IN THE SUPREME COURT OF MISSISSIPPI

CA

NO. 2007-[redacted]-01489

DEWAYNE GAMMEL, INDIVIDUALLY AND
ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES
OF ANOTHY W. GAMMEL, DECEASED

PLAINTIFFS-APPELLANTS

versus

TATE COUNTY SCHOOL DISTRICT

DEFENDANT-APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF TATE COUNTY, MISSISSIPPI

BRIEF OF TATE COUNTY SCHOOL DISTRICT, APPELLEE

ORAL ARGUMENT NOT REQUESTED

WILTON V. BYARS, III - BAR [redacted]
BROOKE NEWMAN- BAR # [redacted]
DANIEL, COKER, HORTON & BELL, P.A.
OXFORD SQUARE NORTH
265 SOUTH LAMAR BOULEVARD
SUITE R
POST OFFICE BOX 1396
OXFORD, MISSISSIPPI 38655-1396
(662) 232-8979

IN THE SUPREME COURT OF MISSISSIPPI

DEWAYNE GAMMEL, INDIVIDUALLY AND
ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES
OF ANOTHY W. GAMMEL, DECEASED — APPELLANTS

VS. — NO. 2007-TS-01489

TATE COUNTY SCHOOL DISTRICT — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities 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:

1. Dwight William Gammell— Plaintiff/Appellant.
2. Darrian Paige Gammell– Plaintiff/Appellant.
3. James Dalton Gammell– Plaintiff/Appellant.
4. Cynthia Gammell Eppes – Plaintiff/Appellant.
5. Amy D. Arnold – Plaintiff/Appellant.
6. Keisha Gammell – Plaintiff/Appellant.
7. R. Dwayne Gammell – Plaintiff/Appellant.
8. Philip A. Stroud, Esq., James D. Harper, Esq., Stroud & Harper, P.C., P. O. Box 210, Southaven, Mississippi 38671– Counsel for Plaintiffs/Appellants.
9. Thomas A. Waller, Esq., Waller Law Firm, PLLC, P. O. Box 3575, Jackson, Mississippi 39207 – Counsel for Plaintiffs/Appellants.
10. Honorable James McClure, III, District Seventeen Circuit Court Judge, 202 French's Alley, Senatobia, Missisippi 38668– Former Counsel for Plaintiffs/Appellants.

11. Daniel J. Griffith, Esq., Griffith & Griffith, 123 S. Court Street, P.O. Drawer 1680, Cleveland, Mississippi 38732-1680 – Counsel for Defendant Tate County.

12. J. Brian Hyneman, Esq., , Hickman, Goza & Spragins, PLLC, P. O. Drawer 668, Oxford, Mississippi 38655-0668 – Counsel for Defendant Christa Dean.

13. Frances Shields, Currie, Johnson, Griffin, Gaines & Myers, 1044 River Oaks Drive, P.O. Box 750, Jackson, Mississippi, 39205-0750 – Counsel for Defendant Tallahatchie Valley Electric Power Association.

14. Honorable Andrew C. Baker, Circuit Court Judge, P.O. Box 368, Charleston, Mississippi 38921 – Presided over this matter.

15. Wilton V. Byars, III, Esq., Brooke Newman, Esq., Daniel Coker Horton & Bell, P.A., 265 North Lamar Boulevard, Suite R, Post Office Box 1396, Oxford, Mississippi, 38655 – Counsel for Defendant/Appellee

16. Gary Walker – Superintendent of Tate County School District.

17. Kay Adams – Principal of East Tate Elementary School.

18. Tate County School District – Defendant/Appellee in this matter.

19. State Farm Mutual Automobile Insurance Company – Defendant.

20. Christa Dean – Defendant.

21. Tallahatchie Valley Electric Power Association – Defendant.

22. Tate County, Mississippi – Defendant.

THIS the 22nd day of April, 2008.

Brooke Newman

WILTON V. BYARS, III
BROOKE NEWMAN
ATTORNEYS FOR APPELLEE

WILTON V. BYARS, III - BAR [redacted]
BROOKE NEWMAN- BAR # [redacted]
DANIEL COKER HORTON & BELL, P.A.
265 NORTH LAMAR BOULEVARD, SUITE R
POST OFFICE BOX 1396
OXFORD, MISSISSIPPI 38655-1396
(662) 232-8979

TABLE OF CONTENTS

PAGE:

B. STATUTES

1. MISS. CODE ANN. § 11-46-7

2. MISS. CODE ANN. § 11-46-9

3. MISS. CODE ANN. § 21-19-49

4. MISS. CODE ANN. § 37-7-301

5. MISS. CODE ANN. § 37-7-321

6. MISS. CODE ANN. § 37-9-69

C. RULES

1. MISS. RULE CIV. P. 56

2. Uniform Circuit and County Court Rule 4.03

D. OTHER SOURCES

1. Jim Fraiser, *Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions,* 76 Miss. L.J. 973, 1004 (2007).

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

OTHER SOURCES

I. STATEMENT OF THE ISSUES

A. The trial court properly denied plaintiffs' untimely request for a continuance of the summary judgment hearing pursuant to Rule 56(f) of the Mississippi Rules of Civil Procedure.

B. The trial court properly held that no legal duty was owed to the decedent by Tate County School District.

C. The trial court's grant of summary judgment was proper as to Tate County School District pursuant to the immunity provisions of the Mississippi Tort Claims Act.

D. The trial court properly held that no issue of proximate cause exists upon which the plaintiffs claim to be entitled to trial.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This wrongful death suit arises out of a vehicle/pedestrian accident that occurred on East Tate Road on February 4, 2005, at approximately 6:45 p.m. (R. at 338). At the time of the accident, Anothy Gammell was crossing East Tate Road to attend a PTA Winter Carnival event held at East Tate Elementary School when he was struck by an automobile driven by Christa Dean. (*Id.*). Mr. Gammel was wearing dark clothing. (R. at 354). The vehicle driven by Christa Dean was traveling at approximately fifty (50) miles per hour in a twenty (20) mile per hour zone marked by multiple signs. (*Id.*). The decedent parked in a parking lot designated by signs at both entrances as "Bus Parking Only" that was not available to the public for parking. (R. at 357). The trial court properly granted summary judgment in this matter as there are no facts upon which TCSD may be liable to the decedent's beneficiaries.

B. COURSE OF RELEVANT PROCEEDINGS

This wrongful death suit was filed by Dwayne Gammell, one of seven wrongful death beneficiaries of decedent Anothy W. Gammell, in the Circuit Court of Tate County, Mississippi, on February 14, 2005, ten days after the subject accident. (R. at 8). The Complaint was

originally filed against Christa Dean, the driver of the speeding vehicle that struck the decedent, and State Farm Mutual Automobile Insurance Company, the decedent's underinsured/uninsured carrier. (R. at 8-13). Over one year later, on May 2, 2006, plaintiffs filed their First Amended Complaint adding TCSD and Tate County as additional defendants. (R. at 36). The Amended Complaint alleged that TCSD failed to provide and/or maintain adequate lighting of the roadway and adjacent parking areas, caution lights, proper signage, warning devices, parking space and law enforcement presence on February 4, 2005. (R. at 41). The Amended Complaint also alleged that TCSD failed to warn the decedent of the above-alleged dangers that existed on the premises on the night of the subject accident. (*Id.*). TCSD filed its Separate Answer and Defenses to Plaintiffs' First Amended Complaint on May 15, 2006, at which time it also propounded its First Set of Interrogatories and Requests for Production of Documents to the plaintiffs. (R. at 52-59). Despite multiple attempts to obtain the plaintiffs' discovery responses, defendant was forced to file a Motion to Compel on August 23, 2006. (R. at 86). On September 15, 2006, Plaintiffs' Responses to TCSD's First Set of Interrogatories were filed on behalf of Cynthia Gammell Eppes and her three minor children, but were not executed by Ms. Eppes. (R. at 95). Responses to TCSD's Requests for Production of Documents were also served on behalf of Ms. Eppes on September 15, 2006. (*Id.*). On September 26, 2006, Plaintiffs' Answers to TCSD's First Set of Interrogatories and Requests for Production of Documents were served by Dwayne Gammell. (R. at 99). At some time prior to the time plaintiffs responded to defendant TCSD's discovery requests, plaintiffs subpoenaed records from a multitude of entities, including Tallahatchie Valley Electric Power Association and Tate County Sheriff's Department without serving copies of the served subpoenas upon all parties to the action immediately after they were served pursuant to MISS. R. CIV. P. 45(d)(2)(A). (R. at 92, 96). The record is clear that plaintiffs conducted discovery in the two

years prior to the filing of defendants' Motions for Summary Judgment.

Over six months after TCSD's answer, on November 28, 2006, plaintiffs finally served their First Set of Interrogatories and Requests for Production of Documents on TCSD. (R. at 104). On January 26, 2007, TCSD responded to plaintiffs' discovery responses in a timely fashion and later provided its responses executed by a representative of TCSD. (R. at 106). Despite plaintiffs' claim that TCSD has unclean hands with regard to any discovery issue, this claim is not only irrelevant, but is false. TCSD obtained an extension of time from plaintiffs to respond to discovery and confirmed this extension in writing to plaintiffs' counsel. Plaintiffs never filed a Motion to Compel discovery responses from TCSD. (Hearing Transcript at 27). Instead, the plaintiffs did not actively pursue their claims and then, when faced with Motions for Summary Judgment, now contend that they had insufficient time to develop a response to a motion that they certainly knew would be filed.

On February 28, 2007, defendant Tate County filed its Motion for Summary Judgment. (R. at 108). On March 2, 2007, Tate County filed a Motion to Stay Discovery pending the ruling on its Motion for Summary Judgment. (R. at 115). Following Tate County's filing for a Motion to Stay Discovery, plaintiffs for the first time since the filing of the Complaint on February 14, 2005, requested to take a deposition. (Hearing Transcript at 54). The deposition requested was that of Kay Adams, the Principal of East Tate Elementary. At the time of filing of Tate County's Motion to Stay Discovery, plaintiffs had over two years in which to conduct discovery. On March 21, 2007, over two years after plaintiffs filed their Complaint, plaintiffs filed a Rule 56(f) Motion for an Extension of Time to conduct discovery requesting "ample time to depose Defendants' employees." (R. at 303). Is two years not "ample time?"

On May 18, 2007, TCSD filed its Motion for Summary Judgment based upon the fact that

plaintiffs failed to establish any duty owed to the decedent by TCSD, that TCSD was immune from liability pursuant to the Mississippi Tort Claims Act, and that plaintiffs' claims failed for lack of causation. (R. at 338). Instead of responding within ten days pursuant to Rule 4.03 of the Uniform Circuit and County Court Rules, on June 25, 2007, three days before the hearing on defendants' Motions for Summary Judgment, plaintiffs filed their Response to TCSD's Motion for Summary Judgment alleging that they needed additional time to conduct discovery on six issues. (R. at 417-425). On June 27, 2008, TCSD filed its Rebuttal Memorandum Brief in Further Support of Motion for Summary Judgment and established support orf all six issues plaintiffs claimed needed further discovery prior to the hearing on the motions for summary judgment. (R. at 426-433). On June 28, 2007, a hearing was held on the motions for summary judgment of both Tate County and TCSD and on plaintiffs' Rule 56(f) Motion for an Extension of Time to Conduct Discovery. (R. at 409-410). At the conclusion of the hearing, the matters were taken under advisement by the Honorable Andrew C. Baker. (Hearing Transcript at 60). On August 2, 2008, the Court entered a M.R.C.P. 54(b) Order Granting Motion for Summary Judgment of TCSD. (R. at 451). In its ruling, the Court held that there was no reason for delay in ruling on the Motions for Summary Judgment and denied the plaintiffs' Motion for Extension of Time to Conduct Discovery. (R. at 451). The Court further held that the plaintiffs' failed to establish any legal duty owed by TCSD to the decedent as his status as a trespasser was relinquished when he stepped off of TCSD property and that plaintiffs' claims against TCSD failed for lack of causation. (R. at 452-453). In other words, he was either a trespasser on the property of TCSD when he was in the bus parking lot or he occupied no status under the premises liability theory when he stepped off TCSD property and onto East Tate Road. It also found that summary judgment was proper because TCSD was immune from liability under the Mississippi Tort Claims Act. (R. at 453).

Following the Court's Order, the plaintiffs filed a Notice of Appeal on August 20, 2007. (R. at 458).

C. STATEMENT OF FACTS

At approximately 6:57 p.m. on February 4, 2005, plaintiffs' decedent, Anothy Gammel, was struck near the center of East Tate Road by a vehicle driven by defendant Christa B. Dean. (R. at 350-355). Dean, according to her own statement, was traveling approximately fifty (50) miles per hour in a twenty (20) mile per hour speed zone when she struck plaintiffs' decedent. (R. at 350-355). Gammel had parked his vehicle in a parking lot restricted for bus use only as indicated by the three signs posted in the parking lot, including at least one sign at each entrance which stated "Bus Parking Only." (R. at 356-358). Gammel was wearing dark clothing as he attempted to cross East Tate Road in an area that was not designated as a school crossing or crosswalk. (R. at 359). There is no crosswalk in the area because it was not intended as a crossing point on East Tate Road for students or other individuals visiting East Tate Elementary. (R. at 356-358). Students are picked up on the school side of the road and the parking lot designated as "Bus Parking Only" is strictly used for the storage of buses and not as a loading/unloading zone. (Hearing Transcript at 16-17). Therefore, there is no need for a crosswalk across East Tate Road to this parking lot. *Id.* The subject parking lot was not intended for parking of attendees of the Winter Carnival, an event organized by the East Tate Elementary PTA. (R. at 356-358).

It is uncontradicted that multiple warning signs were in place along East Tate Road, but ignored by Dean. Ms. Dean had passed the following signs just moments prior to the accident, "SLOW 20 MPH," "SCHOOL ZONE 15 MPH 7:45 A.M. TO 3:00 P.M. STRICTLY ENFORCED," and "SLOW CHILDREN AT PLAY." (R. at 360). Despite these warnings,

Dean continued to travel at 50 miles per hour, over twice the posted speed limit. (R. at 350-355, 360). At the same time, Gammel ignored multiple signs that were in place in the bus parking lot that indicated that it was to be used for "Bus Parking Only." (R. at 356-358). Gammel was therefore a trespasser. While the decedent may have been invited to the Winter Carnival, the decedent relinquished any such status as an invitee when he parked in the "Bus Parking Only" designated parking lot. Regardless of his status when at the Winter Carnival or while parking in the "Bus Parking Only" parking lot, the decedent voluntarily walked onto a county road and any duty owed to him by TCSD was therefore relinquished.

The subject accident did not occur on the property of TCSD. (R. at 350-355). The accident occurred in the middle of East Tate Road, a rural county roadway, as Gammel was walking from an area in which he was a trespasser. The subject parking lot was not intended to be utilized for overflow parking, but instead was intended to be used solely as a parking lot for school buses. (R. at 356-358). Parking was provided for attendees of school functions on the school side of East Tate Road. (*Id.*). As indicated by multiple attendees of the event, there was ample parking in lots on the school side of the road, but the decedent chose not to park in the provided parking lot and instead chose to park in a lot that was restricted to "Bus Parking Only." (Exhibit #5 to Record filed by Philip Stroud at 11; *see also* R. at 356-57). TCSD and East Tate Elementary invited the Mississippi Department of Education to inspect the campus, including the traffic flow, available parking, lay-out of campus, the manner in which school buses pick up and drop off students, and emergency evacuation plans. (Exhibit #4 to Record filed by Philip Stroud identified as bates stamp TCSD 000010-11; *see also* Hearing Transcript at 15). Principal Adams and East Tate Elementary followed each and every request and order made by the Mississippi Department of Education to the letter. (*Id.*).

Plaintiffs' claims primarily focus on the lighting present on the premises of East Tate Elementary on the night of the subject accident. (Appellants' Brief at 11). In addition to smaller lights, there are over twenty (20) pole-mounted lights that are similar to street lights which illuminate the area at night. (*Id.*). A Tate County Sheriff's Department investigation note indicated that one light on the property of East Tate Elementary was "not functioning" but also noted that a light closer to the accident scene was working. (R. at 188). The plaintiffs have failed to establish that TCSD breached any duty with regard to the placement or maintenance of lighting on the campus of East Tate Elementary or that TCSD should not be immune from liability for any absence, condition or malfunction of any sign, signal, warning device or illumination device pursuant to MISS. CODE ANN. § 11-46-9(1)(w).

Plaintiffs claim that the trial court should have delayed its ruling to permit plaintiffs to conduct discovery on issues raised by TCSD's Motion for Summary Judgment. (Appellants' Brief at 12). Particularly, plaintiffs claim that the deposition of Kaye Adams was particularly important. However, the information contained in Adams' Affidavit filed in support of TCSD's Motion for Summary Judgment were facts that plaintiffs could have discovered with a simple visit to the accident scene or by reading TCSD's Responses to Interrogatories that Principal Adams assisted in answering. Therefore, no time for additional discovery was necessary to respond to TCSD's Motion for Summary Judgment as the plaintiffs had over two years to visit the accident scene and inspect the campus of East Tate Elementary.

III. SUMMARY OF THE ARGUMENT

Plaintiffs have asserted that the two years they had to conduct discovery after filing the initial Complaint was insufficient and, accordingly, that the trial court improperly denied their Rule 56(f) Motion for Additional Time to conduct discovery. The trial court exercised its discretion and properly ruled that the plaintiffs had ample time to conduct the discovery necessary

to respond to defendants' Motions for Summary Judgment.

In order to establish a claim of negligence, it is elementary that all four elements of negligence must be established: duty, breach, causation and damages. The plaintiffs failed to establish that any duty was owed to the decedent, that any duty was breached by TCSD, or that any acts or omissions of TCSD were causally related to the subject accident.

Further, the plaintiffs have failed to rebut TCSD's defense that TCSD is immune from liability pursuant to the Mississippi Tort Claims Act (hereinafter "MTCA"). Specifically, TCSD is immune because 1.) its decisions with regard to maintenance and/or construction of lighting, caution lights, signage, warning devices, and the decision to seek or provide for the hiring of law enforcement personnel were all discretionary decisions, 2.) it owed no statutory duty to the decedent, 3.) it had no notice of any alleged defect on the premises, and 4.) any alleged defect was obvious to one exercising due care. As such, the trial court's ruling is supported by the undisputed facts and must be affirmed.

IV. ARGUMENT

A. Standard of Review

As to the Rule 56(f) assignment of error, the appropriate standard of review of a trial court's actions regarding discovery issues is limited to an abuse of discretion standard. *Wyatt v. City of Pearl*, 876 So.2d 281, 283 (Miss. 2004). The Court of Appeals of Mississippi "has repeatedly held that trial judges have vested in them broad discretionary powers in granting or refusing to grant a continuance." *Frye v. Southern Farm Bureau Cas. Ins.* Co., 915 So.2d 486, 490 (Miss. Ct. App. 2005); *see also McClendon v. State*, 335 So.2d 887, 888 (Miss. 1987). "The denial of a continuance is not reversible error unless manifest injustice appears to have resulted from that denial." *Id.* A party in opposition to the motion for summary judgment may not rely on vague assertions that further discovery will produce needed information. *Id.* Instead,

the party must "present specific facts why he cannot oppose the motion and must specifically demonstrate 'how postponement of a ruling on the motion will enable him to rebut the movant's showing of the absence of a genuine issue of material fact.' Moreover, Rule 56(f) is not designed to protect litigants who are lazy and dilatory and normally the party invoking must show what steps have been taken to obtain access to the information allegedly within the exclusive possession of the other party." *Frye*, 915 So.2d at 491.

