IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KAREN FRAZIER — APPELLANT

VS. — CAUSE NO. 2006-SA-01739

MISSISSIPPI DEPT. OF TRANSPORTATION — APPELLEE

BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT
OF SCOTT COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

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Dated: February 6, 2007

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CERTIFICATE OF INTERESTED PARTIES

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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5. Honorable Vernon R. Cotten
   Scott County Circuit Judge
   205 Main Street
   Carthage, MS 39051

SO CERTIFIED this the 6th day of February 2007.

Yancy B. Burns, (MSB #99128)

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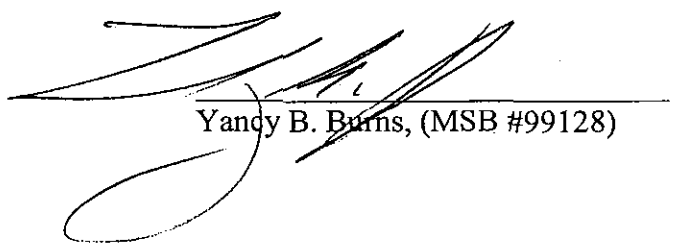

Yancy B. Burns, (MSB #99128)

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I. STATEMENT OF THE ISSUES

The issue for decision before the Court is:

1. Whether the trial court erred in finding that MDOT is immune from liability by virtue of Mississippi Code Annotated section 11-46-9(1)(v) (Rev. 2002)

II. STATEMENT OF THE CASE

A Nature of the Case

Appellant filed a civil action seeking compensatory damages against MDOT pursuant to the Mississippi Tort Claims Act. Frazier alleged that MDOT created a hazardous condition by depositing excessive gravel on the roadway and exacerbated the hazard by failing to post mandatory warning signs of the hazardous condition, which caused her vehicle to spin out of control resulting in serious bodily injury.

B. Course of Proceedings and Disposition of the Case Below

Following discovery, MDOT filed its Motion for Summary Judgment on the grounds of immunity from liability by virtue of Mississippi Code Annotated Section 11-46-9(1)(v)(Rev. 2002). Frazier filed a response to the Motion for Summary Judgment with supporting affidavits and deposition excerpts. The lower court considered the Motion and Response, as well as the respective exhibits offered by the parties in support of same, and granted MDOT's Motion for Summary Judgment by and through its Memorandum Opinion. This matter is before this Honorable Court on appeal from the Circuit Court of Scott County, Mississippi. Appellant, Karen Frazier, appeals the lower court's grant of summary judgment in favor of MDOT.

C. Statement of the Facts

a. Nature of the Construction Work Performed by MDOT

On May 7, 2003, an MDOT road construction crew began work on a road sealing project in Scott County, Mississippi, vicinity intersection HWY 481 and Highway 13. The project was limited in scope and projected to span some 16.7 miles. A seal job is also known in the road construction industry as a "tar and rock" or "slag" job.

The purpose of seal coating, according to MDOT, is to increase the life expectancy of the roadway by sealing cracks with liquid asphalt in the roadway. ***See Exhibit 1:*** *Mike Atkinson deposition at p.16 lines 16-25.* The purpose of the slag or rock is to cover the liquid asphalt or tar, and allows the roller to travel over the liquid asphalt and accomplish the seal. ***Exhibit 1*** *at p.16 lines 16-25.* The MDOT job superintendent, Mike Atkinson, projected that the job would be completed in three to four days. ***Exhibit 1*** *at p. 7, lines 18-20.*

b. Conduct of the Work Generally Performed by MDOT

The first phase in this project, according to MDOT, is accomplished by a distributor truck which sprays liquid asphalt (CRS-2P) on the roadway. ***Exhibit 1*** *at pp 10-11.* The distributor, after spraying the liquid asphalt, is immediately followed by a "spreader" which spreads the slag or gravel over the liquid asphalt or tar. The roller effects the final phase of the actual seal by following the spreader and forcing the seal into the cracks in the roadway. ***Exhibit 1*** *at pp 8 lines 8-19 and pp. 10-11.*

