Id.* Issues of fact sufficient to require reversal of a summary judgment obviously are present where one party swears to one version of the matter in issue, and another says the opposite. *Id.*

ANALYSIS

I. Did Allegue owe a duty to the Waters to disclose all material facts that adversely affected the property value?

[1] ¶ 7. The Waters argue that Allegue should have told them that the house was not 3,000 square feet in size because they owed him a duty to disclose such information. The Waters' brief on this issue is short and is quoted in full:

> Mississippi law recognizes that a broker has a duty to make disclosures of any information that adversely affects the value of the property that the broker is listing. Miss.Code Ann. § 511. All disclosures are required to be made in "good faith." "[G]ood faith means honesty in fact in the conduct of the transaction." *Id.* Mississippi law also provides that "any person who willfully or negligently violates or fails to perform any duty ... shall be liable in the amount of actual damages suffered by a transferee." Miss.Code A. § 523. *See also Lane v. Oustalet,* 850 So.2d 1143 (Miss.App.2002) (finding that a broker may be held liable to a purchaser of real property for failing to disclose that the property had suffered damage due to termite infestation); *Lee Hawkins Realty, Inc. v. Moss,* 724 So.2d 1116 (Miss.App.1998)(finding that broker has duty to deal honestly in its dealings with purchasers of real property).

The problem with this argument is that it contains a number of incorrect and improper citations. More importantly, the Waters do not even attempt to argue how these cases or statutes (if we could figure out which statute is cited) apply to the current case.

¶ 8. The Mississippi Supreme Court has held, "[f]ailure to cite relevant authority obviates the appellate court's obligation to review such issues." *Taylor v. State,* 754 So.2d 598, 604(¶ 12) (Miss.Ct.App.2000); *Dozier v. State,* 247 Miss. 850, 157 So.2d 798, 799 (1963). Thus, we will not address the Waters' first assignment of error.

II. Did the circuit court err in granting summary judgment?

[2] ¶ 9. The Waters also argue that the trial court erred when it granted summary judgment on all of the claims asserted. The Waters claim that there are genuine issues of material fact in dispute. Thus, they argue that the motion for summary judgment should not have been granted.

[3] ¶ 10. The Waters' first claim asserted was for fraud. To establish fraud, the plaintiff must prove the following elements by clear and convincing evidence:

> ***318** (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.

Levens v. Campbell, 733 So.2d 753, 761-62(¶ 35) (Miss.1999). The motion for summary judgment offered evidence presented through the affidavits of two independent appraisers. The appraisers testified that Cody Waters knew that the subject house contained less than 3,000 square feet before the closing. Cody Waters even admitted that "prior to the closing/purchase of the subject residence a potential square footage discrepancy had been communicated to [the Waters] by the home appraiser."

¶ 11. Indeed, the circuit court correctly concluded that there were not genuine issues of a material fact in dispute and that Allegue was entitled to a judgment as a matter of law. Because the Waters were aware, before the closing, that the house did not contain 3,000 square feet, they cannot claim that they were not aware of the falsity of any such statement claiming that the house did contain 3,000 square feet. Also, having learned that Allegue's statement was false before the closing took place, it indicates that the Waters did not rely on the truth of this statement and did not have a right to rely on the truth of such statement. *Id.* Summary judgment was appropriate on the Waters' claim of fraud.

[4] **[5]** ¶ 12. The Waters' second claim asserted was for negligent misrepresentation. To establish a claim for negligent misrepresentation, the plaintiff must establish the following elements:

> (1) a misrepresentation or omission of a fact;(2) that the representation or omission is material or significant; (3) that the defendant failed to exercise that degree of diligence and expertise the public is entitled to expect of it; (4) that the plaintiff reasonably relied on the defendant's representations; and (5) that the plaintiff suffered damages as a direct and proximate result of his reasonable reliance.

Skrmetta v. Bayview Yacht Club, Inc., 806 So.2d 1120, 1124(¶ 13) (Miss.2002). Again, the circuit court was correct to grant summary judgment on this claim because the Waters cannot establish that they reasonably relied on Allegue's statement. The evidence indicated that Waters knew the house was not 3,000 square feet. Hence, they cannot reasonably rely on any negligent misrepresentation Allegue may have made regarding the house being 3,000 square feet. Summary judgment was appropriate on the claim of negligent misrepresentation.

[6] **[7]** ¶ 13. The Waters' third claim asserted was for negligent infliction of emotional distress. A plaintiff may not recover for a claim of negligent infliction of emotional distress without showing that he or she suffered a physical injury. *Wilson v. GMAC,* 883 So.2d 56, 65(¶ 29) (Miss.2004). The Waters have neither alleged nor shown that they suffered physical injury because they purchased

the house. Summary judgment was appropriate on the claim of negligent infliction of emotional distress.

[8] **[9]** ¶ 14. The Waters' final claim asserted was for intentional infliction of emotional distress. To establish a claim for intentional infliction of emotional distress, the plaintiff must show that the defendant through "extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another...." *Peoples* ***319** *Bank & Trust Co. v. Cermack,* 658 So.2d 1352, 1365 (Miss.1995) (quoting Restatement (Second) of Torts § 46 (1966)). The Waterses knew the house did not contain 3,000 square feet when they purchased and closed on the house. Thus, Allegue could not have caused them emotional distress because they knew the house was not 3,000 square feet in size when they closed on it, and they did not have to purchase the house. Summary judgment was appropriate on the claim for intentional infliction of emotional distress.

¶ 15. **THE JUDGMENT OF THE CIRCUIT COURT OF JACKSON COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER, BARNES, ROBERTS AND CARLTON, JJ., CONCUR. ISHEE, J., NOT PARTICIPATING.

All Citations

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