The appropriate standard of review for the grant of summary judgment is de novo. *Prepaid Legal Servs., Inc. v. Battle*, 873 So.2d 79 (Miss. 2004). Under this well established standard, "the Motion should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Peden v. City of Gautier*, 870 So.2d 1185, 1187 (Miss. 2004). When the Court reviews the grant or denial of summary judgment, it considers all evidentiary matters before it. *Rein v. Benchmark Constr. Co.*, 865 So.2d 1134, 1142 (Miss. 2004). The party opposing the Motion must be diligent and may not rest upon the allegations or denials in the pleadings, but must by allegations or denials set forth specific facts showing that there are genuine issues for trial. *Richmond v. Benchmark Constr. Corp.*, 692 So.2d 60, 61 (Miss. 1997).

B. The trial court properly denied plaintiffs' untimely request for a continuance of the summary judgment hearing pursuant to Rule 56(f) of the Mississippi Rules of Civil Procedure.

The trial court properly denied the plaintiffs' request for additional time to conduct discovery in accordance with MISS. RULE OF CIV. P. 56(f). MISS. RULE OF CIV. P. 56(f) provides that:

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Plaintiffs failed to establish the requisite elements to obtain such an extension. The Supreme Court of Mississippi, in *Holifield v. Pitts Swabbing Company*, held that:

> The party resisting summary judgment must present specific facts why he cannot oppose the motion and must specifically demonstrate 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.' The party opposing the motion for summary judgment may not rely on vague assertions that discovery will produce needed, but unspecified, facts particularly where there was ample time and opportunity for discovery. *Sec. & Exch. Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980); *see also, Aviation Specialties, Inc. v. United Tech. Corp.*, 568 F.2d 1186, 1189 (5th Cir. 1978) (failure to conduct discovery where case was on docket for six months bars application of 56(f)). This is so because Rule 56(f) is not designed to protect the litigants who are lazy or dilatory and normally the party invoking Rule 56(f) must show what steps have been taken to obtain access to the information allegedly within the exclusive possession of another party. Finally the determination as to the adequacies of the non-movants Rule 56(f) affidavits and the decision to grant a continuance or order further discovery rests within the sound discretion of the trial judge and will not be reversed unless his decision can be characterized as an abuse of discretion. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1193 (5th Cir. 1986).

533 So. 2d 112 (Miss. 1988). In their Rule 56(f) Motion filed in response to Tate County's Motion for Summary Judgment, plaintiffs claimed to need additional time to conduct discovery, but admitted that discovery was prolonged in this case. (R. at 306). The plaintiffs failed to provide a single reason why the discovery requested was not conducted in the two years prior to the filing of Tate County's Motion to Stay Discovery. (*Id.*). During that two year period, plaintiffs failed to request a single deposition until defendant Tate County filed its Motion for Summary Judgment on February 28, 2007, and its Motion to Stay Discovery pending a ruling on its Motion for Summary Judgment on March 2, 2007. In his Affidavit, Thomas A. Waller, attorney for plaintiffs, admitted that no depositions had been taken and he identified areas upon which the plaintiffs desired to conduct discovery in order to adequately respond to TCSD's Motion for Summary Judgment. (R. at 303-07). However, the Affidavit fails to show what steps the

plaintiffs had taken to obtain access to the information or how the discovery would create a genuine issue of material fact. Instead, the plaintiffs attempt to make issues of immaterial facts that are non-outcome determinative. In their Appellants' Brief, plaintiffs assert that additional discovery should have been allowed because TCSD took more than 90 days to provide plaintiffs with sworn responses to Interrogatories. (Appellants' Brief at 15). What plaintiffs failed to state was that they had agreed in writing to allow TCSD an extension to answer the discovery due to the fact that school was out for Christmas holidays during the period of time in which the responses were due. TCSD provided unsigned responses and all of the documents requested to plaintiffs as soon as it was possible and later provided the responses to Interrogatories signed by the TCSD representative. Plaintiffs neglect to mention that the responses were identical. Regardless, Mississippi case law clearly dictates that it is a party's duty to complain to the court and obtain action by the court regarding any discovery violations. *Ford Motor Co. v. Tennin*, 960 So.2d 379, 394 (Miss. 2007). The plaintiffs never filed an Motion to Compel or requested any action by the trial court, and therefore, cannot rely upon any alleged tardiness by TCSD in responding to discovery requests as a basis for requesting additional discovery.

Due to the fact that the plaintiffs merely relied upon vague assertions that additional discovery would produce needed, but not specified or material facts, and the fact that the further discovery would not produce evidence creating a material fact, the trial court properly exercised its discretion in denying the plaintiffs' Motion for Additional Time and granting TCSD's Motion For Summary Judgment.

C. The trial court properly held that no legal duty was owed to the decedent by Tate County School District.

The decedent was not on the property of TCSD at the time of the subject accident. It is undisputed that the public roadway on which the accident occurred is not, and has never been,

owned by TCSD. TCSD had no duty to warn the decedent, a grown man, of the potential dangers of crossing a roadway. To hold otherwise would require every governmental entity to post warning signs along every road alerting pedestrians that they should watch for oncoming traffic. This assertion by plaintiffs is simply non-sensical. The basis of plaintiff' claims is that TCSD had a duty to warn the decedent that he should look both ways prior to crossing the street for any oncoming vehicles with lights on that any adult using ordinary care should do without warning. If the decedent would have looked and viewed the headlights of oncoming traffic, the accident would have been avoided.

In an attempt to establish a duty owed to the decedent by TCSD, plaintiffs rely upon several sweeping statutes in support of the premise that school districts have the duty to provide and maintain a safe premises for students. (Appellants' Brief at 15-16). However, these statutes do not provide any duty that TCSD owed to an individual that was not even on its property at the time of the accident or to an individual that was a trespasser. Further, plaintiffs misconstrue *Pearl Public School District v. Groner*, a case in which the Supreme Court of Mississippi held that "a school district has a duty of ordinary care with respect to providing a safe environment for its patrons." 784 So. 2d 911, 915 (Miss. 2001). *Groner* is clearly distinguishable in that the non-student patron in *Groner* was on the school premises as an invitee at the time of the accident. The decedent in the subject case had made his way onto a public road after he had exited school property where he was an uninvited trespasser. Clearly the facts of *Groner* do not apply to the case at hand.

In a case eerily similar to the case at hand, the Supreme Court of Mississippi recently held in *Albert v. Scott's Truck Plaza, Inc.* that an owner/occupier of property did not owe the decedent a duty at the time she was fatally injured while crossing a public highway abutting the truck stop. 2008 Miss. LEXIS 121, at *2 (Miss. Feb, 28, 2008). In *Albert*, the decedent and her husband (the

Alberts) were truck drivers who had stopped at Scott's Truck Plaza in Meridian for breakfast in the early morning hours while it was still dark outside. 2008 Miss. LEXIS 121, at *2. They parked the truck in a gravel lot on the west side of Russell Mt. Gilead Road and traveled across the road to Scott's truck stop. *Id.* After breakfast and while crossing Russell Mt. Gilead Road to return to their truck, Kyla Albert was struck and killed by an on-coming vehicle. *Id.* Mark Albert, the decedent's husband, filed suit against the driver of the vehicle, the landowner and lessor of the truck stop, and the operating partners and lessees of the truck stop alleging that Scott's Truck Plaza negligently provided inadequate lighting, obstructed the view of pedestrians and drivers by placing a propane tank and advertising in its parking lot, and failed to warn of hidden dangers. *Id.* at *3. Summary judgment was granted as to all defendants finding lack of duty to provide adequate lighting or warn the decedent of the dangers associated with crossing the road and lack of proximate cause. *Id.* at **3-4.

In upholding the trial court's grant of summary judgment, the Supreme Court first analyzed the decedent's status at the time of the injury in order to determine the duty owed to the decedent by defendants. *Id.* at 4. The Court noted that the decedent was an invitee when she was on the premises of the truck stop, but once she traveled into the public roadway, she relinquished that status. *Id.* at 7. The Court noted that a "tenant/lessee/occupier of premises owes a duty of reasonable care to its invitees for the demised property and such necessary incidental areas substantially under its control . . . **and which he invites the public to use.**" *Id.* citing *Wilson v. Allday*, 487 So.2d 793, 798 (Miss. 1986)(emphasis added). Because the plaintiff was not able to establish that the parking lot was an integral part of the business and that defendants invited the public to use the parking lot, the plaintiff was unable to establish a question of fact as to whether defendants owed the decedent a duty at the time of the accident. *Id.* at *8. Defendants admitted to knowing that customers sometimes parked in the parking lot, but the Court held that

"knowledge of patrons' occasional use of the gravel area was insufficient." *Id.* Due to the fact that the plaintiff was unable to establish any duty owed by defendants to the decedent under the premises liability theory, the Supreme Court of Mississippi affirmed the trial court's grant of summary judgment. *Id.* at *9. As a matter of note, the trial court also addressed the issue of causation and held that the danger of crossing a public roadway was not hidden, but open and obvious, thus requiring no warning. *Id.* Further, the trial court held that the plaintiff failed to prove that the obstructions were a proximate cause of that the lighting was insufficient on the premises. *Id.*

As the Supreme Court of Mississippi in *Albert* held, the duty owed to an individual is determined by the status of the injured party at the time of the injury. *Id.* at *4. As the decedent was not even on the property of TCSD at the time of the injury, he cannot be classified as an invitee, licensee or trespasser. The plaintiff has conceeded that the accident occurred on East Tate Road, a public roadway that is not owned by or in the possession of TCSD. Just as the Court held in *Albert*, the decedent was owed no duty by TCSD and therefore, the plaintiffs' claims against TCSD fail as a matter of law. As such, summary judgment in favor of TCSD was properly granted by the trial court.

The plaintiffs' decedent in this case is one step further removed from establishing liability on TCSD since he had previously been a trespasser in the bus parking lot of TCSD where he parked his vehicle and attempted to cross the public roadway. A trespasser is one who enters upon another's premises without license, invitation or other right. *Adams v. Fred's Dollar Store at Batesville*, 497 So.2d 1097, 110 (Miss. 1986). "A trespasser enters another's property 'merely for his own purposes, pleasure, or convenience, or out of curiosity, and without any enticement, allurement, inducement or express or implied assurance of safety from the owner or person in charge." *Leffler v. Sharp*, 891 So.2d 152, 156-57 (Miss. 2004). A landowner simply owes

trespassers the duty to refrain from wilfully or wantonly injuring them. *Id.* at 157. "An owner owes trespassers no duty to keep his premises in a safe condition for their use, and as a general rule, he is not held responsible for an injury sustained by a trespasser upon the premises from a defect therein." *Id.* at 159. Further, "a landowner need not make it impossible for persons to trespass before he may treat intruders as trespassers." *Id.*

In *Adams*, the Mississippi Supreme Court held that a driver who traveled into a parking lot with posted signs designating the lot "closed" was a trespasser. 497 So.2d at 1097. In *Adams*, a plaintiff who drove onto Fred's parking lot and ran into a concrete block filed suit alleging that Fred's was negligent in maintaining the lot. *Id.* at 1098. The trial court held that plaintiff was a trespasser because (1) the lot contained a sign stipulating "Private Parking Lot–Closed 8 p.m. to 7 a.m. –By Order of Police Dept." and (2) plaintiff did not have permission to travel onto the lot. *Id.* at 1100-01. Accordingly, the Mississippi Supreme Court held that judgment in favor of Fred's was proper since plaintiff failed to present evidence that Fred's willfully or wantonly injured her. *Id.* at 1102; *see also Leffler*, 891 So. 2d 152 (holding that one who goes beyond the bounds of his invitation loses the status of invitee, thereby becoming, in this case, a trespasser); *Langford v. Mercurio*, 183 So.2d 150, 153-54 (Miss. 1966)(holding that customer who exited building through private exit exceeded her invitation, was trespasser and property owner had not breached any duty which it owed to plaintiff as it did not willfully or wantonly injure her). The *Adams* Court held that (1) signage can be used to designate a portion of a premises as "off limits" to individuals, and (2) a person who ignores this signage will be considered a trespasser in premises liability litigation. *Id.* The Court noted that just because Fred's could have done more to prevent trespassers from entering the property does not mean that it was required by law to do so. *Id.* "They could have barricaded the parking lot entrances but such was not necessary. A landowner need not make it impossible for persons to trespass before he may treat intruders as

trespassers. To hold otherwise would be to come dangerously close to requiring that an owner be an insurer of the safety of those who unlawfully enter his property." *Id.* The Court further held that merely because the plaintiff entered the property without incurring any liability or being punished in anyway, plaintiff was not granted licensee status. *Id.*

Adams, as well as *Leffler* and *Langford*, provide guidance in this case. Just as in those cases, the decedent in the present matter entered property that was designated with signage as off limits. The bus parking lot, as indicated by the signs at each entrance, was for "Bus Parking Only." The decedent was not invited to park in the bus parking lot and was present without permission or invitation. He ignored the posted signage and, of his own accord, chose to park in the bus parking lot. Therefore, the decedent was a trespasser at the time he parked his vehicle and approached East Tate Road on foot. At the time that he stepped off the property of TCSD, his status as trespasser was relinquished and any duty owed to him by TCSD was relinquished. Therefore, at the time of the subject accident, TCSD owed the decedent no duty.

As a matter of note, plaintiffs discussed the open and obvious defense established by MISS. CODE ANN. § 11-46-9(1)(v) in this section of Appellants' Brief. TCSD addresses this separately in Section D *infra*, containing the immunities afforded by the MTCA.

D. The trial court's grant of summary judgment was proper as to Tate County School District pursuant to the immunity provisions of the Mississippi Tort Claims Act.

The Mississippi Tort Claims Act (hereinafter "MTCA") provides the exclusive civil remedy against a governmental entity and for claims of negligence against a school district. MISS. CODE ANN. § 11-46-7 (1) (2004); *Harris v. McCray*, 867 So.2d 188, 191 (Miss. 2003). TCSD is exempt from liability because 1.) its decisions with regard to maintenance and/or construction of lighting, caution lights, signage, warning devices, and the decision to seek or provide for the hiring of law enforcement personnel were all discretionary decisions, 2.) it used ordinary care in

performing any statutory duties it owed to Gammel, 3.) it had no notice of any alleged defect on the premises, and 4.) any alleged defect was obvious to one exercising due care.

1. TCSD was under no statutory mandate which would establish liability on the part of TCSD for the subject claims.

In their only reference to the MTCA, plaintiffs assert that TCSD is liable under MISS. CODE ANN. § 11-46-9(1)(b) which **provides immunity** as follows:

> (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: . . .
> (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.

MISS. CODE ANN. § 11-46-9(1)(b) does not establish liability as plaintiffs assert. The clear language of the statute establishes immunity, not liability for the acts or omissions of employees of a governmental entity. In order to establish liability on the part of TCSD, plaintiffs must first show that TCSD owed the decedent a statutorily imposed duty. Plaintiff cites *Lang v. Bay St. Louis/Waveland School District*, 764 So.2d 1234, 1240 (Miss. 1990) and *L.W. v. McComb Separate Municipal School District*, 754 So.2d 1136, 1143 (Miss. 1999) as cases that establish a statutorily imposed duty on TCSD. However, neither of these cases concern any statutorily imposed duty that would impose liability in the subject case.

First, *Lang* dictates that a school board is required by statute to maintain a safe environment for it students and well as to erect, repair and equip school facilities and maintain, control and care for same. TCSD agrees with this premise, but *Lang* can be distinguished from the subject case in that it clearly concerned injuries to a student on school property. The subject case involves an injury to a student's parent that did not occur on school property. Neither *Lang* nor any of the statutes it discusses create any duty, whether statutory or otherwise, on the part of the school district for injuries that result off of school property or by non-students. Therefore,

Lang and the statutes it discusses, MISS. CODE ANN. § 37-7-301(c) and (d), are inapplicable to the subject case and do not create any statutorily imposed duty that creates liability on behalf of TCSD.

Second, plaintiffs cite *L.W.* for the premise that schools have the responsibility to use ordinary care to provide a safe school environment. However, the statute discussed in *L.W.*, MISS. CODE ANN. § 37-9-69, mandates in pertinent part the following: "Such superintendents, principals and teachers shall hold the pupils to strict account for disorderly conduct at school, on the way to and from school, on the playgrounds, and during recess." *L.W.* involved an alleged sexual assault by one student on another student on school premises and involved allegations that a teacher failed to take action upon learning of the allegations. The facts of the instant case do not concern student mis-conduct or the supervision of students in any way. *L.W.* simply does not apply to the case at hand.

Despite the fact that plaintiffs failed to address any of the remaining MTCA issues, TCSD briefly addresses them herein while adhering to the required page limit of twenty-five pages. A more detailed explanation of why immunity is proper under each of the subsections is contained in Defendant TCSD's Motion for Summary Judgment, Memorandum Brief in Support Thereof, and Rebuttal Memorandum in Further Support of Motion for Summary Judgment attached hereto as record excerpts. (R.E. at 1, 2, and 3 respectively).

2. The trial court properly granted summary judgment in favor of TCSD based upon the discretionary function exemptions enunciated in MISS. CODE ANN. §§ 11-46-9(1)(d), (g) and (p).

The Mississippi Supreme Court has held that, in order for the governmental entity to be immune under the discretionary function exemption, the discretionary act must involve an element of choice or judgment that was not foreclosed by legal mandate and was thus not ministerial. *Willing v. Benz*, 958 So. 2d 1240 (Miss. Ct. App. 2007); *Barr v. Hancock County*, 950 So. 2d

254, at 257(Miss. Ct. App. 2007). The act must also have involved potential considerations of social, economic or political policy. *Id.*; see also *Jones v. Miss. Dep't of Transp.*, 744 So.2d 260 (Miss. 1999). TCSD's decisions regarding the maintenance and/or construction of lighting, caution lights, signage, and warning devices, as well as the decision to seek or provide for the hiring of law enforcement personnel, were all decisions involving the element of choice or judgment. As discussed above, there is no legal mandate that dictates the manner in which any of these determinations must be performed. Second, the choice and/or judgment involved had significant social, economic and public policy concerns. Decisions with regard to traffic flow, signage, lighting, placement of crosswalks and retention of law enforcement personnel at an elementary school are the types of determinations which clearly impact, at a minimum, safety of school children, the allocation of limited resources, and the potential involvement of multiple governmental entities. Schools are met with competing demands on a daily basis and are required to determine whether and how to utilize or apply existing resources. The Mississippi Supreme Court and the Court of Appeals have each recognized that the decision to place additional signage, warning devices, lights or caution lights are clearly decisions that require governmental entities to exercise judgment and consider the potential social, economic and political ramifications involved. *Barrentine v. Miss. Dep't of Transp.*, 913 So. 2d 391, 393-94 (Miss. Ct. App. 2005); *Willingham v. Miss. Transp. Comm'n*, 944 So. 2d 949, 952-53 (Miss. Ct. App. 2006); *Jones*, 920 So. 2d at 519; *Brewer v. Burdette*, 768 So. 2d 920, 923 (Miss. 2000).