MDOT allows traffic to negotiate the highway immediately after the roller has embedded the slag and liquid asphalt. ***Exhibit 1*** *at p. 30, lines 21-25, p. 31.* Atkinson defined "slag" as a gravel material 3/16th of an inch thick that is spread on hot tar or liquid asphalt. ***Exhibit 1*** *at p. 8, lines 5-6.* According to MDOT, the slag will lie on its flattest side when spread on the roadway. High volume traffic tends to roll more slag, especially when you have a number of large trucks utilizing the roadway which was the case herein. ***Exhibit 1*** *at p.21, lines 1-15.* MDOT stated that Highway 13 was a high traffic roadway, and larger trucks traveled this route during the completion of the seal job. ***Exhibit 1*** at p. 21, lines 16-23. MDOT suggested that it erred on the side of using more slag than not enough in order to prevent "bleeding" (caused by

not enough slag or too much tar) which is likely in hot summer months after seal jobs. ***Exhibit 1*** *at p. 27, lines 20-25, & p. 28.*

MDOT typically sweeps the excess slag from the roadway twenty-four (24) hours after the completion of sealing operations. According to MDOT, when the majority of the loose gravel is swept from the roadway, "the road is good to go." Further, MDOT stated that the road should be free of all loose materials within three to four days after the completion of sealing operations. ***See Exhibit 1*** *at p. 32, lines 1-12.* MDOT acknowledges that rainfall occurring during or shortly after sealing operations can contribute to a poor seal, and an increased risk of "losing rock." ***Exhibit* 1** *at p. 34, lines 16-20.* MDOT did not check the weather forecast prior to initiating the seal job on Highway 13 on May 7, 2003. ***Exhibit 1*** *at p. 34 lines 11-16.*

c. <u>The Conduct of the Seal Job as Performed on Highway 13 North, Scott County, Mississippi</u>

The operational aspect of this seal job began on May 7, 2003, at approximately 9:00 am. The MDOT crew completed seven (7) miles of sealing operations that afternoon and ceased operations on the roadway at approximately 2:30 pm. ***Exhibit 1*** *at p. 25, lines 23-25.* At roughly the same time of day, Karen Frazier, a thirty-eight (38) year old white female, completed her waitress shift at a local restaurant in Forest, Mississippi. ***See Exhibit 2*** *Karen Frazier deposition at p. 20, lines 6-10.* She was driving a 1997 Chevrolet sedan with no known mechanical defects. ***Exhibit 2*** *at pp 15-16.* She was not under the influence of alcohol or prescription drugs and not impaired or distracted in any manner at the time of the incident. ***Exhibit 2*** *at pp 18-20.*

Mrs. Frazier's vehicle entered the recently sealed roadway on Highway 13 North at a rate of speed of approximately fifty-five (55) mph which was the posted speed limit according to the Mississippi Uniform Accident report completed by State Trooper Joe Nelson (***Exhibit* 3: Frazier**

Accident Report). More than likely, her vehicle's tires lost traction due to an excessive amount of loose gravel left behind by the MDOT crew, causing her vehicle to leave the roadway and collide into a tree. Frazier testified that it was misting immediately before her vehicle left the roadway, and that to the best of her knowledge, she did not see any warning signs prior to the collision; and that the loose gravel did not present itself as an "open and obvious" hazard prior to the collision. ***See Exhibit 4***: ***Karen Frazier Affidavit.*** Trooper Nelson's report also indicates that road surface was wet upon his arrival at the scene. He also noted the presence of loose surface material on the highway, but his report does not reflect that weather conditions contributed to the collision.

