IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KAREN FRAZIER	**APPELLANT**
V.	**CAUSE NO. 2006-SA-01739**
MISSISSIPPI DEPARTMENT OF TRANSPORTATION	**APPELLEE**

BRIEF OF APPELLEE

FROM THE CIRCUIT COURT
OF SCOTT COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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V. — **CAUSE NO. 2006-SA-01739**

MISSISSIPPI DEPARTMENT OF TRANSPORTATION — **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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SO Certified this the 12th of March, 2007

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STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff/Appellant Karen Frazier filed a Complaint seeking compensatory damages for injuries sustained while traveling on Highway 13. Frazier alleged negligence on the part of the Mississippi Department of Transportation (MDOT) for leaving gravel on the roadway, allegedly causing a collision with a tree. However, Appellee/Defendant MDOT, as a governmental entity, is protected under the Mississippi Tort Claim Act (MTCA) codified under Mississippi Code Annotated § 11-46-9, and therefore is immune from liability.

B. Course of Proceedings and Disposition of the Case Below

Karen Frazier filed a Complaint alleging negligence on the part of MDOT for leaving of gravel on the roadway, and failing to warn of a dangerous condition. ®. 2.)[1] In response, MDOT filed a Motion to Dismiss/Motion for Summary Judgment on the grounds that Frazier did not state a claim for which relief can be granted and there are no genuine issues of material fact in dispute. (R. 8.) MDOT raised the defense of immunity as pursuant to Mississippi Code Annotated §11-46-9 which protects MDOT from claims due to weather and dangerous conditions. (R.13.) The lower court granted summary judgment in favor of MDOT and Frazier appeals.

C. Statement of the Facts

MDOT offered the deposition testimony of Mike Atkinson, District Maintenance

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1References to the Original Record are cited as "R." The Appellate Court record was subsequently supplemented and the Supplemental Volume is cited in this Brief as "S.V." The parties have stipulated to an additional supplement to the record which is referred to as "A.S.R." in this brief and signifies the Appellee's Supplemental Record.

Superintendent One for MDOT since 2000, in support of its motion for summary judgment. Atkinson testified that on or about May 6, 2003, he checked the roadway on Highway 13 from Highway 481 to the Leake County line, to insure that all permanent signs and barricades were in place. (A.S.R. 16; R.E. 16.) Those signs included Road Work 1 Mile, barricades with 45 MPH advisory signs, Loose Material sign, No Center Line Ahead sign, and a No Centerline Next 16.7 Miles sign. (A.S.R.16; R.E. 16.) Atkinson also found that additional signs were placed throughout the length of the project, including No Center Stripe and Loose Material 45 MPH signs. (A.S.R.16; R.E. 16.) He verified that all signs were in place on the Highway 13 roadway where MDOT would be working the next day. (A.S.R.16; R.E. 16.) To his satisfaction, all of the signs were placed in accordance with the Manual of Uniform Traffic Control Devices, "MUTCD". (A.S.R.16; R.E. 16.) Atkinson then ordered liquid asphalt for the next day's work. (A.S.R. 16; R.E. 16.)

The next day, May 7, 2003, Atkinson supervised a crew working on Highway 13, beginning about four miles north of Highway 481 in Scott County, Mississippi. (A.S.R. 16; R.E. 16.) There, they were shooting out two loads of liquid asphalt and following that with placement of small stone. (A.S.R.16; R.E. 16.) Working under the direction of the MDOT district office in Newton, Mississippi, the crew began work at 9:00 a.m., and immediately placed temporary signs on the shoulder of Highway 13, including Road Work Ahead, Be Prepared to Stop, and Flagman Ahead signs, all of which were the temporary signeage required by the MUTCD for such road projects. (A.S.R.16; R.E. 16.) During the work, it was not raining. (A.S.R.16; R.E. 16.) The work supervised by Atkinson was finished by about 2:30 p.m. (A.S.R.16; R.E. 16.) The temporary signs were picked up, and Atkinson made

certain that the required permanent signs were in place before he left. (A.S.R.16-17; R.E. 16-17.) Checking carefully, he saw no unusual or hazardous conditions caused by the signs or the condition of the roadway, or with regard to the materials they had placed on the roadway surface. (A.S.R.17; R.E. 17.) However, it did rain after the work crew left. (A.S.R. 17; R.E. 17.)