The plaintiffs have alleged that TCSD failed to provide and/or maintain signs, warning devices, caution lights, lighting for nighttime functions, adequate parking, traffic control, crosswalks and law enforcement personnel. The plaintiffs failed to establish at the trial court level that the property upon which Tate County Elementary is located was unsafe in any way due to the lack of any signs, caution lights, warning devices, lighting for nighttime functions, parking spaces,

or traffic control, or that any of those devices were not properly maintained. Additionally, the plaintiffs failed to provide any evidence to the trial court that the placement, or lack thereof, of signage, warning devices, caution lights, lighting for nighttime functions, parking spaces, or traffic control was improper in any way or that the decision to retain or not retain law enforcement personnel was improper in any way. However, it would not matter if the plaintiffs had provided any evidence that these decisions were improper, because any duty to provide such equipment or personnel is discretionary. MISS. CODE ANN. § 21-19-49(2) and (3) and MISS. CODE ANN. § 37-7-321 (School districts, *in their discretion*, can either rely on local law enforcement, enter into interlocal cooperation agreement with a local law enforcement entity within its jurisdiction, hire off duty certified officers within their jurisdiction, or hire private security guards). TCSD does not concede that any additional signs, lighting or other measures were necessary or required on the approach to East Tate Elementary, however, based upon the MTCA and decisions of the Mississippi Supreme Court, TCSD is immune from liability for all claims made by the plaintiffs. The MTCA clearly states that discretionary governmental functions result in immunity from liability, "whether or not the discretion be abused." *Barrentine,* 913 So.2d at 391 (holding placement or non-placement of traffic control devices or signs is a discretionary function involving the implementation of social, economic or political policy); *Harris,* 867 So.2d at 188 (holding acts or omissions of high school football coach which caused player to suffer heatstroke during practice were discretionary and involved the implementation of social, economic or political policy); MISS. CODE ANN. § 11-46-9(1)(d). Accordingly, the trial court's grant of summary judgment as to TCSD was proper as TCSD is immune from all claims asserted by the plaintiffs under the Mississippi Tort Claims Act.

3. The trial court properly granted summary judgment as to TCSD based upon the dangerous condition exemption established by Miss. Code Ann. § 11-46-9(1)(v).

MISS. CODE ANN. § 11-46-9(1)(v) provides a governmental entity immunity from claims:

> [a]rising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent act 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.

The plaintiffs failed to establish at the trial court level that (1) a dangerous condition existed on TCSD property, (2) it was caused by TCSD or TCSD had notice of the condition and adequate time to protect or warn against it, (3) the condition was not open and obvious to an individual exercising due care, and (4) the condition violated a ministerial duty established by statute or other legal mandate as discussed above. Plaintiffs failed to prove any one of these elements, much less all of them.

Plaintiffs' Answers to Tate County School District's First Set of Interrogatories alleged that "there was insufficient lighting on the school property and adjacent roadway to provide a safe environment for those attending the scheduled school function." (R. at 395). However, stripping away the bare allegation and looking at the facts, the plaintiffs claim that one light along East Tate Road in front of a bus-only parking lot in which plaintiff was a trespasser was not lit at the time of the accident. There were no facts to support the assertion that the lighting on the property of TCSD was inadequate or created a dangerous condition. To the contrary, the facts demonstrated that East Tate Elementary was a well lit area for a grade school that rarely hosts any evening activities. There are over twenty outdoor lights on the property of East Tate Elementary. (R. at 356-57). In addition to the fact that no dangerous condition existed on the premises of TCSD, the plaintiffs failed to prove that TCSD caused any dangerous condition. According to the Mississippi

Court of Appeals, "failure to inspect is not the same as causing a condition." *Hodges v. Madison County Med. Ctr.*, 929 So.2d 381 (Miss. Ct. App. 2006). Therefore, based upon the lack of evidence that TCSD actually caused the dangerous condition, the trial court's issuance of summary judgment was proper as plaintiffs' claims regarding inadequate lighting or any other alleged dangerous condition failed.

Further, the plaintiffs have failed to establish that TCSD knew of or had constructive notice of any dangerous condition in time to warn of it. In *Hodges*, the Mississippi Court of Appeals held that a plaintiff's failure to prove that the medical center employees knew that a spring of a mattress had been replaced with a shoe string defeated the plaintiff's dangerous condition claim. 929 So. 2d at 381. In *Jones v. Mississippi Transportation Co.*, the Mississippi Court of Appeals held that a plaintiff's failure to offer proof that a defect on the shoulder of a road was noticeable upon passing or that there had been any complaints of the defect filed barred the plaintiff's claim of constructive notice of a dangerous condition. 920 So.2d 516 (Miss. Ct. App. 2006). Similarly, in *Mississippi Department of Wildlife, Fisheries and Parks v. Brannon*, the Mississippi Court of Appeals held a plaintiff's claim of constructive notice of a dangerous condition barred due to the lack of proof that the park inspector had observed the condition, that he had failed to make all required inspections, or that the condition had been previously reported. 943 So.2d 53 (Miss. Ct. App. 2006). The plaintiffs in the present case failed to provide any evidence to the trial court that TCSD had notice that a single light was out, much less of any defective condition on its premises on the night of the subject accident. In fact, the school principal lives on the school property and stated in a sworn Affidavit that she was not aware of a light located between East Tate Road and the bus parking lot being out at the time of the subject accident. (R. at 356-57). The plaintiffs did not provide any evidence of complaints made to TCSD or evidence of any actual knowledge on behalf of a TCSD employee. Therefore, the plaintiffs' claims concerning a dangerous

condition are barred and the trial court's decision was proper.

Last, plaintiffs have failed to prove that any alleged dangerous condition was not open and obvious to one using due care. Plaintiffs assert that "it was error for the trial court to hold that TCSD escapes liability on an 'open and obvious' theory because the Court eviscerated the defense 14 years ago" in *Tharp v. Bunge*, 641 So. 2d 20 (Miss. 1994). However, the plaintiffs fail to understand that the subject case involves claims against a governmental entity and not general tort claims. While the open and obvious defense is not an absolute bar to recovery in general tort claims in Mississippi, it is an absolute bar to claims brought against governmental entities under the Mississippi Tort Claims Act. Jim Fraiser, *Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions,* 76 Miss. L.J. 973, 1004 (2007); see also *Howard v. City of Biloxi*, 943 So.2d 751, 756-57 (Miss. Ct. App. 2006)(holding the City of Biloxi exempt for a sidewalk crack was an open and obvious danger and for which the plaintiff should have been aware and used caution). While TCSD contends that no dangerous condition existed on its property on the night of the subject accident, any dangerous condition that did exist was open and obvious to one using due care. It cannot seriously be argued that darkness on a public road was not open and obvious. Gammel chose to park in an unauthorized parking lot, cross East Tate Road in an area not designated as a school crossing, and failed to exercise due care by looking both ways prior to crossing the road. Based upon the MTCA, TCSD is immune from liability for any failure to warn Gammel of a dangerous condition, because any such dangerous condition should have been obvious to him had he been exercising due care. Therefore, the trial court's grant of summary judgment was proper.

4. TCSD is entitled to immunity for Plaintiffs' claims under the Mississippi Tort Claims Act Signs and Signals Exemption.

MISS. CODE ANN. § 11-46-9(1)(w) provides a governmental entity immunity from claims:

> [a]rising 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."

According to the Mississippi Supreme Court in *Jones v. Mississippi Department of Transportation*, MISS. CODE ANN. § 11-46-9(1)(w) is an extension of the exemption granted to governmental entities by virtue of the discretionary function exemption in MISS. CODE ANN. § 11-46-9(1)(d). 744 So.2d 256 (Miss. 1999). The plaintiffs offered the trial court no proof whatsoever that TCSD did not correct any absence, condition, or malfunction within a reasonable time after receiving actual or constructive notice. Principal Adams specifically requested that the Department of Education inspect the property of East Tate Elementary to ensure the proper flow of traffic and placement of parking areas. (Exhibit #4 to Record filed by Philip Stroud identified as bates stamp TCSD000010-11). East Tate Elementary complied with all suggestions made by the Department of Education. *Id.* Therefore, TCSD is immune from claims relating to any signs, signals, warning devices or illumination devices on the property of TCSD or that plaintiffs allege should have been on the property of TCSD.

E. The trial court properly held that no issue of proximate cause exists upon which the plaintiffs claim to be entitled to trial.

Where a plaintiff has failed to establish any of the four elements of negligence, recovery must be denied. *Foster v. Bass,* 575 So.2d 967, 972-73 (Miss. 1990). In order to survive summary judgment, the plaintiffs must offer proof that TCSD owed the decedent a duty, breached that duty and that the breach was the proximate cause of the decedent's injury. *McIntosh v. Victoria Corp.*, 877 So.2d 519, 523 (Miss. Ct. App. 2004). According to the Supreme Court of Mississippi, "proximate cause of an injury is that cause which in natural and continuous sequence

unbroken by an efficient intervening cause produces the injury and without which the result would not have occurred. Forseeability is an essential element of both duty and causation." *Delahoussaye v. Mary Mahoney's, Inc.* 783 So.2d 666, 671 (Miss. 2001).

While unfortunate, the accident that occurred on February 4, 2005, was not caused by any acts or omissions of TCSD. There is simply no proximate cause regarding the unsupported claims against TCSD. Instead, the facts clearly establish that the act of the decedent in crossing a public road at night while wearing dark clothing and without exercising due care, combined with the acts of Ms. Dean in driving her vehicle at twice the posted speed limit without heeding caution signs and keeping a proper lookout, were the proximate cause of the accident. The plaintiffs have simply failed to establish the necessary elements of a negligence causation of action, and, therefore, the plaintiffs' claims against TCSD must be dismissed as a matter of law.

V. CONCLUSION

The trial court's decision to grant summary judgment in favor of TCSD was proper for multiple reasons. First, TCSD owed no duty, statutory or otherwise, to the decedent as he was not on TCSD's property at the time of the accident. Second, TCSD is immune from liability under multiple subsections of the MTCA, one of which is the open and obvious defense which bars any recovery by the plaintiffs. Third, the plaintiffs claims against TCSD failed because there is no causal link between any act or omission of TCSD and the subject accident. Therefore, TCSD can have no liability for the plaintiffs' claims and the trial court's order dismissing Tate County School District should be affirmed.

Respectfully submitted,

TATE COUNTY SCHOOL DISTRICT

BY: Brooke Newman
OF COUNSEL

WILTON V. BYARS, III - BAR # 9335
BROOKE NEWMAN - BAR # 101462
DANIEL COKER HORTON & BELL, P.A.
265 NORTH LAMAR BOULEVARD, SUITE R
POST OFFICE BOX 1396
OXFORD, MISSISSIPPI 38655-1396
(662) 232-8979

VI. CERTIFICATE OF SERVICE

I, Brooke Newman, of counsel for Appellee, Tate County School District, pursuant to M.R.A.P. 25, do hereby certify that I have this day sent, via Federal Express, the original and three (3) copies of the above Appellees' Brief, to the Clerk of the Mississippi Supreme Court and have mailed a true and correct copy of the same to the following:

Philip A. Stroud, Esq.
James D. Harper, Esq.
Stroud & Harper, P.C.
P. O. Box 210
Southaven, MS 38671
Attorneys for Plaintiffs

Honorable Andrew C. Baker
Circuit Court Judge
P.O. Box 368
Charleston, MS 38921

THIS, the 22nd day of April, 2008.

Brooke Newman
BROOKE NEWMAN

VII. ADDENDUM OF STATUTES, CASES, AND OTHER SOURCES

A. CASES

1. *Alberts v. Scott's Truck Plaza, Inc.*, 2008 Miss. LEXIS 121 (Miss. Feb. 28, 2008).

B. STATUTES

1. MISS. CODE ANN. § 11-46-7
2. MISS. CODE ANN. § 11-46-9
3. MISS. CODE ANN. § 21-19-49
4. MISS. CODE ANN. § 37-7-301
5. MISS. CODE ANN. § 37-7-321
6. MISS. CODE ANN. § 37-9-69

C. RULES

1. MISS. RULE CIV. P. 56
2. Uniform Circuit and County Court Rule 4.03

D. OTHER SOURCES

1. Jim Fraiser, *Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions*, 76 Miss. L.J. 973, 1004 (2007).

LEXSEE 2008 MISS. LEXIS 121

MARK ALBERT, INDIVIDUALLY AND AS REPRESENTATIVE OF THE WRONGFUL DEATH BENEFICIARIES OF KYLA ALBERT, DECEASED v. SCOTT'S TRUCK PLAZA, INC., INCORRECTLY NAMED AS RONNY HUDDNAL AND DOROTHY HUDDNAL, A PARTNERSHIP, DOING BUSINESS AS SCOTT'S AMOCO, LONGSPUR, L.P., AND BURNS AND BURNS, INC.

NO. 2007-CA-00008-SCT

SUPREME COURT OF MISSISSIPPI

2008 Miss. LEXIS 121

February 28, 2008, Decided

PRIOR HISTORY: [*1]

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 11/27/2006. TRIAL JUDGE: HON. LESTER F. WILLIAMSON, JR.

DISPOSITION: AFFIRMED.

COUNSEL: FOR APPELLANT: JEFFREY DEAN LEATHERS.

FOR APPELLEES: JAMES RYAN PERKINS, J. WYATT HAZARD, CAROLYN CURRY SATCHER.

JUDGES: LAMAR, JUSTICE. SMITH, C.J., WALLER, P.J., CARLSON AND DICKINSON, JJ., CONCUR. EASLEY AND GRAVES, JJ., DISSENT WITHOUT SEPARATE WRITTEN OPINION. RANDOLPH, J., DISSENTS WITH SEPARATE OPINION JOINED BY DIAZ, P.J.; EASLEY, J., JOINS IN PART.

OPINION BY: LAMAR

OPINION

NATURE OF THE CASE: CIVIL - WRONGFUL DEATH

EN BANC.

LAMAR, JUSTICE, FOR THE COURT:

P1. In this wrongful-death case, Kyla Albert, Mark Albert's wife, was struck and killed while crossing a public roadway en route from Scott's Truck Plaza to the gravel parking area across the road where her truck was parked. Mark Albert ("Plaintiff") filed suit against Scott's Truck Plaza; Longspur, L.P., the owner of the property upon which Scott's Plaza was situated; and Burns and Burns, Inc., the provider of the gas and gas equipment, (collectively, "Defendants") for failure to keep the premises in a reasonably safe condition and failure to warn of the unsafe condition concerning the public roadway. The Circuit Court **[*2]** of Lauderdale County granted summary judgment in favor of the defendants. The dispositive premises-liability question is whether Defendants owed a duty to Kyla Albert at the time she was fatally injured while crossing a public highway abutting the truck stop. We affirm the trial court's grant of summary judgment.

FACTS AND PROCEDURAL HISTORY

P2. Appellant Mark Albert was a truck driver. His wife, Kyla Albert, accompanied him on trips. On December 9, 2002, during a working trip, the Alberts stopped at Scott's Truck Plaza in Meridian, Mississippi, for breakfast. They parked the truck in a gravel lot on the west side of Russell Mt. Gilead Road. Scott's was across the road on the east side. The Alberts ate inside the truck stop. While crossing Russell Mt. Gilead Road to return to the truck, Kyla Albert was struck and killed by a vehicle driven by Terra Lanterman McDonald. The accident occurred about 5:08 a.m., while it was still dark outside.

P3. Mark Albert filed a wrongful-death suit against McDonald; Longspur, L.P., the landowner and lessor of the truck stop; [1] and Ronny and Dorothy Huddnal, the operating partners and lessees of the truck stop. [2] Mark Albert alleged that Scott's acted **[*3]** negligently in that it: (1) failed to provide adequate lighting; (2) placed a propane tank and advertising in its parking lot, which obstructed the view of pedestrians and drivers of oncoming traffic; and (3) failed to warn of hidden dangers. He alleged that these failures amounted to a breach of the business's duty to provide reasonably safe premises.

1 The Huddnals rented the premises on which the truck stop was located from Longspur; however, there was no written lease agreement.
2 Mark Albert reached a settlement agreement with McDonald which resulted in McDonald's release. Additionally, Burns and Burns, Inc., though not named in the style or the substance of either complaint, subsequently was added as a defendant. Burns sold gasoline to the truck stop and provided the gasoline-dispensing equipment.

P4. Defendants filed for summary judgment. The trial court granted summary judgment as to all defendants on November 27, 2006, finding that Albert failed to produce evidence which would establish a genuine issue of material fact concerning (1) whether the propane tank, advertising or alleged inadequate lighting was a proximate cause of the accident; or (2) whether the Defendants had a [*4] duty to provide adequate lighting or warn the decedent of the dangers associated with crossing Russell Mt. Gilead Road. From this judgment, Albert filed a notice of appeal.

DISCUSSION

P5. This Court employs a de novo standard in reviewing a trial court's ruling on a motion for summary judgment. ***Green v. Allendale Planting Co.***, 954 So. 2d 1032, 1037 (Miss. 2007). Such review entails examination of all the evidentiary matters before us, including admissions in pleadings, answers to interrogatories, depositions, and affidavits. ***Id.*** The evidence must be viewed in the light most favorable to the non-movant. ***Id.*** The movant bears the burden of showing that no genuine issue of material fact exists. ***Id.*** The existence of a genuine issue of material fact will preclude summary judgment. ***Massey v. Tingle***, 867 So. 2d 235, 238 (Miss. 2004). "The non-moving party may not rest upon mere allegations or denials in the pleadings but must set forth specific facts showing that there are genuine issues for trial." ***Id.*** (citing ***Richmond v. Benchmark Constr. Corp.***, 692 So. 2d 60, 61 (Miss. 1997)). *See also* ***Mayfield v. The Hairbender***, 903 So. 2d 733, 735 (Miss. 2005) (same); ***KBL Props., LLC v. Bellin***, 900 So. 2d 1160, 1163 (Miss. 2005) [*5] (same).

P6. Summary judgment is mandated where the non-movant fails to establish the existence of an essential element of that party's claim. ***Smith v. Gilmore Mem'l Hosp., Inc.***, 952 So. 2d 177, at 180 (Miss. 2007) (citing ***Galloway Travelers Ins. Co.***, 515 So. 2d 678, 683 (Miss. 198)(quoting ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed. 2d 265(1986))). Mark Albert claims the defendants were negligent. Thus, for Mark Albert's claim to survive summary judgment, he must have set forth specific facts sufficient to establish the existence of each element of negligence - duty, breach, causation and damages. ***Simpson v. Boyd***, 880 So. 2d 1047, 1050 (Miss. 2004).