Mrs. Frazier was knocked unconscious after this collision. While still unconscious, she was transported by ambulance to the Scott County Hospital. Mrs. Frazier's husband, Billy Frazier, traveled Highway 13 North to include the areas where MDOT allegedly posted temporary warning signs for the purpose of determining if any such warning signs were in place, and testified that he saw no warning signs posted. ***See Exhibit 5:*** *Billy Frazier deposition p. 10-17.* Billy Frazier testified that he traveled the area of the seal job at a rate of speed of approximately fifty-five (55) mph minutes after his wife's accident, and that he almost lost control of his vehicle due to the presence of excessive amount of gravel in the roadway. He further states that the hazardous condition caused by the excessive amount of gravel on the roadway was not obvious to him until he nearly lost control of his vehicle. ***See Exhibit 6: Billy Frazier Affidavit.***

d. Other Accidents & Incidents Evidencing Dangerous Roadway Conditions

Frazier's collision was the first of numerous accidents/incidents on May 7, 2003, that were directly attributable to the subject seal job on Highway 13 North. In fact, the loose gravel

on the roadway created such a hazardous condition that the Scott County Sheriff's Office contacted MDOT for the purpose of remedying the hazard. At approximately 7:00 pm, after the reporting of numerous hazardous incidents by the traveling public, an MDOT crew swept the remaining loose gravel from both lanes of travel. ***See Exhibit 7:*** *Tommy Phillip's deposition at p. 28 and pp 42-43.*

Numerous fact witnesses who are not employees of the Defendant testified under oath that no traffic control devices or warning signs were present on the roadway preceding the seal job. Roy Lee Shed, a local commercial driver, was traveling the subject roadway on May 7, 2003, and states that "...the road had three inches of gravel on it...the road was in bad shape" and that there were no warning signs posted on day one of the seal job. ***See Exhibit 8: Shed Affidavit.*** In fact, Shed stated that on the date of Frazier's collision, local truckers who negotiated this stretch of highway advised their contemporaries to avoid Highway 13 because of the poor road conditions caused by loose gravel. Shed stated that most truckers were finding alternate routes due to the hazardous condition posed by the excess gravel left on the roadway. ***Exhibit 8.***

On the same day, Sarah Ann Ragsdale, another motorist who traveled this stretch of roadway at a rate of speed of only thirty (30) mph, lost control of her vehicle and careened off of the roadway due to excessive gravel. ***See Exhibit 9: Ragsdale Accident Report.*** Mrs. Ragsdale also stated that no warning signs were posted in the vicinity of the construction zone as alleged by MDOT on the date of her accident caused by loose materials on the roadway. ***See Exhibit 10: Ragsdale Affidavit.***

III. SUMMARY OF THE ARGUMENT

The lower court, despite a tremendous effort to gather and analyze the conflicting testimony, committed both legal and factual errors in its grant of summary judgment. The lower court, in its review of MDOT's Motion for Summary Judgment, weighed the contradictory evidence offered by the parties, and found that MDOT's testimony in support of its defense that warning signs were posted in the vicinity of the construction zone was more reliable than the contradictory evidence which tended to establish that no warning signs were posted in advance of the excessive amounts of loose gravel placed on the highway by MDOT. The lower court opinion stated that it "...is not persuaded the disparity of statements creates a genuine issue of material fact." Further, the lower court wholly accepted MDOT's claim that the loose gravel did not constitute a hazardous condition until heavy rainfall "which caused gravel to become loose on the highway, which presumably occurred after Frazier's collision.

The legal error committed by the lower court was its misinterpretation of Miss. Code Anno. Section 11-46-1(1)(v)(Rev.2002). This statute applies to Mississippi Tort Claims Act "dangerous conditions claims" existing on the property of the state entity. The statute provides two methods of establishing liability and defeating immunity under the Act: (1) by establishing that the state actor created the dangerous condition on its property; or (2) by establishing that the state actor had actual or constructive notice of the hazard coupled with adequate time to warn against, and the condition was not open and obvious. The instant claim falls under the first category of active negligence. Therefore, the sole issue before the lower court should have been whether the amount of gravel left behind by MDOT on the highway created a hazardous