On that same day, at approximately 2:50 p.m., Frazier was driving north on Highway 13 in the right (east) lane in the area of the work by Atkinson's crew, when she lost control of her vehicle and ran off the roadway to her left beyond the left (west) northbound lane and collided with a tree off the Highway, coming to rest about 12 feet from the highway surface. (S.V. 32; R.E. 118.) Frazier had been traveling at a speed of approximately 55 mph. (S.V. 32; R.E. 118.) The highway patrolman, Joe Nelson, listed inattention as the cause of her accident on his Mississippi Uniform Accident Report. (S.V. 32; R.E. 118.)

At about 5:30 p.m., Tommy Phillips, MDOT Superintendent One over Scott County roads, received a call from the Scott County Sheriff's Office, informing him that there had been an accident on Highway 13 where it had been sealed and there was loose material on the roadway. (A.S.R. 24; R.E. 24.) This included the northbound lane from a point 4 miles north of Highway 481 and then five miles further up Highway 13. (A.S.R.24; R.E. 24.) Phillips rode the length of the roadway, noticing that all of the aforementioned permanent signs required by the MUTCD were in place at that time, including the Loose Material 45 MPH and signs denoting road work. (A.S.R.24; R.E. 24.) He noticed that it had rained during the afternoon and roadway surface was wet, which had caused the loose gravel to separate. (A.S.R. 24; R.E. 24.) He and his crew swept off the loose gravel. (A.S.R. 24; R.E. 24.) He

had received no calls or complaints as to problems with the roadway until he received the Sheriff's call at 5:30 p.m. (A.S.R. 24;R.E. 24.) He is the official who would be called in the event of any complaints or problems related to the roadway. (A.S.R. 24;R.E. 24.) The next day, he saw where somebody had run off the roadway about a mile north of the beginning of that day's chip sealing project, and noted that the driver would have had to drive past the Loose Material 45 MPH sign and other warning signs running the length of the project before running off the road. (A.S.R. 24; R.E. 24.)

During depositions taken on March 29, 2006, Frazier admitted that she could not recall anything about how the May 7, 2003 accident occurred or what led to her collision with the tree on that date. (A.S.R.42; R.E. 42.) She said that she did not take note of any signs (A.S.R. 42;R.E. 42.), was driving 55 mph (A.S.R.39; R.E. 39.), which is in excess of the 45 mph advisory signs placed on the roadway by Tommy Phillips and his crew from May 1 to May 6. Although Karen Frazier's husband, Billy Frazier, testified that the signs were up on May 8, he claimed not to have seen them on May 7, after he returned from the Hospital after nightfall. (A.S.R. 63; R.E. 63.) However, on cross-examination he admitted that he didn't know whether the signs were up or not. (A.S.R.63; R.E. 63.)

By contrast, Tommy Phillips testified that his crew put up the signs and that he verified their existence on the roadway on May 6 and the morning of May 7, and the evening of May 7 after Frazier's accident. (A.S.R. 83-84; R.E. 83-84.) Mike Atkinson also testified that the signs were up on May 6 and all day May 7. (A.S.R. 16; R.E. 16.) Trooper Joe Nelson and eyewitness James Merchant also noted in their affidavits that the signs were up and in place on May 7 prior to and during Plaintiff's accident. (A.S.R. 28; R.E. 28.; A.S.R. 32; R.E. 32.)

Although Frazier testified that there was an excessive amount of loose gravel on the roadway at the accident site (A.S.R. 40; R.E. 40.), Nelson and Merchant dispute that in their affidavits (A.S.R. 28; R.E. 28., A.S.R. 32; R.E.32.), and Atkinson testified that he drove by the area where the accident occurred after they laid the chip sealing down, was looking for problems on the roadway, and found none. (A.S.R. 16-17; R.E. 16-17.) Furthermore, Phillips testified during his deposition that the loose material condition was open and obvious to Frazier by virtue of the signs and the appearance of the roadway, and the sound the roadway made when traveled over by Frazier. (A.S.R. 80, 85;R.E. 80, 85.)

STATEMENT OF THE ISSUES

Whether MDOT is entitled to summary judgment in that there were no genuine issues of material fact to refute that the Mississippi Department of Transportation (MDOT) was immune from liability under § 11-46-9 of the Mississippi Code Annotated.