P7. For a premises-liability claim, as in this case, duty is contingent on the status of the injured person. Thus, the first step in determining duty is to identify the status of the injured at the time of the injury. ***Massey***, 867 So. 2d at 239. Mississippi adheres to the invitee/licensee/trespasser trichotomy when analyzing the property owner's duty of care. ***Corley v. Evans***, 835 So. 2d 30, 37 (Miss. 2003) (citing ***Hudson v. Courtesy Motors, Inc.*** 794 So. 2d 999 (Miss. 2001)). This Court has described the distinction, [*6] stating:

> As to status, an invitee is a person who goes upon the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage. A licensee is one who enters upon the property of another for his own convenience, pleasure or benefit pursuant to the license or implied permission of the owner whereas a trespasser is one who enters upon another's premises without license, invitation or other right.

Holley v. Int'l Paper Co., 497 So. 2d 819, 820 (Miss. 1986) (internal citations omitted). "The determination of which status a particular plaintiff holds can be a jury question, but where the facts are not in dispute the classification becomes a question of law." ***Clark v. Moore Mem'l United Methodist Church***, 538 So. 2d 760, 763 (Miss. 1989) (citing ***Lucas v. Buddy Jones Ford Lincoln Mercury, Inc.***, 518 So. 2d 646, 648 (Miss. 1988); ***Adams v. Fred's Dollar Store***, 497 So. 2d 1097, 1100 (Miss. 1986)).

P8. It is undisputed that Kyla Albert was an invitee when she was upon the premises of the truck stop. The issue this Court must resolve is whether Kyla Albert retained that invitee status upon entering the public roadway.

P9. Scott's argued in its [*7] motion for summary judgment that "[Kyla] Albert's status as an invitee was lost as she entered Russell Mt. Gilead Road . . . ." Mark Albert claimed he would show that "the parking lot across the road from the restaurant was an integral part of Defendant's business and therefore, the decedent, in the moments immediately prior to crossing the road and [while] crossing the road itself, was a business invitee of [Scott's]."

P10. Mark Albert asserts that Kyla Albert retained her status as an invitee of Scott's while walking across the street, since the gravel area was an integral part of Scott's business. Indeed, a "tenant/lessee/occupier of premises owes a duty of reasonable care to its invitees

for the demised property and such *necessary incidental areas substantially under its control . . . .and which he invites the public to use.*" ***Wilson v. Allday***, 487 So. 2d 793, 798 (Miss. 1986) (emphasis added). However, this Court finds that Mark Albert failed to set forth specific facts sufficient to establish that the gravel area across Russell Mt. Gilead Road was an integral part of Scott's business. Mark Albert merely directs the Court to deposition testimony in which Dorothy Huddnal of Scott's [*8] and Dale Burns of Longspur and Burns and Burns admited to knowing that patrons sometimes park across the road. Knowledge of patrons' occasional use of the gravel area was insufficient to show that the area was a "necessary incidental area substantially under [the defendants'] control." Albert likewise failed to show that the defendant invited the public to use the gravel area across the road. Therefore, Plaintiff was unable to establish a question of fact as to whether Defendants owed any duty to Kyla Albert after she left their premises and entered the public roadway, where she was fatally injured.

P11. Establishing the status of the injured party is the first step in determining the property owner's or lessee's duty. Unable to accomplish this first step, Albert failed to establish the existence of a duty under the premises liability theory. Therefore, the inquiry of this Court is complete. The trial court properly granted summary judgment for the defendants. [3]

> 3 This Court notes that the trial court also addressed the issue of proximate cause raised by the parties during summary judgment proceedings. The trial court found that Mark Albert failed to prove either that the alleged obstructions [*9] were a proximate cause or that the lighting was insufficient on the premises. The court further found that the danger of crossing a public roadway was not hidden but open and obvious, thus requiring no warning. Since this Court finds no genuine issue of material fact as to whether Defendants owed a duty, it is unnecessary to address the trial court's findings concerning causation.

CONCLUSION

P12. Mark Albert failed to set forth specific facts sufficient to establish by affidavit, deposition, interrogatories, or other means acceptable for summary judgment purposes that there is a genuine issue of material fact as to whether the defendants owed a duty to Kyla Albert when she was fatally injured. Duty is an essential element of a negligence claim. Since summary judgment is mandated where the non-movant fails to establish the existence of an essential element of that party's claim, summary judgment was appropriate in this case. The judgment of the Circuit Court of Lauderdale County is affirmed.

P13. **AFFIRMED.**

SMITH, C.J., WALLER, P.J., CARLSON AND DICKINSON, JJ., CONCUR. EASLEY AND GRAVES, JJ., DISSENT WITHOUT SEPARATE WRITTEN OPINION. RANDOLPH, J., DISSENTS WITH SEPARATE OPINION JOINED BY [*10] DIAZ, P.J.; EASLEY, J., JOINS IN PART.

DISSENT BY: RANDOLPH

DISSENT

RANDOLPH, JUSTICE, DISSENTING:

P14. The majority acknowledges that "Kyla Albert was an invitee when she was upon the premises of the truck stop." (majority opinion at paragraph 8). The majority then frames the issue as "whether Kyla Albert retained that invitee status upon entering the public roadway[,]" (majority opinion at paragraph 8) and ultimately affirms the lower court's grant of summary judgment for the defendants, finding that she did not. No disagreement lies regarding duty preceding Kyla Albert's entry onto the public roadway. However, by narrowly framing the issue, the majority fails to consider whether the duty was breached preceding Kyla Albert's entry onto the road, which proximately caused or contributed to the accident and her death. The trial court also failed to consider the aforementioned, but its error is compounded by concluding that neither the propane tanks nor inadequate lighting were the *proximate cause* of her death. In so doing, the lower court contravened the stated policy of this Court that:

> [a]ll motions for summary judgment *should be viewed with great skepticism and if the trial court is to err, it is better* [*11] *to err on the side of denying the motion.* When doubt exists whether there is a fact issue, the non-moving party gets its benefit. Indeed, the party against whom the summary judgment is sought should be given the benefit of every reasonable doubt.

Mink v. Andrew Jackson Cas. Ins. Co., 537 So. 2d 431, 433 (Miss. 1988) (citing ***Ratliff v. Ratliff***, 500 So. 2d 981, 981 (Miss. 1986)) (emphasis added). While summary judgment is a necessary and useful tool in an increasingly litigious society, that instrument must be exercised cautiously. *See* ***Mink***, 537 So. 2d at 433 (citation omitted) ("[s]ince a summary judgment serves to effectively terminate a lawsuit, they should only be 'granted with great caution.'"). Moreover, "*[t]he party moving for summary judgment bears the burden of*

persuading the trial court that no genuine issue of material fact exists, and that they are, based on the existing facts, entitled to judgment as a matter of law." ***Daniels v. GNB, Inc.***, 629 So. 2d 595, 600 (Miss. 1993) (citing ***Skelton v. Twin County Rural Elec.***, 611 So. 2d 931, 935 (Miss. 1992)) (emphasis added). Erring on the side of caution, it is my opinion that sufficient proof was offered, when viewed in the light **[*12]** most favorable to Albert, evidencing genuine issues of material fact to be decided by a jury regarding whether inadequate lighting and/or visual obstructions located on the premises were contributing factors to Kyla Albert's death.

P15. In his deposition, Mark Albert, the decedent's husband, stated the parking lot on the Scott's side of Russell Mt. Gilead Road was full when he arrived. Therefore, he parked across the road, alongside three other trucks, as he had done on previous occasions. The deposition testimony of Henry Dale Burns, Jr., the general partner of Longspur, was that the area across the street from Scott's, owned by Burns Family Properties, "occasionally" had trucks parked there. Likewise, Terra Lanterman McDonald, the driver in the accident, testified that:

> [t]here was trucks that parked across the road from the truck stop, and probably in all the years I've been driving I just never happened to come through there when there was somebody crossing across, maybe a few times. But I did know that there was trucks parked across the road from the truck stop.

Dorothy Nell Huddnal, operating partner and lessee of Scott's, acknowledged that some tractor-trailers would park across **[*13]** the road. [4] Nonetheless, Huddnal denied that Scott's had any obligations or duties pertaining to that area. [5]

> 4 Huddnal also testified that the majority of tractor-trailers which stayed in the lot across the road would do business with Scott's. However, she qualified her testimony, noting that "[i]t probably happened within the last year or so[,]" as "they just started doing that on their own[,]" and business did "not really" pick up as "[i]t was about the same still."
>
> 5 According to the deposition testimony of Burns, Jr., the Huddnals were responsible for "[w]hatever equipment they had in that building[,]" while Longspur was responsible for the four outer walls and the roof. This largely comported with the deposition testimony of Hudnall, who stated:
>
> > [a]s far as all of the inside, we did all of the maintenance, *changing lights out*, and stuff like that. Or if we had a problem with the commodes, . . . if we could handle it, we did that. If not, we reported it to Longspur. And as far as . . . the canopy lights, we called Longspur and reported that and they would come and . . . change out the light. Or if we had any problem with the pumps and as far as like CAT scales, . . . we would call **[*14]** them . . . .
>
> (Emphasis added).

P16. According to the accident report, the area of impact occurred north of the propane tanks. If the accident report was correct, Kyla Albert entered the road to access the unpaved parking area from behind the propane tanks immediately before being struck. Although Mark Albert conceded in his deposition that one step beyond the tanks would not put an individual in the roadway, he noted that there are scenarios where the propane tanks "could *possibly* block" one's vision of the roadway. (Emphasis added). As Albert argued in his Response to Scott's Motion for Summary Judgment:

> the mere fact of a seventeen and a half (17 1/2) foot space between the propane tank and the road does not imply a lack of obstruction to view in respect to motorists or pedestrians. This amount of space has a varying effect and therefore is not determinative of visual ability when considering the distance from the tank of a pedestrian and/or motorist, angles of sight, and speed of a vehicle.

McDonald recalled "a liquid petroleum gas thing there . . . by the road . . . ."

P17. Regarding the inadequate lighting issue, Huddnal testified that there were between ten and twelve security **[*15]** lights on the lot, erected prior to 1984 by East Mississippi Power Association ("EMPA"). According to her, Scott's paid a monthly fee to EMPA for those lights, and they were in good working order, along with the canopy lights under the gasoline and diesel islands, at the time of the accident. McDonald testified that Scott's itself is well-lit, "***but out by the road it's not***[,]" and the parking lot across the street "had either one or two night-lights." (Emphasis added). She testified that *while looking directly down the roadway*, she "*did*

not see [Kyla Albert] until she was on the hood of my truck[,]" and that "*if it had been more lighting, it would've been better*, . . . if there was lighting compared to like the TA truck stop across the road, I could've *possibly* seen her . . . ." (Emphasis added).

P18. Unfortunately, the circuit judge accepted Scott's Plaza, Inc.'s assertion in its motion for summary judgment that "the record is void of any scintilla of evidence that said lighting was . . . inadequate[,]" and found, in part, that:

> the Plaintiffs have failed to come forward with evidence which creates a genuine issue of material fact that must be resolved by a jury. The Court finds that **[*16]** the Plaintiff has not proven that the *alleged* obstructions, namely the propane tank and the alleged advertising, were a proximate cause of the accident. The Court finds that the tank itself was 17 1/2 feet from the roadway. The Court further finds that the Plaintiff has not shown that the lighting was insufficient on the premises and thereby was a proximate cause of the accident.

(Emphasis added). That finding plainly ignored McDonald's sworn statement that the property is well-lit, "but out by the road it's not[.]" The circuit court improperly injected itself as the sole finder of fact in finding the "*alleged* obstructions" and inadequate lighting were not proximate causes. Proximate cause is a jury issue. Obviously, the circuit court failed to view the evidence "in the light most favorable" to the non-movant. ***Green v. Allendale Planting Co.***, 954 So. 2d 1032, 1037 (Miss. 2007) (quoting ***Price v. Purdue Pharma Co.***, 920 So. 2d 479, 483 (Miss. 2006)). "Issues of fact sufficient to require a denial of a motion for summary judgment are obviously present where one party swears to one version of the matter in issue and another party takes the opposite position." ***Green***, 954 So. 2d at 1037 (quoting **[*17]** ***Price***, 920 So. 2d at 483). The accident report and sworn testimony, discussed *supra*, viewed "in the light most favorable" to Albert, establish genuine issues of material fact for a jury to determine if inadequate lighting or visual obstructions, or the combination thereof, were proximate or contributory causes of Kyla Albert's death. I would reverse the lower court's decision to grant summary judgment.

DIAZ, P.J., JOINS THIS OPINION. EASLEY, J., JOINS THIS OPINION IN PART.

§ 11-46-7. Exclusiveness of remedy; joinder of government employee; immunity for acts or omissions occurring within course and scope of employee's duties; provision of defense for and payment of judgments or settlements of claims against employees; contribution or indemnification by employee.

(1) The remedy provided by this chapter against a governmental entity or its employee is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary.

(2) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties. For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense.

(3) From and after July 1, 1993, as to the state, from and after October 1, 1993, as to political subdivisions, and subject to the provisions of this chapter, every governmental entity shall be responsible for providing a defense to its employees and for the payment of any judgment in any civil action or the settlement of any claim against an employee for money damages arising out of any act or omission within the course and scope of his employment; provided, however, that to the extent that a governmental entity has in effect a valid and current certificate of coverage issued by the board as provided in Section 11-46-17, or in the case of a political subdivision, such political subdivision has a plan or policy of insurance and/or reserves which the board has approved as providing satisfactory security for the defense and protection of the political subdivision against all claims and suits for injury for which immunity has been waived under this chapter, the governmental entity's duty to indemnify and/or defend such claim on behalf of its employee shall be secondary to the obligation of any such insurer or indemnitor, whose obligation shall be primary. The provisions of this subsection shall not be construed to alter or relieve any such indemnitor or insurer of any legal obligation to such employee or to any governmental entity vicariously liable on account of or legally responsible for damages due to the allegedly wrongful error, omissions, conduct, act or deed of such employee.

(4) The responsibility of a governmental entity to provide a defense for its employee shall apply whether the claim is brought in a court of this or any other state or in a court of the United States.

(5) A governmental entity shall not be entitled to contribution or indemnification, or reimbursement for legal fees and expenses from its employee unless a court shall find that the act or omission of the employee was outside the course and scope of his employment. Any action by a governmental entity against its employee and any action by an employee against the governmental entity for contribution, indemnification, or necessary legal fees and expenses shall be tried to the court in the same suit brought on the claim against the governmental entity or its employee.

(6) The duty to defend and to pay any judgment as provided in subsection (3) of this section shall

continue after employment with the governmental entity has been terminated, if the occurrence for which liability is alleged happened within the course and scope of duty while the employee was in the employ of the governmental entity.

(7) For the purposes of this chapter and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.

(8) Nothing in this chapter shall enlarge or otherwise adversely affect the personal liability of an employee of a governmental entity. Any immunity or other bar to a civil suit under Mississippi or federal law shall remain in effect. The fact that a governmental entity may relieve an employee from all necessary legal fees and expenses and any judgment arising from the civil lawsuit shall not under any circumstances be communicated to the trier of fact in the civil lawsuit.

Sources: Laws, 1984, ch. 495, § 5; reenacted and amended, Laws, 1985, ch. 474, § 4; reenacted and amended, Laws, 1986, ch. 438, § 3; Laws, 1987, ch. 483, § 4; Laws, 1988, ch. 442, § 4; Laws, 1989, ch. 537, § 4; Laws, 1990, ch. 518, § 4; Laws, 1991, ch. 618, § 4; Laws, 1992, ch. 491 § 6; Laws, 1993, ch. 476, § 3, eff from and after passage (approved April 1, 1993).

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

[Effective until the date Laws of 2007, ch. 582, § 21, is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended, this section will read as follows:]

(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 USCS 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;

(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; or

(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.

[Effective from and after the date Laws of 2007, ch. 582, § 21, is effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended, this section will read as follows:]

(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 USCS 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;

(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; or

(y) Arising out of the construction, maintenance or operation of any highway, bridge or roadway project entered into by the Mississippi Transportation Commission or other governmental entity and a company under the provisions of Section 1 or 2 of Senate Bill No. 2375, 2007 Regular Session, where the act or omission occurs during the term of any such contract.

(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; Laws, 2007, ch. 582, § 21, eff _____ (the later of July 1, 2007, or the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section.)

§ 21-19-49. Appropriation of funds or conveyance of buildings and property to school districts by local governments; contracts for provision of additional police protection for schools; off-duty law enforcement officers authorized to use public uniforms and equipment for school security purposes; municipalities authorized to donate to public school districts for certain purposes.

(1) The governing authority of any municipality or the board of supervisors of any county are hereby authorized and empowered to appropriate money or dedicate and convey municipally-owned buildings and property or county-owned buildings and property, as the case may be, to the school district or districts situated within that municipality or county for the purpose of erecting, purchasing or otherwise providing the school building or a site for such school building of such school district, in cases where the governing authority or board of supervisors are of the opinion that the location of such school building within the corporate limits of the municipality or the county, or in close proximity thereto, will be of special benefit to the inhabitants of the municipality or county.

(2) Municipalities, municipal police departments and the sheriffs' departments may contract with the school board of any school district to provide additional Law Enforcement Officers Training Academy-certified police protection to said school district on such terms and for such reimbursement as the school district and the entity may agree in their discretion.

(3) The governing authority of any municipality or the board of supervisors of any county may allow off-duty municipal or county law enforcement officers who are hired individually for security purposes by the school district or districts within that municipality or county to use municipal or county law enforcement uniforms and equipment during such off-duty employment.

(4) The governing authority of any municipality, in its discretion, may donate funds, equipment or in-kind services to any school district located within the boundaries of the municipality to assist the voluntary character development or public service programs of that school district.

Sources: Codes, 1930, § 2553; Laws, 1942, § 3374-156; Laws, 1928, Ex. ch. 39; Laws, 1950, ch. 491, § 156; Laws, 1996, ch. 520, § 1; Laws, 2000, ch. 359, § 1; Laws, 2005, ch. 379, § 1, eff from and after July 1, 2005.

§ 37-7-301. General powers and duties [Repealed effective June 30, 2009].