condition on its property. Appellant offered testimony in the form of affidavits and deposition excerpts when viewed in the light most favorable to her, created genuine issues of material fact whether the loose gravel posed a dangerous condition to unsuspecting motorists under the conditions existing at the time of the collision. The most compelling testimony offered revealed that even experienced commercial truck drivers were avoiding this stretch of highway due to the excessive amounts of gravel left behind by MDOT. Further, even MDOT employees admitted that they swept the roadway of excess gravel on the evening of Frazier's collision after being requested to do so by the local sheriff's office, despite the fact that sweeping operations are usually conducted 24 hours after the seal is completed. The severity of the hazard was further illustrated by the testimony offered by another motorist that was traveling at a speed of only 30 mph, yet lost control of her vehicle on the same day due to the presence of excessive gravel on the roadway. The lower court appreciated this testimony and even found that "The Court grants that the kind of road repair project being undertaken could easily be described as potentially creating a dangerous condition, this being obvious because the originally smooth pavement would be significantly altered by the presence of loose gravel." The lower court's analysis should have ended here. However, the lower court expanded the burden of proof required of Frazier and demanded proof of MDOT's notice of late afternoon rainfall which did not create the hazardous condition, but merely exacerbated the hazard and it is not relevant to the issues herein.

IV. ARGUMENT

A. Standard of Review

Our 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 grant or denial of **summary judgment** and examines all the evidentiary matters before it-admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. 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 ***929** motion should be denied. 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. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt. *Williamson ex rel. Williamson v. Keith,* 786 So.2d 390, 393(¶ 10) (Miss.2001) (quoting *Heigle v. Heigle,* 771 So.2d 341, 345(¶ 8) (Miss.2000)). 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 Medical Center,* 790 So.2d 903, 915-16(¶ 15) (Miss.Ct.App.2001).

At the **summary judgment** level, "the court does not set out to finally determine negligence nor the extent of damages;" rather, the court upon a motion for **summary judgment**, merely determines if there are any disputed material issues of fact when the plaintiff's evidence is given the benefit of all reasonable inferences in its favor. *Id.*

B. **MDOT has a Duty to Warn Motorists of Known Dangerous Conditions**

Mississippi Code Annotated § 11-46-9(d) (Rev.2002), grants immunity to governmental entities for failure to perform discretionary duties, and Mississippi Code Annotated § 11-46-9(v)

(Rev. 2002), provides immunity for injuries arising from a dangerous condition on governmental property "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..."

Therefore, under this statute, summary judgment is not proper if there is a genuine dispute of material fact concerning any one of the following elements of her claim: (1) a dangerous condition, (2) on the government entity's property, (3) which the government entity caused by negligence or wrongful conduct, *or* of which it had actual or constructive notice and adequate time to protect from or warn against, and (4) the condition was not open and obvious. *Lowery v. Harrison County Bd. of Supervisors*, 891 So.2d 264, 267 (Miss. Ct. App. 2004). Since there is evidence that MDOT placed the gravel on the roadway, i.e., the alleged dangerous condition, the analysis should focus on whether there is any evidence to suggest that the condition created by MDOT was dangerous. What constitutes a "dangerous condition" is not defined by Mississippi law and is to be determined by the trier of fact. *Lowery*, 891 So.2d at 267.

While Mississippi Code Annotated § 11-46-9(v) (Rev. 2002) provides the conceptual framework of analysis, we look to both the Mississippi Constitution and the statutes enacted thereafter by the Mississippi Legislature define the scope of MDOT's duty to maintain our state highway system and warn motorists of hazardous conditions. The authority vested in the legislature for the construction and maintenance of Mississippi's roadways comes from the Mississippi Constitution Article 6, § 170 (1924), which states, in part:

> The board of supervisors shall have full jurisdiction over roads, ferries, and bridges, to be exercised in accordance with such regulations as the legislature may prescribe, and perform such other duties as may be required by law; provided, however, that the legislature may have the power to designate certain highways as "state highways," and place such highways under the control and supervision of the state highway commission, for construction and maintenance.