SUMMARY OF THE ARGUMENT

Frazier alleges injuries sustained in an accident on Highway 13 were the result of negligence on behalf of MDOT. She claims that MDOT negligently left gravel on the roadway, and such negligence and the surrounding circumstances prevent MDOT from protecting itself under the Mississippi Tort Claims Act.

The MDOT's maintenance and repair of Highway 13 was a discretionary function as well as the determination of where and how many warning signs to place at and around the work site. Frazier ignored the warning signs and was injured when her car went off the road due to her own negligence. The trial court properly held that MDOT gave adequate notice of the work being performed and did not have either actual or constructive notice of any dangerous condition on the roadway prior to 5:30 p.m. when Superintendent Phillips received a call from the Sheriff's office which was after Frazier's accident.

The defect in the roadway was not only open and obvious, but was also caused by weather, more specifically, the rain fall that occurred after the MDOT crew had finished their work for the day. The rain caused the loose gravel on the roadway to separate. MDOT had no notice of this, but in addition to the lack of notice, MDOT had placed signs warning motorists such as Frazier, to proceed with caution due to the maintenance work. Frazier admitted to not seeing the signs and driving through the area at an admitted 55 miles per hour which was in excess of the warning limit of 45 miles per hour.

Frazier's own negligence was the sole cause of her accident. The MDOT is immune from suit in this case because of the discretionary, weather, and notice provisions of the Mississippi Tort Claims Act. Consequently, Defendant MDOT is entitled to a granting of a Summary Judgment because Frazier failed to offer proof that the condition was not open and

obvious, that the MDOT did not place warning signs, and that MDOT had notice of any possible dangerous condition caused by the rain.

ARGUMENT

I. SUMMARY JUDGMENT IS PROPER BECAUSE THERE ARE NO GENUINE ISSUES IN DISPUTE THAT MDOT IS IMMUNE UNDER THE MISSISSIPPI TORT CLAIMS ACT.

A. Standard of Review

The appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. This Court employs a *de novo* standard of review of a lower court's entry of summary judgment and examines all the evidentiary matters before it: admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. *Williamson ex rel. Williamson v. Keith*, 786 So. 2d 390, 393 (Miss.2001); M.R.C.P. 56©. 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 favor. Otherwise, the motion should be denied. *Id.* Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. *Id.* In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. *Id.* We have also held that the non-moving party must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. *Dailey v. Methodist Med. Ctr.*, 790 So. 2d 903, 915-16 (Miss. Ct. App.2001).

The trial court after examining all of the documents and relevant information held that there were no genuine issues of material fact and that the MDOT was immune under the Mississippi Tort Claims Act. Specifically, the trial court properly analyzed Mississippi Code § 11-46-9(1)(v) which held that a governmental entity shall not be liable for any claim:

> arising out of an injury caused by a dangerous condition on property of the

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

The trial court examined both aspects of § 11-46-9(1)(v) and found that the defendant had met its burden for both prongs.

B. MDOT Employees Were Not Negligent or Engaged in Wrongful Conduct in Creating the Hazardous Condition.

At the time of the accident in this case, the MDOT was implementing a "tar and slag" job to repair sections of Highway 13. (A.S.R. 96; R.E. 96.) In deposition testimony, Atkinson explained that to successfully complete this repair, as in all "tar and slag" repairs, liquid tar is spread on the roadway which is covered by loose gravel for approximately a twenty-four hour period to allow for it to take hold and settle in excess gravel into the road. (A.S.R 97-98; R.E. 97-98.) The trial court for the sake of argument held that this could be considered a dangerous condition due to the fact that loose gravel had to be left on the roadway. (R. 50; R.E. 125.) The trial court found that this created an affirmative duty on behalf of the MDOT to warn motorists of the possible dangerous condition, which it did. (R. 50; R.E. 125.)

MDOT satisfied its duty to warn by placing warning signs along the roadway to warn of the conditions and construction work being performed. (A.S.R. 16; R.E. 16.) According to Phillips and Atkinson, signs were placed warning motorists of the construction zone, loose materials in the road signs, no center line signs and the MDOT provided affidavits that the signs were in place prior to the beginning of the construction, during the construction, and were found to still be in place after Frazier's accident. (A.S.R. 16, 24, 32; R.E. 16, 24, 32.)

Frazier argued that her affidavit and the affidavit of Billy Frazier at least created a genuine issue of material fact as to whether the warning signs were in place at the time of the accident. The trial court considered their testimony and did not find such testimony was sufficient to rebut the unequivocal assertions of the employees of MDOT that the signs were in fact in place at the time of the accident. (R. 50-51; R.E. 125-26.)