The school boards of all school districts shall have the following powers, authority and duties in addition to all others imposed or granted by law, to wit:

(a) To organize and operate the schools of the district and to make such division between the high school grades and elementary grades as, in their judgment, will serve the best interests of the school;

(b) To introduce public school music, art, manual training and other special subjects into either the elementary or high school grades, as the board shall deem proper;

(c) To be the custodians of real and personal school property and to manage, control and care for same, both during the school term and during vacation;

(d) To have responsibility for the erection, repairing and equipping of school facilities and the making of necessary school improvements;

(e) To suspend or to expel a pupil or to change the placement of a pupil to the school district's alternative school or homebound program for misconduct in the school or on school property, as defined in Section 37-11-29, on the road to and from school, or at any school-related activity or event, or for conduct occurring on property other than school property or other than at a school-related activity or event when such conduct by a pupil, in the determination of the school superintendent or principal, renders that pupil's presence in the classroom a disruption to the educational environment of the school or a detriment to the best interest and welfare of the pupils and teacher of such class as a whole, and to delegate such authority to the appropriate officials of the school district;

(f) To visit schools in the district, in their discretion, in a body for the purpose of determining what can be done for the improvement of the school in a general way;

(g) To support, within reasonable limits, the superintendent, principal and teachers where necessary for the proper discipline of the school;

(h) To exclude from the schools students with what appears to be infectious or contagious diseases; provided, however, such student may be allowed to return to school upon presenting a certificate from a public health officer, duly licensed physician or nurse practitioner that the student is free from such disease;

(i) To require those vaccinations specified by the State Health Officer as provided in Section 41-23-37;

(j) To see that all necessary utilities and services are provided in the schools at all times when same are needed;

(k) To authorize the use of the school buildings and grounds for the holding of public meetings and gatherings of the people under such regulations as may be prescribed by said board;

(*l*) To prescribe and enforce rules and regulations not inconsistent with law or with the regulations of the State Board of Education for their own government and for the government of the schools, and to

transact their business at regular and special meetings called and held in the manner provided by law;

(m) To maintain and operate all of the schools under their control for such length of time during the year as may be required;

(n) To enforce in the schools the courses of study and the use of the textbooks prescribed by the proper authorities;

(o) To make orders directed to the superintendent of schools for the issuance of pay certificates for lawful purposes on any available funds of the district and to have full control of the receipt, distribution, allotment and disbursement of all funds provided for the support and operation of the schools of such school district whether such funds be derived from state appropriations, local ad valorem tax collections, or otherwise. The local school board shall be authorized and empowered to promulgate rules and regulations that specify the types of claims and set limits of the dollar amount for payment of claims by the superintendent of schools to be ratified by the board at the next regularly scheduled meeting after payment has been made;

(p) To select all school district personnel in the manner provided by law, and to provide for such employee fringe benefit programs, including accident reimbursement plans, as may be deemed necessary and appropriate by the board;

(q) To provide athletic programs and other school activities and to regulate the establishment and operation of such programs and activities;

(r) To join, in their discretion, any association of school boards and other public school-related organizations, and to pay from local funds other than minimum foundation funds, any membership dues;

(s) To expend local school activity funds, or other available school district funds, other than minimum education program funds, for the purposes prescribed under this paragraph. "Activity funds" shall mean all funds received by school officials in all school districts paid or collected to participate in any school activity, such activity being part of the school program and partially financed with public funds or supplemented by public funds. The term "activity funds" shall not include any funds raised and/or expended by any organization unless commingled in a bank account with existing activity funds, regardless of whether the funds were raised by school employees or received by school employees during school hours or using school facilities, and regardless of whether a school employee exercises influence over the expenditure or disposition of such funds. Organizations shall not be required to make any payment to any school for the use of any school facility if, in the discretion of the local school governing board, the organization's function shall be deemed to be beneficial to the official or extracurricular programs of the school. For the purposes of this provision, the term "organization" shall not include any organization subject to the control of the local school governing board. Activity funds may only be expended for any necessary expenses or travel costs, including advances, incurred by students and their chaperons in attending any in-state or out-of-state school-related programs, conventions or seminars and/or any commodities, equipment, travel expenses, purchased services or school supplies which the local school governing board, in its discretion, shall deem beneficial to the official or extracurricular programs of the district, including items which may subsequently become the personal property of individuals, including yearbooks, athletic apparel, book covers and trophies. Activity funds may be used to pay travel expenses of school district personnel. The local school governing board shall be authorized and empowered to promulgate rules and regulations specifically designating for what purposes school activity funds may be expended. The local school governing board shall provide (i) that such school activity funds shall be maintained and expended by the principal of the school generating the funds in individual bank accounts, or (ii) that such school activity funds shall be

maintained and expended by the superintendent of schools in a central depository approved by the board. The local school governing board shall provide that such school activity funds be audited as part of the annual audit required in Section 37-9-18. The State Department of Education shall prescribe a uniform system of accounting and financial reporting for all school activity fund transactions;

(t) To contract, on a shared savings, lease or lease-purchase basis, for energy efficiency services and/or equipment as provided for in Section 31-7-14, not to exceed ten (10) years;

(u) To maintain accounts and issue pay certificates on school food service bank accounts;

(v) (i) To lease a school building from an individual, partnership, nonprofit corporation or a private for-profit corporation for the use of such school district, and to expend funds therefor as may be available from any nonminimum program sources. The school board of the school district desiring to lease a school building shall declare by resolution that a need exists for a school building and that the school district cannot provide the necessary funds to pay the cost or its proportionate share of the cost of a school building required to meet the present needs. The resolution so adopted by the school board shall be published once each week for three (3) consecutive weeks in a newspaper having a general circulation in the school district involved, with the first publication thereof to be made not less than thirty (30) days prior to the date upon which the school board is to act on the question of leasing a school building. If no petition requesting an election is filed prior to such meeting as hereinafter provided, then the school board may, by resolution spread upon its minutes, proceed to lease a school building. If at any time prior to said meeting a petition signed by not less than twenty percent (20%) or fifteen hundred (1500), whichever is less, of the qualified electors of the school district involved shall be filed with the school board requesting that an election be called on the question, then the school board shall, not later than the next regular meeting, adopt a resolution calling an election to be held within such school district upon the question of authorizing the school board to lease a school building. Such election shall be called and held, and notice thereof shall be given, in the same manner for elections upon the questions of the issuance of the bonds of school districts, and the results thereof shall be certified to the school board. If at least three-fifths (*3/5*) of the qualified electors of the school district who voted in such election shall vote in favor of the leasing of a school building, then the school board shall proceed to lease a school building. The term of the lease contract shall not exceed twenty (20) years, and the total cost of such lease shall be either the amount of the lowest and best bid accepted by the school board after advertisement for bids or an amount not to exceed the current fair market value of the lease as determined by the averaging of at least two (2) appraisals by certified general appraisers licensed by the State of Mississippi. The term "school building" as used in this paragraph (v)(i) shall be construed to mean any building or buildings used for classroom purposes in connection with the operation of schools and shall include the site therefor, necessary support facilities, and the equipment thereof and appurtenances thereto such as heating facilities, water supply, sewage disposal, landscaping, walks, drives and playgrounds. The term "lease" as used in this paragraph (v)(i) may include a lease/purchase contract;

(ii) If two (2) or more school districts propose to enter into a lease contract jointly, then joint meetings of the school boards having control may be held but no action taken shall be binding on any such school district unless the question of leasing a school building is approved in each participating school district under the procedure hereinabove set forth in paragraph (v)(i). All of the provisions of paragraph (v)(i) regarding the term and amount of the lease contract shall apply to the school boards of school districts acting jointly. Any lease contract executed by two (2) or more school districts as joint lessees shall set out the amount of the aggregate lease rental to be paid by each, which may be agreed upon, but there shall be no right of occupancy by any lessee unless the aggregate rental is paid as stipulated in the lease contract. All rights of joint lessees under the lease contract shall be in proportion to the amount of lease rental paid by each;

(w) To employ all noninstructional and noncertificated employees and fix the duties and compensation of such personnel deemed necessary pursuant to the recommendation of the superintendent of schools;

(x) To employ and fix the duties and compensation of such legal counsel as deemed necessary;

(y) Subject to rules and regulations of the State Board of Education, to purchase, own and operate trucks, vans and other motor vehicles, which shall bear the proper identification required by law;

(z) To expend funds for the payment of substitute teachers and to adopt reasonable regulations for the employment and compensation of such substitute teachers;

(aa) To acquire in its own name by purchase all real property which shall be necessary and desirable in connection with the construction, renovation or improvement of any public school building or structure. Whenever the purchase price for such real property is greater than Fifty Thousand Dollars ($50,000.00), the school board shall not purchase the property for an amount exceeding the fair market value of such property as determined by the average of at least two (2) independent appraisals by certified general appraisers licensed by the State of Mississippi. If the board shall be unable to agree with the owner of any such real property in connection with any such project, the board shall have the power and authority to acquire any such real property by condemnation proceedings pursuant to Section 11-27-1 et seq., Mississippi Code of 1972, and for such purpose, the right of eminent domain is hereby conferred upon and vested in said board. Provided further, that the local school board is authorized to grant an easement for ingress and egress over sixteenth section land or lieu land in exchange for a similar easement upon adjoining land where the exchange of easements affords substantial benefit to the sixteenth section land; provided, however, the exchange must be based upon values as determined by a competent appraiser, with any differential in value to be adjusted by cash payment. Any easement rights granted over sixteenth section land under such authority shall terminate when the easement ceases to be used for its stated purpose. No sixteenth section or lieu land which is subject to an existing lease shall be burdened by any such easement except by consent of the lessee or unless the school district shall acquire the unexpired leasehold interest affected by the easement;

(bb) To charge reasonable fees related to the educational programs of the district, in the manner prescribed in Section 37-7-335;

(cc) Subject to rules and regulations of the State Board of Education, to purchase relocatable classrooms for the use of such school district, in the manner prescribed in Section 37-1-13;

(dd) Enter into contracts or agreements with other school districts, political subdivisions or governmental entities to carry out one or more of the powers or duties of the school board, or to allow more efficient utilization of limited resources for providing services to the public;

(ee) To provide for in-service training for employees of the district;

(ff) As part of their duties to prescribe the use of textbooks, to provide that parents and legal guardians shall be responsible for the textbooks and for the compensation to the school district for any books which are not returned to the proper schools upon the withdrawal of their dependent child. If a textbook is lost or not returned by any student who drops out of the public school district, the parent or legal guardian shall also compensate the school district for the fair market value of the textbooks;

(gg) To conduct fund-raising activities on behalf of the school district that the local school board, in its discretion, deems appropriate or beneficial to the official or extracurricular programs of the district; provided that:

(i) Any proceeds of the fund-raising activities shall be treated as "activity funds" and shall be accounted for as are other activity funds under this section; and

(ii) Fund-raising activities conducted or authorized by the board for the sale of school pictures, the rental of caps and gowns or the sale of graduation invitations for which the school board receives a commission, rebate or fee shall contain a disclosure statement advising that a portion of the proceeds of the sales or rentals shall be contributed to the student activity fund;

(hh) To allow individual lessons for music, art and other curriculum-related activities for academic credit or nonacademic credit during school hours and using school equipment and facilities, subject to uniform rules and regulations adopted by the school board;

(ii) To charge reasonable fees for participating in an extracurricular activity for academic or nonacademic credit for necessary and required equipment such as safety equipment, band instruments and uniforms;

(jj) To conduct or participate in any fund-raising activities on behalf of or in connection with a tax-exempt charitable organization;

(kk) To exercise such powers as may be reasonably necessary to carry out the provisions of this section;

(*ll*) To expend funds for the services of nonprofit arts organizations or other such nonprofit organizations who provide performances or other services for the students of the school district;

(mm) To expend federal No Child Left Behind Act funds, or any other available funds that are expressly designated and authorized for that use, to pay training, educational expenses, salary incentives and salary supplements to employees of local school districts; except that incentives shall not be considered part of the local supplement as defined in Section 37-151-5(o), nor shall incentives be considered part of the local supplement paid to an individual teacher for the purposes of Section 37-19-7(1). Mississippi Adequate Education Program funds or any other state funds may not be used for salary incentives or salary supplements as provided in this paragraph (mm);

(nn) To use any available funds, not appropriated or designated for any other purpose, for reimbursement to the state-licensed employees from both in state and out of state, who enter into a contract for employment in a school district, for the expense of moving when the employment necessitates the relocation of the licensed employee to a different geographical area than that in which the licensed employee resides before entering into the contract. The reimbursement shall not exceed One Thousand Dollars ($1,000.00) for the documented actual expenses incurred in the course of relocating, including the expense of any professional moving company or persons employed to assist with the move, rented moving vehicles or equipment, mileage in the amount authorized for county and municipal employees under Section 25-3-41 if the licensed employee used his personal vehicle or vehicles for the move, meals and such other expenses associated with the relocation. No licensed employee may be reimbursed for moving expenses under this section on more than one (1) occasion by the same school district. Nothing in this section shall be construed to require the actual residence to which the licensed employee relocates to be within the boundaries of the school district that has executed a contract for employment in order for the licensed employee to be eligible for reimbursement for the moving expenses. However, the licensed employee must relocate within the boundaries of the State of Mississippi. Any individual receiving relocation assistance through the Critical Teacher Shortage Act as provided in Section 37-159-5 shall not be eligible to receive additional relocation funds as authorized in this paragraph;

(oo) To use any available funds, not appropriated or designated for any other purpose, to reimburse

persons who interview for employment as a licensed employee with the district for the mileage and other actual expenses incurred in the course of travel to and from the interview at the rate authorized for county and municipal employees under Section 25-3-41;

(pp) Consistent with the report of the Task Force to Conduct a Best Financial Management Practices Review, to improve school district management and use of resources and identify cost savings as established in Section 8 of Chapter 610, Laws of 2002, local school boards are encouraged to conduct independent reviews of the management and efficiency of schools and school districts. Such management and efficiency reviews shall provide state and local officials and the public with the following:

(i) An assessment of a school district's governance and organizational structure;

(ii) An assessment of the school district's financial and personnel management;

(iii) An assessment of revenue levels and sources;

(iv) An assessment of facilities utilization, planning and maintenance;

(v) An assessment of food services, transportation and safety/security systems;

(vi) An assessment of instructional and administrative technology;

(vii) A review of the instructional management and the efficiency and effectiveness of existing instructional programs; and

(viii) Recommended methods for increasing efficiency and effectiveness in providing educational services to the public;

(qq) To enter into agreements with other local school boards for the establishment of an educational service agency (ESA) to provide for the cooperative needs of the region in which the school district is located, as provided in Section 37-7-345. This paragraph shall repeal on July 1, 2010;

(rr) To implement a financial literacy program for students in Grades 10 and 11. The board may review the national programs and obtain free literature from various nationally recognized programs. After review of the different programs, the board may certify a program that is most appropriate for the school districts' needs. If a district implements a financial literacy program, then any student in Grade 10 or 11 may participate in the program. The financial literacy program shall include, but is not limited to, instruction in the same areas of personal business and finance as required under Section 37-1-3(2)(b). The school board may coordinate with volunteer teachers from local community organizations, including, but not limited to, the following: United States Department of Agriculture Rural Development, United States Department of Housing and Urban Development, Junior Achievement, bankers and other nonprofit organizations. Nothing in this paragraph shall be construed as to require school boards to implement a financial literacy program;

(ss) To collaborate with the State Board of Education, Community Action Agencies or the Department of Human Services to develop and implement a voluntary program to provide services for a full-day prekindergarten program that addresses the cognitive, social, and emotional needs of four-year-old and three-year-old children. The school board may utilize nonstate source special funds, grants, donations or gifts to fund the voluntary program;

(tt) With respect to any lawful, written obligation of a school district, including, but not limited to, leases (excluding leases of sixteenth section public school trust land), bonds, notes, or other agreement, to

agree in writing with the obligee that the State Tax Commission or any state agency, department or commission created under state law may:

(i) Withhold all or any part (as agreed by the school board) of any monies which such local school board is entitled to receive from time to time under any law and which is in the possession of the State Tax Commission, or any state agency, department or commission created under state law; and

(ii) Pay the same over to any financial institution, trustee or other obligee, as directed in writing by the school board, to satisfy all or part of such obligation of the school district.

The school board may make such written agreement to withhold and transfer funds irrevocable for the term of the written obligation and may include in the written agreement any other terms and provisions acceptable to the school board. If the school board files a copy of such written agreement with the State Tax Commission, or any state agency, department or commission created under state law then the State Tax Commission or any state agency, department or commission created under state law shall immediately make the withholdings provided in such agreement from the amounts due the local school board and shall continue to pay the same over to such financial institution, trustee or obligee for the term of the agreement.

This paragraph (tt) shall not grant any extra authority to a school board to issue debt in any amount exceeding statutory limitations on assessed value of taxable property within such school district or the statutory limitations on debt maturities, and shall not grant any extra authority to impose, levy or collect a tax which is not otherwise expressly provided for, and shall not be construed to apply to sixteenth section public school trust land;

(uu) With respect to any matter or transaction that is competitively bid by a school district, to accept from any bidder as a good faith deposit or bid bond or bid surety, the same type of good faith deposit or bid bond or bid surety that may be accepted by the state or any other political subdivision on similar competitively bid matters or transactions. This paragraph (uu) shall not be construed to apply to sixteenth section public school trust land. The school board may authorize the investment of any school district funds in the same kind and manner of investments, including pooled investments, as any other political subdivision, including community hospitals;

(vv) To utilize the alternate method for the conveyance or exchange of unused school buildings and/or land, reserving a partial or other undivided interest in the property, as specifically authorized and provided in Section 37-7-485, Mississippi Code of 1972;

(ww) To delegate, privatize or otherwise enter into a contract with private entities for the operation of any and all functions of nonacademic school process, procedures and operations including, but not limited to, cafeteria workers, janitorial services, transportation, professional development, achievement and instructional consulting services materials and products, purchasing cooperatives, insurance, business manager services, auditing and accounting services, school safety/risk prevention, data processing and student records, and other staff services; however, the authority under this paragraph does not apply to the leasing, management or operation of sixteenth section lands. Local school districts, working through their regional education service agency, are encouraged to enter into buying consortia with other member districts for the purposes of more efficient use of state resources as described in Section 37-7-345;

(xx) To partner with entities, organizations and corporations for the purpose of benefiting the school district; and

(yy) To borrow funds from the Rural Economic Development Authority for the maintenance of school

buildings.

Sources: Codes, 1942, § 6328-24; Laws, 1953, Ex Sess, ch. 28, § 2; Laws, 1970, ch. 373, § 1; Laws, 1971, ch. 340, § 1; Laws, 1982, ch. 466, § 1; Laws, 1985, ch. 466, § 1; Laws, 1985, ch. 493, § 3; Laws, 1986, ch. 415, § 3; Laws, 1986, ch. 433, § 18; Laws, 1986, ch. 492, § 9; Laws, 1987, ch. 307, § 4; Laws, 1989, ch. 585, § 6; Laws, 1990, ch. 535, § 4; Laws, 1993, ch. 549, § 1; Laws, 1993, ch. 562, § 1; Laws, 1995, ch. 515, § 1; Laws, 1995, ch. 344, § 3; Laws, 1995, ch. 426, § 2; Laws, 1996, ch. 437, § 1; Laws, 2000, ch. 370, § 4; Laws, 2000, ch. 559, § 1; Laws, 2004, ch. 408, § 2; Laws, 2004, ch. 485, § 1; Laws, 2004, ch. 563, § 1; Laws, 2005, ch. 394, § 1; Laws, 2005, ch. 540, § 2; Laws, 2006, ch. 390, § 1; Laws, 2006, ch. 417, § 14; Laws, 2007, ch. 416, § 2, eff from and after June 30, 2007.

§ 37-7-321. Employment and designation of peace officers; minimum level of basic law enforcement training required; operation of radio broadcasting and transmission station; interlocal agreements with other law enforcement entities for provision of certain equipment or services.

(1) The school board of any school district within the State of Mississippi, in its discretion, may employ one or more persons as security personnel and may designate such persons as peace officers in or on any property operated for school purposes by such board upon their taking such oath and making such bond as required of a constable of the county in which the school district is situated.