Pursuant to Mississippi Code Annotated § 65-3-3 (Rev. 2003) the legislature has designated specific roads as state highways. The legislature established the Mississippi Department of Transportation to oversee the construction and maintenance of these designated state highways. Miss. Code Ann. § 65-1-2 (c) (Rev. 2001).

Mississippi law requires the Commissioner of Public Safety to adopt a manual for uniform traffic control, which must generally conform with the system approved by the American Association of State Highway Officials ("AASHTO"). Miss.Code Ann. § 63-3-301 (Rev.1996). Local authorities may place and maintain traffic control devices as they deem necessary; however, the devices shall conform to the state manual. *Id.* § 63-3-305.

Interpreting § 63-3-305, the Attorney General concluded that local authorities have a duty to determine the necessity of traffic control devices and post signs thereto conforming with state law. Miss. Att'y Gen. Opinion No.2000-0565 (Sept. 29, 2000). However, to ensure uniformity, all such devices must meet the specifications set forth in the manual. *Id.*

This Mississippi Supreme Court has considered the relationship between MUTCD and the standard of care and held that the MUTCD was admissible as nonconclusive proof of the standard of care. *Jones v. Panola County*, 725 So.2d 774 (Miss.1998). *See* also *Leflore County v. Givens,* 754 So.2d 1223 (Miss.2000). In *Panola County,* the plaintiff sued the county after his vehicle struck a gravel pile that was used to mark a closed bridge. *Id.* at 725 So.2d at 775. The plaintiff appealed the decision of the trial court prohibiting him from offering the MUTCD as evidence of the applicable standard of care in the placement of warnings. *Id.* at 777. Reversing and remanding, the Mississippi Supreme Court held that "the relevant MUTCD provisions may properly be considered by a jury as evidence of negligence, albeit not as conclusive evidence

thereof." *Id.* at 778 (footnote omitted). However, the Court stressed that a verdict favoring the plaintiff based solely on the MUTCD guidelines would be improper. *Id.* at 778-79.

The Mississippi Supreme Court has further held that both counties and the Department of Transportation have a duty to warn motorists of a known dangerous condition. *Jones v. Miss. Dep't of Transp.*, 774 So.2d 256, 258 (Miss.1999). The case arose after the county reopened a road but failed to place a stop sign where the road intersected with another forming a "T" intersection. *Id.* at 258. In this decision the Court recognized that although Mississippi had not formally adopted a manual, the MUTCD was the manual to be used in conformity with the statutes. *Id.* at 262 (citing *Jones v. Panola County,* 725 So.2d at 777-78).

Therefore, MDOT must take affirmative action and post temporary traffic control devices in accordance with the MUTCD to warn motorists of hazardous conditions as defined by the manual. If there is any evidence offered below that suggests that MDOT either failed to post traffic control devices in the vicinity of the construction zone to warn Frazier of the hazardous condition, or failed to post such devices in accordance with the manual, then summary judgment is not appropriate.

V. LEGAL ANALYSIS

A. The Loose Gravel in Question Constituted a Hazardous Condition to Motorists at the Time of the Collision

MDOT, by its own admission and conduct, concedes that the loose materials in the seal job zone constituted a hazardous condition. First, MDOT contends that it warned Frazier and other motorists to decrease vehicle speed to forty-five (45) mph within the construction zone, and further enhanced this warning by the placement of a "loose materials" sign. Further, an MDOT employee stated under oath that a vehicle traveling at a speed in excess of forty-five (45) mph would "fishtail" upon contact with the loose surface materials placed on the roadway by MDOT.