1. Frazier Failed To Produce Evidence That the Warning Signs Were Not in Place at the Time of Her Accident.

MDOT produced the affidavits of Tommy Phillips and Mike Atkinson that both observed that the warning signs were in place before the construction project began and were in place before the accident occurred, as well as the affidavits of Trooper Joe Nelson who investigated the accident and James Merchant, an eye witness, who both swore that the signs were in place at the time of the accident. A.S.R. 16, 24, 28, 32; R.E. 16, 24, 28, 32. In order to rebut this assertion, Frazier relies on her own affidavit, her husband, Billy Frazier's affidavit, and the unsigned, unsworn affidavits of Sarah Ragsdale and Roy Shed which were improperly considered by the trial court. (S.V. 92, R.E. 129.;S.V. 113, R.E. 131.; S.V. 137-38, R.E 134-35; S.V. 137-38, R.E. 136-37.)

In her affidavit, Frazier stated that she "did not see any warning signs advising her to decrease her speed to 45 mph, the presence of loose materials, or no centerline." (S.V. 92, R.E. 129.) However, in her deposition she testified:

> Q: I understand that you don't remember seeing any, but do you feel that under oath you could deny that there were signs there?
>
> A: I couldn't say there was or there wasn't because I don't know. I couldn't even tell you who myself was that day.

(A.S.R. 42;R.E. 42.)

Consequently, Frazier was unable to deny the existence of the warning signs on Highway 13 on the day of the accident. Frazier further relies on the testimony and affidavit of her husband, Billy Frazier, to corroborate that the signs were not in place. However, his testimony was similar to Frazier's, except that he *did see* the signs in place the next day. Bill Frazier testified:

Q: Do you think it (the sign) was there the day before and you just missed it?

A: I don't know

Q: So you don't know whether it was there or not?

A: No, sir.

* * *

Q. So, then it would be your testimony today that the Loose Material 45 sign and the NO Center Line signs were not up on May 7th?

A. I did not see them on May 7th.

Q. Okay.

A. But like I said, I did see them the next day. I showed them to Karen the next day, which was the 8th.

B.

(A.S.R. 63; R.E. 63.)

James Merchant, a retired firefighter who lives near the accident scene provided his affidavit in support of MDOT's motion for summary judgment. (A.S.R. 32; R.E. 32.) He observed the accident from his front porch, and he had also seen the Loose Material 45 MPH sign just south of his home on Highway 13 earlier the in the day on May 7th. (A.S.R. 32; R.E. 32.)

Based on the this evidence, Frazier is unable to establish that there is a genuine issue of material fact as to the presence of the warning signs on Highway 13. As the trial court held:

> There was significant equivocation in the testimonies and affidavit from Plaintiff. The crux of what that testimony revealed was that the deponent/affiant "did not see the warning signs", implying they could have been present but not observed. On the other hand, the deponents/affiants for Defendant stated unequivocally (without any equivocation) that the signs were present. The Court finds that the Plaintiff has failed to show that Defendant did not exhibit adequate warning signs of the roadway project.

(R. 52, R.E. 127.)

Clearly, the evidence in support of and in response to MDOT's motion for summary judgment establishes the presence of warning signs on Highway 13.

2. Placement of Warning Signs is a Discretionary Function Given Immunity Under § 11-46-9(1)(d) of the Mississippi Tort Claims Act.

The placement of warning signs by the MDOT implicates Mississippi Tort Claims Act section 11-46-9(1)(d) which provides immunity for the performance of discretionary functions. In *Willigham v. Mississippi Transportation Commission*, 944 So. 2d 949, 952 (Miss. 2006), the Mississippi Supreme Court held that the placement or non-placement of warning signs is a discretionary act, involving a choice that must be based upon public policy and other considerations. The Supreme Court held that while the MTC's duty to place warning signs is statutory, the execution of that duty is discretionary. *Id.* As such, the Court held that the MTC was entitled to immunity under Mississippi Code § 11-46-9(1)(d). *Id.* Moreover, where the discretionary exemption is involved, the governmental entity is not required to demonstrate that it used ordinary care in its acts and omissions in order to be cloaked with the immunity provided by this exemption. *Collins v. Tallahatchie County,* 876 So.2d 284, 289 (Miss. 2004); *Dozier v. Hinds County*, 354 F. Supp.2d 707, 714-15 (S.D. Miss. 2005).