(2) Any person employed by a school board as a security guard or school resource officer or in any other position that has the powers of a peace officer must receive a minimum level of basic law enforcement training, as jointly determined and prescribed by the Board on Law Enforcement Officer Standards and Training and the State Board of Education, within two (2) years of the person's initial employment in such position. Upon the failure of any person employed in such position to receive the required training within the designated time, the person may not exercise the powers of a peace officer in or on the property of the school district.

(3) The school board is authorized and empowered, in its discretion, and subject to the approval of the Federal Communications Commission, to install and operate a noncommercial radio broadcasting and transmission station for educational and vocational educational purposes.

(4) If a law enforcement officer is duly appointed to be a peace officer by a school district under this section, the local school board may enter into an interlocal agreement with other law enforcement entities for the provision of equipment or traffic control duties, however, the duty to enforce traffic regulations and to enforce the laws of the state or municipality off of school property lies with the local police or sheriff's department which cannot withhold its services solely because of the lack of such an agreement.

Sources: Laws, 1975, ch. 351, § 1; Laws, 1986, ch. 492, § 18; Laws, 2000, ch. 437, § 1; Laws, 2006, ch. 441, § 2, eff from and after July 1, 2006.

§ 37-9-69. General duties of superintendents, principals and teachers.

It shall be the duty of each superintendent, principal and teacher in the public schools of this state to enforce in the schools the courses of study prescribed by law or by the state board of education, to comply with the law in distribution and use of free textbooks, and to observe and enforce the statutes, rules and regulations prescribed for the operation of schools. Such superintendents, principals and teachers shall hold the pupils to strict account for disorderly conduct at school, on the way to and from school, on the playgrounds, and during recess.

Sources: Codes, 1942, § 6282-24; Laws, 1953, Ex Sess, ch. 20, § 24, eff from and after July 1, 1954.

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When

a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Costs to Prevailing Party When Summary Judgment Denied. If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

Comment

The purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial.

Rule 56 permits any party to a civil action to move for a summary judgment on a claim, counter-claim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. The motion may be directed toward all or part of a claim or defense and it may be made on the basis of the pleadings or other portions of the record, or it may be supported by affidavits and other outside material. Thus, the motion for a summary judgment challenges the very existence or legal sufficiency of the claim or defense to which it is addressed; in effect, the moving party takes the position that he is entitled to prevail

as a matter of law because his opponent has no valid claim for relief or defense to the action, as the case may be.

Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses; in addition to providing an effective means of summary action in clear cases, it serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either a claim or defense on pain of loss of the case for failure to do so. In this connection the rule may be utilized to separate formal from substantial issues, eliminate improper assertions, determine what, if any, issues of fact are present for the jury to determine, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist.

A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, it cannot be used to deprive a litigant of a full trial of genuine fact issues.

Rule 56 is not a dilatory or technical procedure; it affects the substantive rights of litigants. A summary judgment motion goes to the merits of the case and, because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata. A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered against him.

It is important to distinguish the motion for summary judgment under Rule 56 from the motion to dismiss under Rule 12(b), the motion for a judgment on the pleadings under Rule 12(c), or motion for a directed verdict permitted by Rule 50.

A motion under Rule 12(b) usually raises a matter of abatement and a dismissal for any of the reasons listed in that rule will not prevent the claim from being reasserted once the defect is remedied. Thus a motion to dismiss for lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, or failure to join a party under

Rule 19, only contemplates dismissal of that proceeding and is not a judgment on the merits for either party. Similarly, although a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is addressed to the claim itself, the movant merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief; unless the motion is converted into one for summary judgment as permitted by the last sentence of Rule 12(b), it does not challenge the actual existence of a meritorious claim.

A motion for judgment on the pleadings, Rule 12(c), is an assertion that the moving party is entitled to a judgment on the face of all the pleadings; consideration of the motion only entails an examination of the sufficiency of the pleadings.

In contrast, a summary judgment motion is based on the pleadings and any affidavits, depositions, and other forms of evidence relative to the merits of the challenged claim or defense that are available at the time the motion is made. The movant under Rule 56 is asserting that on the basis of the record as it then exists, there is no genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law. The directed verdict motion, which rests on the same theory as a Rule 56 motion, is made either after plaintiff has presented his evidence at trial or after both parties have completed their evidence; it claims that there is no question of fact worthy of being sent to the jury and that the moving party is entitled, as a matter of law, to have a judgment on the merits entered in his favor.

A Rule 12(c) motion can be made only after the pleadings are closed, whereas a Rule 56 motion always may be made by defendant before answering and under certain circumstances may be made by plaintiff before the responsive pleading is interposed. Second, a motion for judgment on the pleadings is restricted to the content of the pleading, so that simply by denying one or more of the factual allegations in the complaint or interposing an affirmative defense, defendant may prevent a judgment from being entered under Rule 12(c), since a genuine issue will appear to exist and the case cannot be resolved as a matter of law on the pleadings.

Subsections (b) and (h) are intended to deter abuses of the summary judgment practice. Thus, the trial court may impose sanctions for improper use of summary judgment and shall, in all cases, award expenses to the party who successfully defends against a motion for summary judgment.

For detailed discussions of Federal Rule 56, after which MRCP 56 is patterned, *See* 10 Wright & Miller, *Federal Practice and Procedure*, Civil §§ 2711-2742 (1973); 6 Moore's Federal Practice ¶¶ 56.01-.26 (1970); C. Wright, Federal Courts § 99 (3d ed. 1976); *See* also *Comment*,

Procedural Reform in Mississippi: A Current Analysis, 47 Miss.L.J. 33, 63 (1976).

Rule 4.03
MOTION PRACTICE

The provisions of this rule shall apply to all written motions in civil actions.

1. The original of each motion, and all affidavits and other supporting evidentiary documents shall be filed with the clerk in the county where the action is docketed. The moving party at the same time shall mail a copy thereof to the judge presiding in the action at the judge's mailing address. A proposed order shall accompany the court's copy of any motion which may be heard *ex parte* or is to be granted by consent. Responses and supporting evidentiary documents shall be filed in the same manner.

2. In circuit court a memorandum of authorities in support of any motion to dismiss or for summary judgment shall be mailed to the judge presiding over the action at the time that the motion is filed. Respondent shall reply within ten (10) days after service of movant's memorandum. A rebuttal memorandum may be submitted within five (5) days of service of the reply memorandum. Movants for summary judgment shall file with the clerk as a part of the motion an itemization of the facts relied upon and not genuinely disputed and the respondent shall indicate either agreement or specific reasons for disagreement that such facts are undisputed and material. Copies of motions to dismiss or for summary judgment sent to the judge shall also be accompanied by copies of the complaint and, if filed, the answer.

3. Accompanying memoranda or briefs in support of other motions are encouraged but not required. Where movant has served a memorandum or brief, respondent may serve a reply within ten (10) days after service of movant's memorandum or brief. A rebuttal memorandum or brief may be served within five (5) days of service of the reply memorandum.

4. No memorandum or brief required or permitted by this rule shall be filed with the clerk. Memoranda or briefs shall not exceed 25 pages in length. If any memorandum, brief or other paper submitted in support of a legal argument in any case cites or relies upon any authority other than a Mississippi or federal statute, Mississippi or federal Rule of Court, United States Supreme Court case, or a case reported in the Southern or Federal Reporter series, a copy of such authority must accompany the brief or other paper citing it.

5. All dispositive motions shall be deemed abandoned unless heard at least ten days prior to trial.

[Adopted effective May 1, 1995; amended May 23, 2002.]

LEXSEE 76 MISS L J 973

Mississippi Law Journal

Spring, 2007

76 Miss. L.J. 973

LENGTH: 14551 words

ARTICLE: RECENT DEVELOPMENTS IN MISSISSIPPI TORT CLAIMS ACT LAW PERTAINING TO NOTICE OF CLAIM AND EXEMPTIONS TO IMMUNITY ISSUES: SUBSTANTIAL/STRICT COMPLIANCE, DISCRETIONARY ACTS, POLICE PROTECTION AND DANGEROUS CONDITIONS

NAME: Jim Fraiser *

BIO:

* B.A. 1976, J.D. 1979, The University of Mississippi. After serving as the Hinds County, Mississippi, Assistant District Attorney (1980-1982) and with Fraiser Law Offices (1983-2000), Jim Fraiser served as Mississippi Special Assistant Attorney General (1995-2000), Director of Choctaw Legal Defense (2000-2004), and as an associate with the firm of Page, Mannino, Peresich & McDermott, PLLC (2004-2006) defending against and asserting claims under the purview of Mississippi's Tort Claims Act in all state and federal trial and appellate courts. He has authored three previous articles for the Mississippi Law Journal and eleven articles for ALR 5th and ALR Fed, many of which concern tort claims act law. He currently serves as a federal administrative law judge for the Social Security Administration in Tupelo, Mississippi. He is also a professor of law at Mississippi College Law School and the author of three novels and seven non-fiction books about the history, culture and architecture of the Deep South. The opinions expressed in this article are those of the author only and not necessarily those of his employer.

SUMMARY:

... This review includes decisions by the Mississippi Supreme Court, the Mississippi Court of Appeals, and Mississippi's federal courts, as well as decisions published in other jurisdictions interpreting key issues of statutory tort claims act schemes similar to Mississippi's, which demonstrate the evolving nature of Mississippi Tort Claims Act judicial interpretation, with emphasis on the key issues of what constitutes sufficient notice of claim, and the scope of immunities conferred upon governmental entities by the discretionary, police protection, and dangerous condition exemptions. ... Finally, in 1993, the legislature partially abrogated sovereign immunity, subject to (1) claimants' exhaustion of administrative remedies where required; (2) filing of notices of claim 90 days prior to instituting suits against the state and its agencies or any political subdivisions such as counties or municipalities; and (3) numerous exemptions, which provided that, regardless of the negligence of governmental officials and employees, governmental entities would not be held liable in certain situations, such as when their employees acted within their discretion whether or not their discretion was abused, when they acted in the course of providing police protection, and when a dangerous condition existed on the property of a governmental entity that was not created or caused by the entity or of which the entity had no notice and timely opportunity to repair or warn against . ... Subsequently, when it became apparent that the government would not suffer unduly from the payment of legitimate claims thanks in part to the Tort Claims Act's cap on damages, and that claimants were losing recoveries because of draconian enforcement of the Act's notice and exemption provisions, certain rules were relaxed, including the shift from strict compliance with claim notice provisions to substantial compliance therewith. ... Finding that this additional time made the notice statute less difficult to comply with, the Mississippi Supreme Court began enforcing stricter substantial compliance requirements by finding fault with incomplete compliance with the seven notice factors of subsection (2). ... Even if the claimant were to successfully argue that the decision to design the roadway was not one within the officials' discretion, and that the discretionary exemption did not bar the claim, she could not prevail on that argument, because one exemption, the design exemption, applied to her design claim, and that claim was thus snared by the exemption octopus's design arm and consigned forever to the watery grave of summary judgment. ... In other words, if an officer subdues a physically disputatious

arrestee, he will not be found to have acted with reckless disregard even if he accidentally injures the arrestee short of using wanton force.

TEXT:
[*973]

I. Introduction

This article examines recent developments and the current status of Mississippi law concerning certain key issues related to what is commonly referred to as the Mississippi Tort Claims Act. n1 This review includes decisions by the Mississippi Supreme Court, the Mississippi Court of Appeals, and **[*974]** Mississippi's federal courts, as well as decisions published in other jurisdictions interpreting key issues of statutory tort claims act schemes similar to Mississippi's, which demonstrate the evolving nature of Mississippi Tort Claims Act judicial interpretation, with emphasis on the key issues of what constitutes sufficient notice of claim, and the scope of immunities conferred upon governmental entities by the discretionary, police protection, and dangerous condition exemptions.

II. Judicial History of Mississippi's Tort Claims Act

The principle of sovereign immunity was concisely expressed in the ancient maxim, "the King can do no wrong." The English began eroding this concept in medieval times with various documents that include the Magna Carta. However, the maxim's rationale probably served as the philosophical basis for sovereign immunity in the United States of America. n2 Congress partially abrogated sovereign immunity with its passage of the Federal Tort Claims Act, n3 through which it allowed plaintiffs to bring certain tort actions against the government pending their exhaustion of administrative remedies and compliance with various procedural requirements. n4

The Mississippi Supreme Court demanded an end to sovereign immunity in 1982, n5 and the Mississippi legislature enacted a Sovereign Immunity Act in 1983, but did not enact provisions that ended full immunity until after the state's highest court declared the legislature's stalling to be unconstitutional. n6

Finally, in 1993, the legislature partially abrogated sovereign immunity, subject to (1) claimants' exhaustion of administrative remedies where required; n7 (2) filing of notices of **[*975]** claim 90 days prior to instituting suits against the state and its agencies or any political subdivisions such as counties or municipalities; n8 and (3) numerous exemptions, which provided that, regardless of the negligence of governmental officials and employees, governmental entities would not be held liable in certain situations, such as when their employees acted within their discretion whether or not their discretion was abused, n9 when they acted in the course of providing police protection, and when a dangerous condition existed on the property of a governmental entity that was not created or caused by the entity or of which the entity had no notice and timely opportunity to repair or warn against . n10

Mississippi's appellate courts reacted to the new Act in a manner quite predictable in light of American tort claims act history. As I noted years earlier in a law journal article n11 analyzing the Mississippi Tort Claims Act:

The national trend in the sovereign immunity milieu involved an early conservative view of recovery subsequent to the various states' waiver of sovereign immunity, followed by a more liberal recovery-favoring policy in response to the unfairness to injured citizens occasioned by strict statutory construction of notice and exemption statutes. The most recent movement is back towards a middle-ground construction designed to establish both a reasonable recovery for injured citizens and to appropriately limit diminution of already scarce governmental financial resources. n12

In short, I believed I had detected a pattern of judicial interpretation of tort claims act statutes in other states that would be repeated by our courts. Initially, our courts assuaged governmental concerns about the sudden loss of limited state **[*976]** and local funds by limiting claimants' recoveries via strict interpretations of the claim notice n13 and exemption provisions of the new Tort Claims Act. Subsequently, when it became apparent that the government would not suffer unduly from the payment of legitimate claims thanks in part to the Tort Claims Act's cap on damages, n14 and that claimants were losing recoveries because of draconian enforcement of the Act's notice and exemption provisions, certain rules were relaxed, including the shift from strict compliance with claim notice provisions to substantial compliance therewith. n15 In time, after both the damage cap n16 and the number of adverse judgments increased, our courts shifted once again, moving back towards a middle-ground view of several key issues. In this article, I will attempt to both demonstrate our courts' shifts in perspective regarding these issues, and discuss the direction our courts may take in future decisions under the auspices of the Mississippi Tort Claims Act.

III. Notice of Claim

Mississippi's notice of claim statute has two principle parts. Mississippi Code Section 11-46-11(1) contains a tolling period between the service of notice and the filing of suit. Subsection (2) provides the factual information and method of service and delivery required for the claim notice. As will be discussed hereafter, there has been significant shifting by our courts as to what constitutes adequate compliance with these two separate provisions. [*977]

In its landmark decision of City of Jackson v. Lumpkin, n17 the Mississippi Supreme Court ruled that strict compliance with the notice provisions of Missississpi Code Section 11-46-11 was a mandatory jurisdictional requirement. n18 Citing my law journal article n19 in support of their rationale, the court declared that our "legislature's choice of mandatory, condition precedent language [i.e., that claimants 'shall' file a presuit notice of claim] suggests an intent to require strict compliance with the notice of claim provisions and a directive to the court to disallow substantial compliance." n20

This ruling led to a rash of decisions that upheld circuit court dismissals of actions where plaintiffs had failed to strictly comply with the mandatory jurisdictional claim notice provisions of the statute. n21 In other words, any notice of claim was potentially insufficient that did not address each of the seven required notice factors of Mississippi Code Section 11-46-11(2):

(1) notice in writing; (2) sent by registered or certified mail or delivered in person; (3) containing a short and plain statement of the facts regarding the circumstances of the injury; (4) giving the extent of the injury; (5) providing the names of all persons involved; (6) listing the damages sought; and (7) citing the residence of the plaintiff.

Upon finding that the requirement of strict compliance with the statute was "very difficult to comply with", n22 the Mississippi Supreme Court subsequently abandoned strict compliance in its landmark decision, Reaves v. Randall, ex rel [*978] Rouse. n23 In Reaves, the court declared that substantial compliance with the "simple requirements" of the notice statute would be sufficient to grant the trial court jurisdiction over the case. n24 Any questions about the court's intent were resolved in the decision of Carr v. Town of Shubuta, n25 which asserted the proposition that substantial compliance with the condition precedent information requirement of Section 11-46-11 was all that the statute required. n26 The court further defined substantial compliance by stating that substantial compliance was that which "informs the entity of the claimant's intent to make a claim and contains sufficient information" to satisfy the purposes of the statute. n27 Consequently, subsequent decisions in accord with Reaves and Carr provided that even though one or more of the seven required categories of information were not fully addressed, so long as substantial compliance, as defined in Carr, was had, the notice was sufficient. n28 However, the court was swift to point out that no compliance, and compliance that was not substantial, were insufficient. n29

During the Lumpkin/Carr shift, I was employed with the Attorney General's Office and assigned to the Mississippi Tort Claims Board, where I coordinated the defense of all tort claims against state agencies and employees. Greg Hardy, the [*979] Administrator for the Mississippi Tort Claims Fund, and the Board's claims adjuster, Bruce Donaldson, notified me that the Board was concerned that the immunities and defenses afforded by the statute were being substantially eroded by the progeny of Reaves and Carr. At the Board's behest, I drafted a proposed amendment to Section 11-46-11(1), which the Legislature adopted in April of 1999. The amendment accorded plaintiffs suing the state the 95 day tolling period before suit need be filed, as had been allowed under the old statute, but increased the tolling period to 120 days for actions against political subdivisions. As before, this tolling period also served the legislative purpose of allowing governmental entities sufficient time to investigate and settle claims prior to litigation. To those tolling periods, the 1999 amendment added an additional 90 days during which the plaintiff could delay before filing a complaint. n30

Finding that this additional time made the notice statute less difficult to comply with, n31 the Mississippi Supreme Court began enforcing stricter substantial compliance requirements by finding fault with incomplete compliance with the seven notice factors of subsection (2). n32 In Fairley v. George County, n33 the court ruled that a claim notice letter, which was not served by the statutorily required methods, and did not contain a statement of facts and did not state the extent of injuries and damages sought that were also required by the statute, did not constitute substantial compliance with the statute. The court [*980] subsequently decided, in City of Pascagoula v. Tomlinson, n34 that when a plaintiff deprived the governmental entity of its opportunity to investigate and settle claims by failing to wait the required 95 or 120 day tolling period between filing notice and filing suit (as provided in subsection (1) of the statute), the entity could petition the trial court for a stay of proceedings for the balance of the unexpired tolling (waiting) period. n35

The court's gracious attempts to forgive failed efforts at substantial compliance, and its patience in dealing with plaintiffs and their attorneys who failed to substantially comply with red letter claim notice procedures, officially waned in 2004. That year, in the twin decisions of Davis v. Hoss n36 and Wright v. Quesnel, n37 the court declared that, when

plaintiffs failed to comply with the statute's tolling provisions and filed suit before the 95 or 120 day tolling period lapsed, the public entity was not required to request a stay, but could move the court to dismiss the plaintiff's action for failure to comply with the statute's procedural requirements.