The relevant portion of the MUTCD as applied herein is found in Chapter 6F, and entitled *Temporary Traffic Control Devices.* ***See Exhibit 11: Manual for Uniform Traffic Control Devices, 2003 Edition.*** "The needs and control of all road users (motorists, bicyclists...) through a temporary traffic control zone shall be an essential part of highway construction, utility work, maintenance operations, and management of traffic incidents. Section 6F.02 defines the general characteristics and purposes of the signs, and explains that "TTC zone signs convey both general and specific messages by means of words or symbols and have the same three categories as all road user signs: regulatory, warning, and guide. "Warning" signs in TTC zones shall have a black legend and border on an orange background. *MUTCD*, 2003 Edition. The 2003 Edition of the MUTCD, the standard by which MDOT's TTC plan is judged, does not list a "Loose Materials" warning sign, but instead depicts a warning sign message of "Loose Gravel." Therefore, according to the applicable version of the MUTCD, MDOT's TTC device plan, assuming *arguendo* that it was even implemented at the time of the collision, did not conform to

the manual and constitutes evidence of negligence. MDOT offered no evidence of compliance with the MUTCD. The trial court accepted MDOT's claim of compliance at face value despite the fact that MDOT's traffic control signage did not comply with the latest version of the manual.

According to MDOT employees, temporary "warning" signs were placed in the vicinity of the construction zone in accordance with the MUTCD. "Warning" is defined by Webster's Dictionary as 1. To tell (a person) of a danger, coming evil, misfortune, etc.; put on guard; caution. MDOT's affirmative representation that it posted warning signs within the construction zone constitutes an admission that the loose materials therein constituted a danger to the traveling public that requires a warning. Since MDOT allegedly warned motorists of this potential hazard, its arguments concerning the non-existence of a hazardous condition and lack of notice thereof are inconsistent and overreaching. MDOT's affirmative act of spreading loose gravel on the highway and the alleged posting of warning signs in the construction zoneprovides sufficient evidence in support of the element of Frazier's claim that "loose gravel" is a hazardous condition under the circumstances.

The trial court arbitrarily dismissed the contradictory lay evidence offered by Frazier concerning the extent of gravel on the roadway as well as the lack of warning signs posted. The lay testimony offered by Billy Frazier, Sarah Ragsdale & Shed tends to establish that dangerous roadway conditions in excess of mere loose gravel existed at the time of the Frazier collision. Their testimony indicates that excessive amounts of gravel within the seal zone created an ultra-hazardous condition, and that no warning signs were posted in advance of the hazard. The Mississippi Supreme Court has found loose gravel in a construction zone to be a potential roadway hazard. *Bush Construction Co., Inc v. Blakeney,* 350 So.2d 1370, 1373 (Miss. 1977).

MDOT, by and through the admissions of its employees, provided sufficient evidence of the existence of a hazardous condition on the roadway at the time of the collision. If Frazier's vehicle was traveling at the posted rate of speed of 55 mph and no mandatory warning signs were posted to advise Frazier to decrease her speed as claimed by Frazier, and loose gravel was present on the roadway, as admitted by MDOT and claimed by Frazier, then it is likely that her vehicle would "fishtail" and leave the roadway, as admitted by MDOT. Even the lower court found for the Plaintiff on this issue, yet embarked on an unnecessary analysis of notice issues.

B. <u>MDOT Created the Hazardous Condition</u>

MDOT employees were engaged in the seal job on s state highway that utilized large amounts of slag or gravel which gave rise to the "Loose Materials" warning signs that it allegedly posted in the vicinity of the construction zone. Since MDOT created the condition and allegedly posted warning signs, the existence of a hazardous condition and notice of the hazard is not an issue. *Lowery v. Harrison County Board of Supervisors*, 891 So.2d 264 (Miss. App. 2005). Alternatively, even if wet weather conditions contributed to poor skid resistance due to the presence of loose gravel on the roadway, MDOT was well aware of the potentially dangerous combination of loose gravel and rainfall. Despite MDOT's knowledge that rainfall could substantially increase the traveling public's risk of injury on loose gravel, MDOT failed to consult any reliable source for the weather forecast for Scott County before construction began that day.