The discretionary exemption, like all Mississippi Tort Claims Act exemptions, is to be interpreted liberally in favor of limiting liability. *See In re Foust,* 310 F.3d 849, 864 (5th

Cir. 2002)(interpreting Miss. Code Ann. § ll-46-9, and citing Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of Immunity, Non-jury Trial, and Limitation of Liability,* 68 Miss. Law Journal 703, 741, (1999), for the proposition that the exemptions must be so construed.). On such a liberal interpretation of the MTCA's exemption, Frazier's claims for negligent maintenance of the roadway are barred.

Frazier alleges no facts that MDOT did not act within its discretion in deciding which signs to place on the roadway and what work to do on the roadway. The decision regarding placement or non-placement of stop signs or other traffic devices is discretionary even if the discretion is abused. *Barrentine v. MDOT*, 913 So. 2d 391 (Miss. App.2005); *Dozier v. Hinds County*, 354 F. Supp.2d 707 (S.D. Miss. 2005). Further, "road maintenance and repair are discretionary functions," *Brewer v. Burdette,* 769 So.2d 920, 923 (Miss. 2000)(citing *Mohundro v. Alcorn County*, 675 So.2d 848, 854 (Miss. 1996)).

Inasmuch as the decisions to place the road signs were a discretionary function, MDOT is protected by the provisions of the Mississippi Tort Claims Act section 11-46-9(1)(d) establishing immunity for the performance of discretionary functions. MDOT is entitled to summary judgment because Frazier has presented no set of disputed facts that the immunity provisions of the MTCA are inapplicable.

C. MDOT Did Not Have Notice of the Alleged Dangerous Condition on the Road That Was Caused by the Weather Until After Frazier's Accident.

To hold MDOT liable under the second prong of Mississippi Code Annotated § 11-46-9(1)(v) in this case, Frazier must prove that MDOT had notice prior to Frazier's accident that there was a hazardous condition that MDOT failed to warn or protect against. "Mere

proof of a defective condition in streets, no matter how dangerous, is not sufficient to show breach of the [government's] duty to maintain. . .A would-be plaintiff must go further and show that the [entity] had actual or constructive knowledge of the defect." *Jenkins v. MDOT*, 904 So.2d 1207, 1212 (Miss. App. 2004)(citing *City of Jackson v. Locklar*, 431 So.2d 475, 479-80 (Miss. 1983)). Frazier has not offered any proof that MDOT was aware of the defective condition of Highway 13 at the time of Frazier's accident.

Frazier alleges that the loose gravel left on the roadway was the cause of her accident and that this loose gravel posed a dangerous condition for motorists once wet. (R. 2.) The accumulation of gravel on a roadway is not itself a dangerous condition. *Lowery v. Harrison Co. Bd. of Supervisors*, 891 So.2d 264, 267 (Miss. App. 2005). It is common for loose gravel, or "slag" to be left on a roadway after construction. This slag is swept from the road 24 hours after the sealing operations of the road are completed. In support of the motion for summary judgment, MDOT provided evidence that at the conclusion of the work day on May 7, 2003, Mike Atkinson, District Maintenance Superintendent for MDOT, made certain that the signs were in place and that no unusual or hazardous conditions existed on the roadway.

Mississippi Code Annotated § 11-46-9(1)(v) exempts governmental entities from liability for injuries not caused by the negligence of employees, or if caused by such negligence, that it did not have notice to warn against, *and no duty exists where the danger is obvious to one exercising due care.* The actions of MDOT and its employees clearly fall within this exemption. In the present case, the roadway was in the normal condition of a just completed "slag and tar" job when MDOT employees left it. In addition, the required signs were in place warning of loose material in the roadway. Frazier simply failed heed the

warnings and slow her speed to drive carefully across a wet surface where she knew, or reasonably should have known, and was warned that loose material would be present. Such loose material or gravel was not itself a dangerous condition. Frazier was not injured by any dangerous condition, but rather by her own inattention and negligence as cited in the police accident investigation report. (A.S.R. 30; R.E. 30.)