Any questions about whether this was a return to strict compliance with notice procedures was answered in the landmark decision of University of Mississippi v. Easterling. n38 In Easterling, the court declared that, "in order to make it perfectly clear to all that strict compliance is required, as stated in Davis and Wright, we hereby overrule Tomlinson and its progeny." n39 In so doing, the court reversed the trial court's decision to deny the state's motion to dismiss for failure to comply with Section 11-46-11(2) by filing suit four months prior to filing notice of claim. It was not the duty of the state to file a motion for stay, the court concluded; the plaintiff had the option of voluntarily dismissing her prematurely filed complaint and properly serving notice, or suffering court-ordered dismissal **[*981]** for non-compliance. n40

However, the Easterling Court made it crystal clear that its decision applying strict compliance only applied to the "mandatory" 90-day notice requirement contained in subsection (1) of Section 11-46-11, n41 and not to any other aspect of the statute. In other words, the rule of substantial compliance, as it related to the seven notice factors, was not abrogated by the Easterling decision as rendered on April 6, 2006.

That abrogation finally came on June 1, 2006, n42 in the decision of South Central Regional Medical Center v. Guffy. n43 In Guffy, the court decided that allowing claimants to not comply with any one of the seven notice factors contained in Section 11-46-11(2) rendered the concept of substantial compliance "meaningless." n44 Henceforth, the court declared, the issue would be whether the claimant complied, rather than substantially complied, with the statute. n45

In light of the Guffy rationale, claimants must now provide the "substantial details" pertaining to each of the seven notice factors in order to comply with Section 11-46-11(2). n46 The failure of any claimant to "provide any of the seven [statutorily required] categories [of information]," for example, the failure to give a short and plain statement of the facts or to provide the plaintiff's residence address, "falls short of the statutory requirement and amounts to non-compliance." n47 And when some information is provided in each of the seven required categories, the courts "must determine whether the information is 'substantial' enough to be in compliance with the statute. If it is, the result is 'compliance' not 'substantial compliance' with **[*982]** the requirements under Section 11-46-11(2))." n48

The Guffy compliance guidelines should be most welcome to practitioners dealing with the notice requirements of Section 11-46-11(1)-(2). However, before declaring that I predicted that a return to strict compliance was inevitable in my 1999 Mississippi Law Journal article, n49 or that I asked that comprehensible Guffy-like guidelines be provided in that same article, n50 I must admit that my proposed 1999 amendment to Section 11-46-11(1) proved rather difficult to understand, and was only clarified by the court's extraordinarily helpful explanation in its Page decision, which, according to the Easterling Court, is still good law. n51

With adequate claim notice guidelines finally in place for the first time since 1999 (when the Reaves Court overruled Lumpkin and instituted a nebulous substantial compliance standard, and since my proposed amendment to subsection (1) of Section 11-46-11 muddied the waters further), Mississippi's bench and bar should be able to successfully navigate the requirements of both sections of 11-46-11. Just as importantly, the law has circled around to the point where justice may best be obtained: where governmental entities are accorded their legislatively-mandated information and a sufficient waiting period to investigate and settle claims prior to litigation, and plaintiffs are not denied their day in court by unnecessarily draconian (and incomprehensible) procedural requirements.

IV. Mississippi's Exemptions from Immunity and "Fraiser's Octopus"

My 1999 law review article n52 examined the nature of **[*983]** Mississippi's Tort Claims Act exemptions to immunity, n53 which, by legislative prerogative and choice, exempt Mississippi's governmental entities from liability for damages despite otherwise actionable conduct involving negligent acts and omissions. These exemptions were, I argued, disjunctive in nature, and thus, "like an octopus's arms; even if one does not get you, another one may." n54

In other words, if a claimant sues an entity for injuries allegedly caused by the steepness of a roadway curve, the question arises whether the Act's exemptions bar her claim(s) against the entity designing the curve. If the claimant alleges improper design, the government may raise the design exemption n55 and argue that the claim is barred because the roadway had been designed in accordance with the design standards of the day. Even if the claimant were to successfully argue that the decision to design the roadway was not one within the officials' discretion, and that the discretionary exemption n56 did not bar the claim, she could not prevail on that argument, because one exemption, the

design exemption, applied to her design claim, and that claim was thus snared by the exemption octopus's design arm and consigned forever to the watery grave of summary judgment.

However, I continued, should the claimant allege in her complaint the creation of a dangerous condition by allowing a pothole to develop in the curve as a second and separate allegation, then the octopus's design arm would have no effect upon that claim, and the entity must defend the dangerous condition claim by resort to another of the octopus's arms, the dangerous condition exemption, n57 and demonstrate that it had no pre-accident knowledge of the condition or that the condition was open and obvious to the driver/claimant. If the plaintiff failed [*984] to meet her burden of proof as to governmental knowledge, then the octopus's dangerous condition arm would drag her claim beneath the waves and beyond all hope of monetary recovery.

Mississippi's appellate courts struggled with these issues for years before finally deciding to adopt my octopus-metaphor rationale. In Pearl River Valley Water Supply District v. Bridges, n58 the Mississippi Court of Appeals held that, even though the discretionary exemption may not have barred the claimant's excessive force claim, the police protection exemption did. This was so, the court reasoned (while citing my law journal article), n59 because the exemptions were "written in the disjunctive" as indicated by the Act's use of the word "or," so the "applicability of any one of these exemptions creates immunity." n60 This landmark decision had the effect of settling the issue of the applicability of the octopus's arms to any one claim. The Bridges claimant had only raised one claim -- excessive force, and the police protection exemption barred it, so there was no need to consider whether or not the discretionary exemption applied to the facts of the case. n61 This rationale was most recently reiterated by our court of appeals in Willing v. Benz, wherein the court stated:

As established by precedent of both this Court and our supreme court, where any of the immunities enumerated in section 11-49-9(1) apply, the government is completely immune from the claims arising from the act or omission complained of. n62

The second issue, as to the efficacy of one octopus's arm in [*985] defeating two or more claims, was decided by the Court of Appeals in MacDonald ex rel. v. Mississisippi Deptartment of Transportation n63 In MacDonald, the plaintiff, injured while traversing the pre-Katrina bridge between Ocean Springs and Biloxi, raised several claims, including defective design, negligent construction, negligent maintenance, and failure to warn of a dangerous condition. The lower court granted summary judgment on the defective design claim, but not on the other claims. The issue before the appellate court, as concisely stated in the Trial Lawyers' amicus brief, was whether "Fraiser's octopus", by defeating one claim (defective design), defeated them all, as it had defeated the one claim in Bridges.

Once again, citing my law journal article in support of its rationale, the court ruled that the one exemption did not defeat all other claims, and that for each claim raised by a plaintiff, any one exemption (octopus's arm) may ensnare and defeat it, but whether it defeats any other claims, or whether any other exemptions apply to those other claims, must be determined on a case-by-case basis. n64 Stating that, "we read Mr. Fraiser's law review article to comply with our current decision," n65 the Court cited my example, taken from the New Jersey case of Costa v. Josey, n66 where that court had determined that the barring of a design claim by the New Jersey Tort Claims Act's design exemption would afford the government no immunization on the plaintiff's negligent maintenance claim. The Mississippi Court of Appeals (correctly) concluded that my law review article did not advocate the interpretation of the all-destroying "Fraiser's octopus" as erroneously found by the lower court, and that "succinctly put, immunity as to one claim does not necessarily, as a matter of law, equate to" immunity as to all claims. n67

While the Mississippi Court of Appeal's approach to these [*986] issues is both middle-ground just and consistent with legislative intent, it does create a potential danger that must be briefly addressed here. Although one exemption does not necessarily apply to any other claims, it may sometimes apply. This is particularly so where the plaintiff has resorted to what I characterized in the aforementioned law review article as "artful pleading." n68

In this context, "artful pleading" occurs when a plaintiff realizes that his claim, let us say, a design claim, is barred by the design exemption, so he re-casts that claim as separate failure to warn and negligent maintenance claims. The courts should not allow such tactics to resurrect an otherwise dead-in-the-water-by-exemption-octopus-arm claim.

Some courts in other states have already refused to do so. In Manna v. State, n69 it was held that "a plaintiff cannot cast a design improvement as a 'maintenance' action to circumvent immunity given the 'original design.'" n70 Where roadway design was the real issue, the court concluded, and the design had been properly approved in accordance with the design standards of the day, no dangerous condition claim could prevail simply because of "the advent of faster automobiles." n71

Similarly, in Szymanski v. Department of Highways of the State of Colorado, n72 it was decided that the plaintiff's attempt to characterize a design claim as improper sightline, absence of warning signs or negligent maintenance claims, could not avert dismissal of all claims, since all of them related to the claimed inadequacies of the roadway's design. n73

In other words, truly separate claims must be defeated by separate exemptions, as would be the case with the claims of [*987] negligent design and subsequent improper maintenance by failing to replace a stop sign. However, where the other claims are all mere rewording of the original barred claim, a different result is obtained. For example, where the roadway was properly designed so as to bar a design claim, but the claimant alleges different flaws such as improper sightline and absence of particular warning signs, which are nothing more than complaints about the original design, such artful pleading should not be allowed to delay dismissal and cause needless further litigation expense.

V. Discretionary Exemption

Mississippi Code Section 11-46-9(1)(d) immunizes governmental entities for all acts or omissions based upon the exercise or performance or failure to exercise or perform a discretionary function or duty of a governmental entity or employee, whether or not that discretion is abused. The first issue relevant to any discretionary exemption, federal or state, is the standard applicable to the exemption. Mississippi's appellate courts have taken a decidedly schizophrenic approach to this issue.

They first ruled that "discretion" was simply a matter of whether a governmental employee exercised judgment in a matter where the action was not otherwise mandated by law, regulation or ordinance. n74 In other words, if an act was required by law, its carrying out was a ministerial act, and not a discretionary one. But where the law was silent as to how an act should be performed or decision should be made (or not), so long as the employee acted or failed to act within his or her discretion and judgment, the act or omission was immunized by this exemption.

Subsequently finding this interpretation too conservative, Mississippi's appellate courts allowed bad facts to create bad law by borrowing an "ordinary care" requirement from another [*988] exemption (exemption (b), commonly known as "the compliance with statutes and ordinances exemption"), and adding it to the discretionary mix. n75 Now, in addition to exercising judgment, a governmental employee was also required to exercise ordinary care for the exemption to immunize his or her negligent acts or omissions. n76 This was an absurd n77 approach, n78 since the legislature's obvious intent in creating this exemption was to immunize discretionary acts regardless of negligence (the lack of ordinary care) or whether the discretion was abused.

Realizing they had overstepped legislative intent and the bounds of reason, our courts once again wisely circled back to the middle, deleted the "ordinary care" requirement, and added a "policy considerations" prong to the discretionary analysis. n79 This meant that, since ordinary care was no longer a relevant issue, the discretionary exemption applied when (a) an employee exercised discretion (judgment) where that judgment was not foreclosed by legal mandate and was thus not ministerial, n80 and (b) the act also involved potential considerations of [*989] social, economic or political policy alternatives.

This second prong of the discretionary test, that of policy considerations, expands "discretion" to mean more than merely exercising judgment. "Judgment/discretion" must also implicate social, economic or political policy to be immunized judgment/discretion. In other words, the decision by a bus driver to allow a claimant to exit a school bus at a particular intersection does not implicate policy, and is merely a judgment call, and thus not immunized by this exemption. n81 However, a school board's decision to allow children to de-board buses during thunderstorms, at busy intersections, during nuclear attacks, etc., is a policy decision which may not be second guessed, even where ordinary care is not utilized by the board. Thus, if the board has decided that children may be let off at all intersections, then the driver's decision to do so is immunized as discretionary -- i.e., as involving judgment-plus-policy considerations.

Despite the fact that this concept sounds very middle-ground just and quite reasonable, it has not served as a firm guide for our appellate courts. Although ordinary care was banned from the exemption in 2004 in Collins v. Tallahatchie County, n82 and policy considerations were written in to the test in 2003 in the case of Doe v. State, ex rel. The Mississippi Deptartment of Corrections, n83 our courts have not always followed this precedent.

In Sanders v. Riverboat Corp. of Mississippi-Vicksburg, n84 the Mississippi Court of Appeals applied the discretionary/judgment/ministerial standard to treatment rendered by a paramedic without mentioning the policy aspect and while [*990] applying the defunct ordinary care standard. Further, in Doe, although the Mississippi Supreme Court noted that the policy prong applied to the discretionary test, it did not specifically apply it, holding forth with a largely judgment/ministerial analysis. n85

There are, however, a few cases that provide guidance to the practitioner navigating the treacherous waters of discretionary exemption law. In Stewart v. City of Jackson, n86 it was held that a city bus driver's decision to allow an elderly passenger to exit the bus and cross a street by herself, a non-ministerial act involving judgment, did not involve real policy decisions, so the discretionary exemption did not immunize it. n87

Noting that the purpose of the two-prong public policy function discretionary exemption test was to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort," n88 the court, in Dotts v. Pat Harrison Waterway District, n89 ruled that the district's decisions as to sufficient enclosure of the water area, signage at the pond, and its decisions regarding lifeguards and their equipment, were grounded in public policy and susceptible to a policy analysis, and thus protected by the discretionary exemption. n90

A recent federal decision interpreted the policy prong of the MTCA's discretionary exemption to hold that a regional housing authority official's decision to issue housing-choice vouchers to tenants allowing them to obtain housing elsewhere constituted **[*991]** an immunized policy discretion decision, in Urban Developers L.L.C. v. City of Jackson. n91 That court further noted that "a wide variety of governmental conduct has been held [by Mississippi's appellate courts] to involve the implementation of social, economic or political policy." n92 The examples cited by the court included:

The manner in which a police department supervises, disciplines and regulates its police officer, City of Jackson v. Powell, 917 So. 2d 59, 74 (Miss. 2005); the decision to grant or deny parole, Doe v. State ex rel. Mississippi Dep't of Corr., 859 So. 2d 350 (Miss. 2003) the placement or non-placement of traffic control devices or signs, Barrentine v. Miss. Dep't of Transp., 913 So. 2d 391 (Miss. App. 2005); the acts or omissions of high school football coach which caused a player to suffer heatstroke during practice, Harris ex rel. Harris v. McCray, 867 So. 2d 188 (Miss. 2003); and the decision of emergency medical personnel to use a "load and go" approach on an expectant mother. Sanders v. Riverboat Corp. of Mississippi-Vicksburg, 913 So. 2d 351 (Miss.App. 2005). n93

And in another recent decision, the Mississippi Court of Appeals declined to determine whether a police officer's act of radioing in the location of a dangerous condition on a roadway, rather than remaining on the scene and warning approaching drivers of the condition, was immunized by the discretionary immunity, because, although the lower court found that the act was not ministerial, the lower court did not then proceed with the required additional analysis of whether the decision implicated policy. n94 Suffice it to say, the two-prong ministerial/policy discretionary test is the law of the land in Mississippi. n95 **[*992]**

To summarize, the first issue to be broached with regard to the discretionary exemption is whether or not law, ordinance or regulation requires that an act be performed a certain way, thereby making it ministerial rather than discretionary. If there is no such mandate, and the act, decision or omission requires discretion or judgment, then for immunity to apply, the act, decision or omission must also have been subject to policy analysis. This means that the act or decision or omission happened, or did not happen because it was the kind of thing about which a governmental entity decision-making body could have met, and discussed its social, economic or political ramifications and decided to have done or not done something in a particular way.

Although this sounds like vintage Groucho Marx at best, and something imagined by Franz Kafka at worst, it is really not as difficult as it sounds, notwithstanding the fact that our courts have encountered almost as much difficulty with it as the Marx Brothers encountered in Duck Soup.

But I digress. The Stewart and Dotts cases have provided sufficient guidance on the second prong of the discretionary test so that everyone can tell the difference between a decision to let a lady off a bus or the decision to place particular signs at a pond and to provide lifeguards with particular life-saving equipment. n96 The former decision is judgment only, while the second involves a judgment-plus-policy analysis. The plethora of judgment/ministerial cases handed down by our courts show the necessity of determining whether any law mandates action or inaction when calculating the first prong of the discretionary exemption test. n97 However, whether or not counsel should engage **[*993]** in all this reckoning before filing a lawsuit or defending one under Mississippi's Tort Claims Act is entirely up to his or her discretion. But good judgment and sound policy militate in favor of taking the time.

VI. Police Protection Mississippi Code Section 11-46-9(1)(c) provides immunity for a governmental employee engaged in activities or duties related to police or fire protection n98 unless the employee acted in reckless disregard for the safety and well-being of any person not engaged in criminal activity at the time of injury. Consequently, the three issues involved in an analysis of liability pursuant to this section are (a) what constitutes activities or duties related to police protection; (b) what constitutes reckless disregard; and (c) what constitutes "criminal activity" within this context.

A. What is "Police Protection"?

Our appellate court has found police protection to include a host of activities "clearly integral to providing police protection." n99 These have included "deciding whether to arrest a driver or allow him to continue driving, arresting and detaining a suspect, administering an intoxilizer test on the roadway, accidentally shooting a person resisting arrest, aiming weapons at and negligently detaining a suspect," n100 patrolling the streets and negligent maintenance of a police vehicle's brakes, n101 using a county sheriff's vehicle to drive to a location [*994] in order to obtain keys for county gas pumps, n102 combat drills as part of a federally funded police corps training program, n103 a sheriff's seizure of goods on behalf of a creditor, n104 a police officer's decision to pursue a suspect in a high-speed chase, n105 a police officer's radioing-in the location of a dangerous condition on a roadway, n106 an officer's subduing of a citizen resisting arrest, n107 and the activities of a 911 police emergency operator. n108

Suffice it to say, this prong of the reckless disregard test is not difficult to meet, and, ironically, is often met by the plaintiff's act of pleading that the defendant acted in the course and scope of his duty as a police officer. As for the other two prongs, to quote the Bard, "ay, there's the rub." n109

B. What is "Reckless Disregard"?

Reckless disregard was defined as willful and wanton conduct which requires knowingly and willingly and intentionally performing a wrongful act, in the Fifth Circuit decision of In Re Foust. n110 However, it has also been defined by Mississippi's highest court as more than negligence, but less than an intentional act, accompanied by a conscious indifference to consequences amounting almost to a willingness that harm should follow -- a higher standard than gross negligence but not intentional per se -- in Mississippi Department of Public Safety v. [*995] Durn. n111 A more recent definition may be found in Jackson v. Payne, n112 where the Court of Appeals cited the Mississippi Supreme Court's resort to Black's Law Dictionary to produce the following definition originally related in Turner v. City of Ruleville: n113 "the voluntary doing . . . of an improper or wrongful act, or with knowledge of existing conditions, the voluntary refraining from doing a proper or prudent act when such an act or failure to act evinces an entire abandonment of any care, and heedless indifference to results which may follow and the reckless taking of a chance of an accident happening without intent that any occur." n114

In the final analysis, it appears that indifference in the face of a good chance of accidental personal injury n115 is at the heart of "reckless disregard." The Mississippi Supreme Court has worded it more eloquently, declaring that it will find reckless disregard when the "conduct involved evince(s) not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved." n116

In other words, if an officer subdues a physically disputatious arrestee, he will not be found to have acted with reckless disregard even if he accidentally injures the arrestee short of using wanton force. n117 However, where an officer shoves a [*996] handcuffed arrestee's face into a concrete floor, n118 or beats and kicks a subdued and handcuffed arrestee, n119 he will be found to have acted with reckless disregard.