C. <u>The Hazardous Condition Was Not Open and Obvious</u>

Since MDOT's affirmative acts of negligence created the hazard, "failure to warn" is not a component of Appellant's claim. Billy Frazier's testimony suggests that the hazardous

conditions existing on the highway were not "open and obvious" to a reasonably prudent motorist. Billy Frazier testified that he traveled the area of the seal job at a rate of speed of approximately fifty-five (55) mph just minutes after his wife's accident, and that he almost lost control of his vehicle because of the excessive amount of gravel in the roadway. He further states that the hazardous condition caused by the excessive amount of gravel on the roadway was not obvious to him until he nearly lost control of his vehicle. ***See Exhibit 6: Billy Frazier Affidavit.*** Karen Frazier testified that to the best of her knowledge, she did not see any warning signs prior to the collision, and that the loose gravel did not present itself as an "open and obvious" hazard prior to the collision. ***See Exhibit 4: Karen Frazier Affidavit.***

D. <u>Weather Conditions Were Not the Sole Cause of Frazier's Injuries</u>

MDOT asserted, without any supporting evidence, that rainy weather conditions are solely to blame for Frazier's collision and resulting injuries. MDOT offered no evidence of when the rainfall began or how much accumulated on the roadway. However, Appellant concedes that "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]rising out of an injury solely by the effect of weather conditions and the use of streets and highways." Miss.Code Ann. § 11-46-9(1)(q) (Rev. 2002).

According to the applicable statute, weather must be the sole cause of the collision in order for immunity to bar Frazier's claim. MDOT has offered no evidence in support of its contention that Frazier's injuries were caused solely by weather conditions. The evidence offered by Shed, the Fraziers and Ragsdale, dispute any contention that weather was the sole causative factor in Frazier's collision. The lower court erroneously found that MDOT had no opportunity to remedy the hazardous condition until it became aware of the heavy rainfall.

In any event, MDOT had full knowledge that rain could substantially increase the traveling public's risk of injury on loose gravel, and affirmatively chose to conduct this seal operation without consulting any reliable weather source for the forecast for Scott County before construction began that day. MDOT's' affirmative acts of negligence are three-fold: (1) failing to properly control inherent risks in the operation by conducting the operation without regard to potential adverse weather conditions; (2) placing excessive amounts of gravel on the roadway during the peak of high temperatures which contribute to a poor seal and loose slag; and (3) failing to post any warning signs in the vicinity of the hazard. This case illustrates the "perfect storm" that can develop and cause injury to unsuspecting motorists when standard industry risk assessment procedures are not utilized during the planning phase, and its controls are not executed before, during, and after the operation.

VI. CONCLUSION

The evidence, when viewed in a light most favorable to the Appellant, establishes that MDOT placed excessive gravel or slag on this stretch of roadway on May 7, 2003, and failed to post any warning signs to unaware motorists such as the Appellant, whose vehicle entered the recently sealed area at the posted speed of 55 mph. The evidence established that sealing operations create a potentially hazardous situation on the roadway by the mere presence of loose materials and gravel coupled with high volume/high speed traffic. MDOT is aware that motorists should decrease their speed in this type of construction zone because when excessive speed is met with loose materials, the tires will lose traction and cause the vehicle to fishtail off of the roadway. If sealing operations were not potentially dangerous to motorists, MDOT would not be required by law to post warning signs. MDOT argues strenuously that it placed warning signs in the immediate vicinity of the loose gravel which put Frazier on notice of the

potential hazard that it created as a byproduct of sealing operations. MDOT should concede that the Mississippi Supreme Court has found loose gravel in a construction zone to be a potential roadway hazard. *Bush Construction Co., Inc v. Blakeney*, 350 So.2d 1370. 1373 (Miss. 1977).

MDOT failed to offer any testimony that would tend to establish that rainfall was the sole contributing cause of this collision. MDOT offered no evidence to establish when the rainfall began or how much rainfall accumulated on the roadway before the collision. In any event, Billy Frazier testified under oath that the weather was not a substantial contributing factor to the collision. On the contrary, his testimony tends to establish that the excess gravel on the roadway was the proximate cause of the collision.