Regarding the weather, it has been held that public entities may not be held liable for rain which causes roads to erode and develop potholes, as that is a problem caused by weather, even though the governmental entity failed to correct the potholes and erosion. *Schepens v. City of Long Beach*, 2004-CA-02367-COA (Miss. Ct. App. March 21, 2006). The Mississippi Tort Claims Act specifically states that an entity will not be held liable for injuries caused solely by the effect of weather conditions on the use of streets and highways. Miss. Code. Ann. § 11-46-9(1)(q).

The evidence establishes that if there was a problem with the roadway, it was caused by the weather-- particularly the rain, which may have caused additional rock to separate from the slag job performed earlier that day. Frazier has not come forward with any evidence to substantiate her view that the alleged hazardous condition on the roadway was caused by MDOT employees. Indeed, MDOT had no notice of the weather conditions and no opportunity to correct any problems that may have arisen due to a lack of notice. (A.S.R. 24; R.E. 24.)

In the absence of notice, a governmental entity's decision to maintain or repair roads, or to place traffic control devices or signs, is purely discretionary, and the entity will be immune from suit even upon proof of an abuse of discretion. *Jones v. Mississippi Trans.*

Com'n., 920 So. 2d 516, 519 (Miss. Ct. App. 2006). Even if the loose gravel was the cause of Frazier's accident, she may not recover because of the lack of notice on the part of MDOT of the dangerous condition, as was noted in *Lowery*, 891 So.2d at 267 (defendant immune even if loose gravel was cause of accident where entity had no notice of condition; summary judgment granted); *Boyd Bros. v. MDOT*, 2005 WL 1362594 (S.D. Miss.)(where MDOT had no notice of stoplight malfunction, summary judgment was warranted on dangerous condition exemption). Similarly, where the rain had caused puddles and an expected slick asphalt on a highway, resulting in a driver spinning out and crashing, the court, in *Petree v. Crowe*, 272 So. 2d 399, 406 (La. App. 2nd Cir. 1973), ruled that the accident was caused by the prevailing weather circumstances upon an asphalt roadway and the failure of the plaintiff to maintain control of his vehicle in a rainstorm.

The evidence shows that Frazier's accident occurred at 2:50 pm. and Tommy Phillips, MDOT Superintendent over Scott County Roads, was not made aware that a problem existed on Highway 13 until 5:30 pm when he was called by the local sheriff's office. Furthermore, MDOT offered sworn testimony that the roadway was in good condition when MDOT employees left it, and that they had no notice of complaints or problems until they received a call from the Sheriff's office.

Notice is an essential element for a governmental entity to be held liable under § 11-46-9. Frazier has not offered any proof that MDOT had notice or should have known of the dangerous condition before Frazier's accident. In the complete absence of such proof, MDOT is entitled to summary judgment as there are no genuine issues of material fact in dispute as to notice

II. FRAZIER WAS FULLY WARNED AND CHARGED WITH NOTICE OF THE HIGHWAY CONSTRUCTION PROJECT AND THE OPEN AND OBVIOUS DANGERS ASSOCIATED WITH IT.

A. With the Existence of an Open and Obvious Condition, Frazier Should Have Reduced Her Speed.

It is undisputed that Frazier was exceeding the posted speed limit on the warning signs requiring motorists to reduce their speed. (S.V. 32; R.E. 118.) The lower court, in its opinion and order, stated that Frazier's case turns on whether the warning signs were present at the time of the accident. (R.48; RE.123.) The judge correctly points out that if the warning signs were in place then "this would negate the claim of negligence or other wrongful conduct on the part of Defendant." (R. 48; R.E. 123.)

Frazier alleges that MDOT was negligent in failing to post signs warning motorists of potentially hazardous roadway conditions. In support of this claim, Frazier provided her own testimony where she conceded that she did not know if the signs were up. (A.S.R. 42; R.E. 42.). In addition, Frazier provided testimony from her husband, Billy Frazier, who on cross-examination admitted that he did not know whether the signs were up or not. (A.S.R. 63; R.E. 63.) Frazier also provided the *unsigned* affidavit of Sarah Ragsdale in which she claims not to have seen any warning signs. (S.V. 137; R.E. 134.)

MDOT, however, provides unequivocal testimony from Superintendent Mike Atkinson, Superintendent Tommy Phillips, Mississippi Highway Patrol Trooper Joe Nelson, and James Merchant that the warning signs were in place at the time of Frazier's accident. (A.S.R. 83-84, R.E. 83-84; A.S.R. 28, R.E. 28; A.S.R. 32, R.E. 32.) Given the testimony of these individuals, Frazier has clearly failed to meet her burden in coming forward with sufficient evidence to show that MDOT did not properly place warning signs along the

roadway. The lower court stated that Frazier's evidence only established that the warning signs *might not have been observed* by the witnesses, and this was not enough to implicate MDOT. (R. 52; R.E. 127.)

B. Frazier Offered No Expert Testimony Regarding Accident Reconstruction to Prove the Existence of a Dangerous Condition, as Required in *Lowery.*

After sufficient period for discovery in this case, Frazier has shown no material issue of fact as to MDOT's negligence, or that any of MDOT's acts or omissions were not covered by the discretionary exemption's immunities. In response to MDOT's motion for summary judgment, Frazier is required to offer evidence demonstrating notice and expert testimony that MDOT failed to comply with a standard or procedure in its work on Highway 13 at the site of the accident. *Lowery v. Harrison Co. Bd. of Supervisors*, 891 So. 2d 264, 267 (Miss. Ct. App. 2004). Frazier has wholly failed to do so.

As the lower court recognized: "*Lowery* also stands for the proposition that a Plaintiff must have an expert in accident reconstruction to prove the existence of a dangerous condition." (R. 48; R.E. 123.) Accordingly, Frazier's case fails for lack of proof implicating that MDOT knew, or should have known that a dangerous condition could result from the weather conditions incurred and further precautions needed to be taken.

C. Frazier's Negligence was the Sole Cause of the Accident Because the Problem was Open and Obvious.

When a driver approaches a section of a roadway which is under repair, and signs warn of potential dangers such as loose gravel, and advise slower speeds, that driver is faced with an obvious danger which requires the driver to exercise due care, and further warning is not required. In *Bush Construction Company, Inc. v. Blakeney*, 350 So. 2d 1370, 1373

(Miss. 1977), where a contractor has placed numerous hazard signs along a highway warning of resurfacing work, the Court held that the plaintiff could not recover for running off the road, because "when one is sufficiently warned that a public thoroughfare is under construction or undergoing repairs, he should exercise a vigilant caution and keep a constant lookout for dangers incident to the progress of the work." *See also MDOT v. Trosclair*, 851 So. 2d 408, 417-418 (Miss. Ct. App. 2003)(drivers must make adjustments to sign warnings; they must exercise "vigilant caution"; "whatever reasonably warns a driver of construction invokes the need for vigilance.")

In *Norris v. City of New Orleans*, 433 So. 2d 392, 394 (La. App. 4th Cir. 1984), the Court found that a driver, approaching an intersection where one traffic signal was down the other was malfunctioning, failed to exercise due care and proceed more cautiously in the face of an obvious danger, and thus, could not recover against the city for failure to repair the lights, where the city had no notice of the light problems. Even further, in *City of Clinton v. Smith*, 861 So. 2d 323, 327 (Miss. 2003), the Court ruled that a plaintiff could not recover for injuries sustained when he slipped on ice not shoveled by the city, where he admitted that the ice and snow on the ramp was obvious for anyone to see, and Section 11-46-9(v) absolved the city of liability where the danger was obvious to the one injured.

Frazier saw or reasonably should have seen the Loose Material 45 MPH warning signs and the numerous other signs posted along Highway 13. She was aware of the raining conditions, and should have exercised vigilant caution and due care in the face of such warnings and conditions, but did not. Consequently, it was Frazier's own negligence that caused of the accident. MDOT is entitled to summary judgment because Frazier has not met

her burden in showing that genuine facts remain which are in dispute that require resolution by a finder of fact.

CONCLUSION

Pursuant to the Mississippi Tort Claims Act, governmental entities are immunized from liability when they are performing a discretionary function, when the condition is caused by weather, when they have warned of the condition, and when they do not have actual or constructive notice of a dangerous condition on government property. Frazier has failed to prove that MDOT was acting outside of the provisions of this protective statute. Based on the facts presented, MDOT was clearly performing a discretionary function under Mississippi Code Annotated § 11-46-9(1)(d) by performing road maintenance work and is protected by the statute from liability for Frazier's alleged damages.