MDOT failed to produce any evidence that would tend to establish that it complied with the appropriate Manual for Uniform Traffic Control devices by its alleged placement of the temporary traffic control devices on the shoulders of the roadway. MDOT has offered testimony from Mr. Phillips who states that he consulted a similar manual from his bookshelf and placed the signs in accordance with that manual's instructions. At the very least, Phillips must testify under oath that he relied on the current MUTCD in preparing a signage plan for the subject project, attach the cover of the applicable MUTCD to the affidavit, and then attest that MDOT properly implemented the plan in accordance with the MUTCD. MDOT has not produced any evidence that would meet this minimal threshold of proof.

The lower court failed to properly review Billy Frazier's testimony concerning whether the appropriate signs were in place at the time of the collision. Billy Frazier's testimony should be considered in its entirety and its admissibility is governed by MRE 401. MRE 401 provides that "relevant evidence" means evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action *more probable or less probable* than it

would be without the evidence. Billy Frazier testified to the best of his knowledge concerning whether the signs were posted, and to the best of his knowledge, they were not. It is unreasonable, especially in a civil case where the burden of proof is "more likely than not," to require a witness to state to an absolute level of certainty that a particular sign was either posted or not posted in a specific location on the date in question. The best that any driver could state is that he was keeping a proper lookout on the road in question, and that he either does or does not recall seeing the loose gravel sign. Drivers do not look at signs on roadways that have been there for years. Common experience tells us that drivers primarily scan the roadway, and they look at signs that convey new and pertinent information. If a motorist knows that the speed limit is 55 on a given road, he's not going to look at the speed limit sign unless it is a new and different type of sign.

MDOT cannot produce any documentary evidence that would tend to establish that the proper signage was in place on the roadway in question on May, 2003, beyond the testimony of its employees, and the testimony of Trooper Joe Nelson whose testimony is discredited by the accident report that he completed. Plaintiff had produced substantial evidence that the required signature warning signs were not posted immediately before the collision.

The court, upon review of the testimony of the parties, will find the following disputed facts which are relevant to this action: (1) whether a hazardous condition existed on the roadway at time of the incident in question; (2) whether the proper temporary traffic control warning signs were in place on the date in question; (3) the amount of rainfall present on the roadway before the collision and whether rainfall was even a contributing factor to the incident.

One issue that is not disputed is whether loose gravel lying on a recently sealed roadway is hazardous. It is undisputed that MDOT created this hazard. Sufficient evidence exists in the

record which tends to establish that the roadway conditions were hazardous prior to heavy rainfall. Frazier unequivocally stated under oath that it was only "misting" immediately before the collision.

For the reasons and authorities mentioned herein, the lower court's grant of summary judgment should reversed, and this action remanded to the lower court for trial.

Respectfully submitted this the 6th day of February 2007.

KAREN FRAZIER

By: _____
Yancy B. Burns

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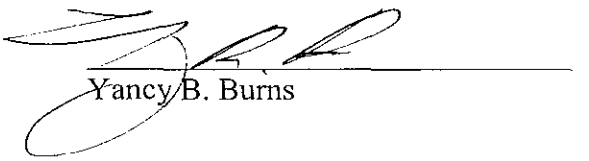
CERTIFICATE OF SERVICE

I, Yancy B. Burns, attorney for the Appellant, Karen Frazier, do hereby certify that I have this day served a true and correct copy of the foregoing by mailing a true and correct copy thereof by United States Mail, with postage fully prepaid thereon, to the following attorney:

Jim Kitchens, Esq.
PAGE, MANNINO, PERESICH
& MCDERMOTT, P.L.L.C.
P.O. Box 16450
Jackson, MS 39236

SO CERTIFIED this the 6th day of February 2007.



Yancy B. Burns