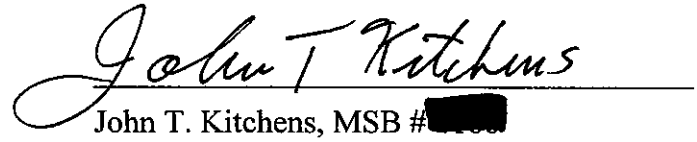
Frazier did not produce any evidence establishing that MDOT was not acting within its discretion, or that it did not act with due care by warning of the ongoing road construction. In order to overcome summary judgment, Frazier must offer a genuine issue of material fact demonstrating that MDOT caused a dangerous condition, that was not open and obvious to Frazier, that MDOT had actual or constructive notice prior to the accident, and that her accident was not caused by the weather. Frazier has failed produce proof, either through lay or expert testimony, to satisfy this burden.

Additionally, Frazier was duly warned and charged to act with due care when passing through the construction site. In the absence of proof to the contrary, the accident was the result of Frazier's inattention and negligence. Therefore, under the provisions of the Mississippi Tort Claims Act, MDOT is immune from liability and Frazier's claims fail on the

merits.

The Mississippi Department of Transportation respectfully requests that this Court enter an order affirming the entry of summary judgment in its favor and assessing all costs of this appeal to Frazier.

Respectfully Submitted,



John T. Kitchens, MSB #[redacted]

§ 11-46-9

Statutes and Session Law

TITLE 11 CIVIL PRACTICE AND PROCEDURE

CHAPTER 46 IMMUNITY OF STATE AND POLITICAL SUBDIVISIONS FROM LIABILITY AND SUIT FOR TORTS AND TORTS OF EMPLOYEES

11-46-9 Exemption of governmental entity from liability on claims based on specified circumstances.

11-46-9. Exemption of governmental entity from liability on claims based on specified circumstances.

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

(a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

(b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;

(c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused;

(e) Arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation;

(f) Which is limited or barred by the provisions of any other law;

(g) Arising out of the exercise of discretion in determining whether or not to seek or provide the resources necessary for the purchase of equipment, the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services;

(h) Arising out of the issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature;

(i) Arising out of the assessment or collection of any tax or fee;

(j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;

(k) Arising out of the imposition or establishment of a quarantine, whether such quarantine relates to

persons or property;

(*l*) Of any claimant who is an employee of a governmental entity and whose injury is covered by the Workers' Compensation Law of this state by benefits furnished by the governmental entity by which he is employed;

(m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed;

(n) Arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work;

(o) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including but not limited to any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USC 715 (32 USCS 715), or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;

(p) Arising out of a plan or design for construction or improvements to public property, including but not limited to, public buildings, highways, roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;

(q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways;

(r) Arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities;

(s) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;

(t) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;

(u) Arising out of or resulting from riots, unlawful assemblies, unlawful public demonstrations, mob violence or civil disturbances;

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

(w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice; or

(x) Arising out of the administration of corporal punishment or the taking of any action to maintain control and discipline of students, as defined in Section 37-11-57, by a teacher, assistant teacher, principal or assistant principal of a public school district in the state unless the teacher, assistant teacher, principal or assistant principal acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety.

(2) A governmental entity shall also not be liable for any claim where the governmental entity:

(a) Is inactive and dormant;

(b) Receives no revenue;

(c) Has no employees; and

(d) Owns no property.

(3) If a governmental entity exempt from liability by subsection (2) becomes active, receives income, hires employees or acquires any property, such governmental entity shall no longer be exempt from liability as provided in subsection (2) and shall be subject to the provisions of this chapter.

Sources: Laws, 1984, ch. 495, § 6; reenacted without change, 1985, ch. 474, § 5; Laws, 1987, ch. 483, § 5; Laws, 1993, ch. 476, § 4; Laws, 1994, ch. 334, § 1; Laws, 1995, ch. 483, § 1; Laws, 1996, ch. 538, § 1; Laws, 1997, ch. 512, § 2, eff from and after July 1, 1997.

CERTIFICATE OF SERVICE

I, John T. Kitchens, attorney for the Appellee, Mississippi Department of Transportation, do hereby certify that I have this day mailed, postage prepaid, by United States mail, a true and correct copy of the above and foregoing document to:

Yancy Burns, Esq.
The Crawley Law Firm
P.O. Box 13849
Jackson, MS 39236-3849
Attorney For Appellant

I do further certify that on this date, I deposited the original and four (4) copies of the foregoing along with an electronic disk, by hand delivery to the Clerk of this Court at Gartin Justice Building, 450 High Street, Jackson, Ms 39201.

THIS the 12th day of March, 2007.

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