It appears that the history of Confederate General Nathan Bedford Forrest may be instructive on this point. Commendable, it is, to take the fight to the enemy with great dispatch so long as he continues to fight back, as was the case at Forrest's resounding victory at the battle of Brice's Crossroads, Mississippi; but after the enemy has surrendered, as had black federal troops at Fort Pillow, Tennessee, there is no excuse for continuing to make war upon him.

Regarding "honest" mistakes, a law enforcement officer will be immunized under this statute if she arrests the wrong person, so long as the arrest is with probable cause or pursuant to a warrant, n120 or if he draws his weapon during a misdemeanor arrest where he has reason to believe that shots have been fired in the area. n121 Conversely, when an officer makes an arrest with no probable cause and without comparing the photo on a driver's license to the appearance of the person driving the car, n122 he will be found to have acted with reckless disregard. n123

Another situation where the issue of reckless disregard is often litigated is that involving motor vehicle accidents caused by law enforcement officers. Whether reckless disregard is found in those cases depends upon a specific set of circumstances attending the accidents in question, and the efforts made by the officer to avoid injury to others.

In Ogburn v. City of Wiggins, n124 an officer who struck a [*997] vehicle which was traveling in the wrong lane was held not to have acted with reckless disregard since the weather was clear, he was driving a short distance in a rural area, and he testified that he was looking out for other drivers when this one veered suddenly into his lane. Similarly, in Joseph v. City of Moss Point, n125 although the officer was stopped and not paying attention to traffic in his own lane, and moved forward as a reflex response to an accident occurring ahead of him, the fact that he attempted to slam on his brakes and avoid hitting the vehicle in front of his was held to demonstrate that he did not act in reckless disregard.

Further, in Bonner v. McCormick, n126 where a driver idling at an intersection began driving when the light turned green, but then suddenly stopped, it was held that the officer who hit him from behind had not acted with reckless disregard where the officer had insufficient time to stop despite attempting to do so.

However, in an effort to curb dangerous conduct by a decided minority of law enforcement officers, the courts have found reckless disregard in circumstances where an officer drives blindly into an accident without concern for the consequences to others. In City of Jackson v. Brister, n127 the Mississippi Supreme Court for the first time considered five high-speed pursuit factors in determining whether an officer was acting with reckless disregard while in pursuit of another. These factors are (1) the length of the chase, (2) the type of neighborhood, (3) the characteristics of the streets, (4) the presence of other traffic, (5) weather conditions and visibility, and (6) the seriousness of the pursuit. n128 Following this rationale, our Supreme Court [*998] found reckless disregard where an officer sped through a busy city intersection, without siren blaring, where visibility was limited, and failed to yield the right of way, in City of Jackson v. Lipsey. n129 Likewise, in Mississippi Department. of Public Safety v. Durn, n130 where a speeding trooper passed a vehicle on the left which was in the process of making a left turn, and struck that vehicle, he was found to have acted with reckless disregard, since he knew the driver was turning but sped on in the face of potential harm to others. n131

The difference between reckless disregard and immunized negligence may be explained with resort to another historic incident. Union Admiral David Farragut's words when braving the batteries at Mobile en route to Vicksburg -- "damn the torpedoes, full speed ahead," worked well in wartime, but would not suffice on Mississippi's public roads, nor should it. It is one thing to preserve the Union with a courageous-to-the-point-of-recklessness naval assault, and yet another to maim innocent civilians because you did not take the time to look before you leapt.

C. What is "Criminal Activity"?

Once a plaintiff has established that a law enforcement officer acted with reckless disregard, she has one more hurdle to clear before she has overcome the police protection exemption. She must establish that she was not engaged in criminal activity at the time she was injured by the officer's recklessness. The matter to determine, then, is what is meant by "criminal activity"?

In City of Jackson v. Perry, n132 it was held that, whether [*999] the criminal activity is a traffic offense, any other misdemeanor, or a felony is irrelevant; so long as the officer has probable cause to arrest and proceeds to do so, the act leading to the probable cause meets Mississippi's definition of "criminal activity." n133 However, the court continued, to be the species of criminal activity contemplated by the statute, it must be "more than fortuitous . . . it must be shown that the [injured party] was engaged in criminal activity that is a cause of the harm." n134

In other words, where the criminal activity results in the officer making an arrest, the requisite nexus exists to defeat liability. The penultimate case making this point was Pearl River Valley Water Supply District v. Bridges, n135 where the plaintiff's act of resisting arrest was the activity that caused the officer to use force to make an arrest. The court found a sufficient nexus between the criminal activity and the alleged harm to grant immunity under the statute. n136

Conversely, in Durn, n137 no causal nexus was found where, although the plaintiff was executing an illegal left turn when he was struck by the trooper's vehicle, his illegal turn was merely fortuitous criminal activity, and not the cause of the harm, which was the trooper's negligent speeding in the wrong lane. n138 Similarly, in City of Jackson v. Calcote, n139 the Mississippi [*1000] Court of Appeals ruled that even though the claimant was arrested on an outstanding warrant, had drugs in his car, and attempted to escape and resisted handcuffing, since the beating he received occurred after he was subdued, handcuffed, and no longer committing any crime, there existed no nexus between the claimant's criminal activity and the officer's reckless assault of his person, so the city could find no respite in the exemption. n140

Clearly, for the criminal activity to be the type that excuses an officer's reckless disregard, it must be the cause of the injury and not merely fortuitous, and it must be ongoing criminal activity at the precise time of the injury.

VII. Dangerous Condition Exemption

Section 11-46-9(1)(v) of the Mississippi Code immunizes governmental entities for injuries arising from a dangerous condition on governmental property that was not caused by the entity's negligent or wrongful conduct, or of which it had no notice, either actual or constructive, and no adequate opportunity to protect or warn against the condition, provided that the entity had no duty to warn of any condition open and obvious to anyone exercising due care.

In other words, to recover in the face of this exemption's immunizing provisions, a claimant must prove (1) that a dangerous condition existed on government property,

(2) that it was caused by the entity and/or the entity had notice of the condition and adequate time to protect or warn against it, and (3) that the condition was not open and obvious to the claimant with the exercise of due care.

A. What is a "Dangerous Condition" on Government Property?

Although a dangerous condition is ordinarily easy to recognize (i.e., we know it when we see it, or fall into it, as the case may be), and the concept of "on government property" largely speaks for itself, this issue, much like a hidden danger, is more **[*1001]** troublesome than it appears at first blush.

It was held in Jenkins v. MDOT n141 that proof of a dangerous condition in the public streets or highways, no matter how dangerous it may be, is never sufficient proof for recovery; there must also be proof that a standard was violated with regard to the condition or that an engineer failed to follow the appropriate inspection procedure. n142

In other words, that a condition exists on government property means little with regard to liability. The claimant must also offer a reasonable explanation as to how it got there. This is so because if a dangerous condition on a roadway was caused solely by the weather, the government is immune, as per Section 11-46-9(1)(q).

Furthermore, to be actionable, the dangerous condition must have been created by the character of the governmental property, not by non-governmental human agency. As was held in Johnson v. Alcorn State University, n143 a dangerous condition on a college campus cannot be a danger that hoodlums may shoot someone; it must be dangerous due to its physical character. n144 That is to say, due to an unreasonably darkened parking lot or a field bordered by an electric fence with no signs warning against the danger of electrocution. n145

B. Causation

Proof of causation does not guarantee a finding of liability as it may in other legal contexts; it is merely a necessary step in the progression towards proof of liability. It will not be in **[*1002]** ferred against the government, and a plaintiff must prove causation in each case in order to prevail under the purview of this exemption. For example, in Hodges v. Madison County Medical Center, n146 the plaintiff proved that the hospital bed upon which she was sitting collapsed because a shoe string, rather than a metal spring, had been used to support the mattress. n147 However, because the plaintiff failed to offer any proof that state employees substituted the string for the mattress, the court ruled that she could not prevail on her dangerous condition claim for lack of proof of causation. n148

The proof of causation contemplated by the statute is proof of an act or omission by a governmental employee directly causing the dangerous condition. In Mississippi Deptartment of Transportation v. Trosclair, n149 the court found that the plaintiff had proved via eyewitness testimony that the government caused a dangerous condition by creating a three- to five-inch drop-off from the roadbed to the unpaved shoulder, failing to erect sufficient signs or signals to warn of that danger to the driving public, and denying the State's motion for summary judgment. n150

C. Sufficient Notice and Opportunity to Protect or Warn

Once causation is demonstrated, the plaintiff must then offer proof that the entity knew of the dangerous condition, by either actual or constructive notice, in time to protect or warn the public of the danger. Four recent cases address this rather thorny issue.

In Hodges n151 it was held that, although a string had negligently been used to support a mattress in lieu of a spring, leading to the collapse of a bed and resulting injuries to the **[*1003]** plaintiff, the plaintiff's failure to offer proof that the employees knew that the mattress was hanging by a thread defeated her dangerous condition claim. n152 By contrast, in Ladner v. Stone County, n153 where a county inspector sent notices twice a year for five years to the Board of Supervisors that a bridge in their county was advancing in decay, it was decided that the county had actual notice of the dangerous condition and sufficient time and money to repair the bridge or warn of its condition, and was thus liable for the injuries sustained by the plaintiff during the bridge's not unexpected collapse. n154

In City of Jackson v. Locklar, n155 our highest court cited five-factors that are useful in determining whether constructive notice of a dangerous condition existed: (1) the length of time the defect existed; (2) the nature or character of the defect; (3) the publicity of the place where the defect existed; (4) the amount of travel over the area; and (5) any other factors in evidence which tend to show notoriety. n156 Considering those factors, the Mississippi Court of Appeals in Jones v. Mississippi Transportation Company n157 that a plaintiff's failure to offer proof that a roadway's shoulder defect was noticeable upon passing or that there had been any complaints filed by motorists concerning the defect, barred his claim of constructive notice of a dangerous condition. Similarly, in Mississippi Deptartment of Wildlife, Fisheries and Parks v. Brannon n158 the court determined that, in absence of proof that the park inspector had observed a drop-off covered by leaves, or that he had failed to make all required inspections to seek out any possible

dangerous conditions, or that any had been previously reported, a plaintiff could not successfully advance a constructive notice claim. n159 By contrast, in City of Jackson v. Internal [*1004] Engine Parts Group, Inc., n160 the Mississippi Supreme Court ruled that proof of the city's failure to inspect and maintain a drainage ditch, which later flooded because it was blocked when heavy rains came, constituted proof of actual notice of the long existing blockage which reasonable inspection and maintenance would have revealed. n161

D. Open and Obvious

Once a plaintiff has proven the existence of a dangerous condition on governmental property that was caused by the government and of which the government had notice and opportunity to warn or protect against, then he must also prove that the condition was not open and obvious to any using due care. Although the open and obvious defense is not an absolute bar to claims in general tort law in comparative negligence states such as Mississippi, it is an absolute bar to recovery in claims brought under the auspices of the Mississippi Tort Claims Act. n162 The slippery slope that the plaintiff must negotiate with regard to this issue is: (a) if the condition was so open and obvious to the government that it had actual notice of the condition, perhaps it should also have been obvious to the plaintiff; and (b) if the condition was not open and obvious to the plaintiff, it may have been similarly disguised from the government. n163

E. So What is a Plaintiff to do?

He or she should do as did the plaintiff in City of Newton v. Lofton n164 and offer proof of a condition hidden to the plain [*1005] tiff but of which the government should have been aware by virtue of having created the condition or having constructive knowledge that it existed. In Newton, the court decided that a parking lot under repair containing dangers hidden by tall grass that had been created by the city, with no signs or devices surrounding the construction site warning that the construction was not completed, constituted a dangerous condition that was not open and obvious to the plaintiff. n165

Conversely, in City of Clinton v. Smith, n166 where the plaintiff testified he observed an obviously dangerous condition, i.e., that he noted the presence of ice and snow on a ramp before he fell off of it, the Court ruled that he would not be able to overcome the immunity conferred by the dangerous condition exemption. n167

The proof necessary to overcome the dangerous condition exemption is not insignificant, and making that proof usually requires making extensive use of pretrial discovery procedures. However, as Cicero did in preparing to prosecute the powerful Cataline in the trial that made Cicero the leading lawyer of his era, the lawyer asserting claims under the MTCA should utilize all available resources in support of efficaciously presenting a claim. That is, assuming he or she wishes to avoid summary judgment.

VIII. Conclusion

The road to justice under the auspices of Mississippi's Tort Claims Act has been a long and winding one, which our appellate courts have successfully navigated with only a minimal number of problematic twists and turns. In the final analysis, the middle ground has proven the high ground, where our courts have provided plaintiffs with a fair shot at recovery and given governmental entities their due with regard to pre-suit notice and immunizing defenses. It was a distinct pleasure to be so intimately involved in this navigation of Mississippi's [*1006] Tort Claims Act waters during the past ten years, and to labor in the company of so many outstanding lawyers and hard working public servants, while receiving guidance from an abundance of learned trial and appellate state and federal judges.

The struggle for Tort Claims Act justice will continue, and future shifts in the form of landmark decisions are as inevitable in Mississippi as they are in other states. However, the combatants and deciders alike may take pride in knowing that Mississippi's legislators, courts, lawyers and the voting public have worked together to craft a Tort Claims Act and supporting body of law that is the equal of any other in our nation. Even more, it stands as a shining example, in these perilous times, of how American democracy can and does work for the good of all, despite the attempts of a few self-interested ones within and the many misguided ones without who seek to denigrate or destroy it.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationContent & Form

FOOTNOTES:

n1 MISS. CODE ANN. § § 11-46-1 to -23 (Supp. 2005). This statute is also known as the Mississippi Governmental Immunity Act.

n2 See Jones v. Knight, 373 So.2d 254, 259 (Miss. 1979) (Bowling, J., dissenting) (attributing history of American sovereign immunity to English common law).

n3 28 U.S.C. § 2675 (2000).

n4 Id.

n5 Pruett v. City of Rosedale, 421 So.2d 1046, 1052 (Miss. 1982) (en banc).

n6 Presley v. Miss. State Highway Comm'n., 608 So.2d 1288, 1301 (Miss. 1992) (en banc).

n7 MISS. CODE ANN. § 11-46-11(1) (1994).

n8 Id.

n9 MISS. CODE ANN. § 11-46-9(1)(d) (1994).

n10 MISS. CODE ANN. § 11-46-9(1)(v) (1994).

n11 See Jim 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. L.J. 703 (1999).

n12 Id. at 860.

n13 See, e.g., City of Jackson v. Lumpkin, 697 So.2d 1179, 1181 (Miss. 1997) (deciding that plaintiffs must strictly comply with the claim notice requirements of 11-46-11).

n14 MISS. CODE ANN. § 11-46-15(1), (2) (1994) (allowing then a maximum of $ 250,000 for all claims arising out of a single occurrence. The cap has since increased substantially by drafted-in provisions that increase it with the passage of time).

n15 Reaves ex rel. Rouse v. Randall, 729 So. 2d 1237, 1240 (Miss. 1998).

n16 The amount initially increased to $ 500,000 for each occurrence. See MISS. CODE ANN. § 11-46-15(1) (1994).

n17 697 So. 2d 1179, 1181 (Miss. 1997).

n18 Id. at 1182.

n19 J. James Fraiser III, A Review of Issues Presented by Section 11-46-11 of the Mississippi Tort Claims Act: The Notice Provisions and Statute of Limitations, 65 MISS L. J. 643, 650 (1996).

n20 Lumpkin, 697 So. 2d at 1182 n.1 (quoting J. James Fraiser III, A Review of Issues Presented by Section 11-46-11 of the Mississippi Tort Claims Act: The Notice Provisions and Statute of Limitations, 65 MISS. L.J. 643, 650 (1996)).

n21 See, e.g., Carpenter v. Dawson, 701 So. 2d 807 (Miss. 1997) (holding a two sentence letter to a city adjuster was insufficient notice of a claim).

n22 See the Mississippi Supreme Court's belated explanation in University of Mississippi Medical Center v. Easterling, 928 So. 2d 815 (Miss. 2006).

n23 729 So. 2d 1237 (Miss. 2006).

n24 Id. at 1240.

n25 733 So. 2d 261 (Miss. 1999).

n26 Id. at 265.

n27 Id. at 263. For a lengthy discussion of the purposes of notice of claim statutes, see J. James Fraiser III, Persons or Entities Upon Whom Notice of Injury or Claim Against State of State Agencies May or Must be Served, 45 ALR 5th 173, 190 (1996). These purposes ordinarily include giving the entity time to adequately investigate the claim and settle it without incurring legal expenses if it is meritorious, prepare a defense and locate witnesses and other evidence while still available, budgeting for fiscal liabilities, and correcting the problem before others are injured. Id.

n28 See, e.g., City of Pascagoula v. Tomlinson, 741 So. 2d 224 (Miss. 1999), rev'd, Univ. of Miss Med. Ctr. v. Easterling, 928 So. 2d 815 (Miss. 2006).

n29 See, e.g., Little v. Miss. Dep't of Human Servs., 835 So. 2d 9, 12-13 (Miss. 2002) ("we can hardly afford relief under the MTCA when there is no effort to comply with the procedural mandates."), and Gale v. Thomas, 759 So. 2d 1150, 1158 (Miss. 1999) (quoting Carr at 733 So. 2d at 265 ("Substantial compliance is not the same as, nor a substitute for, non-compliance."))

n30 For a thorough discussion of how the 1999 amendment must be complied with, see Page v. University of Southern Mississippi, 878 So. 2d 1003 (Miss. 2004), which essentially held that, subsequent to the filing of notice, the limitations period of 11-46-11(2) is tolled for 95 or 120 days for the state or political subdivision, respectively, until the claim is denied in writing or the tolling period expires. MISS CODE ANN. § 11-46-11(2) (Supp. 1999). At that time, an additional 90 days is added during which the plaintiff must file the complaint. If the agency denies the claim before the tolling period expires, the plaintiff does not get credit for any unexpired tolling period time, and has only the unused remaining one year limitations period plus an additional 90 days in which to file suit.

n31 See, e.g., Univ. of Miss. Med. Ctr. v. Easterling, 928 So. 2d 815 (Miss. 2006).

n32 Miss. Code Ann. § 11-46-11(2).

n33 871 So. 2d 713, 718 (Miss. 2004).

n34 741 So. 2d 224 (Miss. 1999).

n35 Id. at 228.

n36 869 So. 2d 397, 402 (Miss. 2004).

n37 876 So. 2d 362, 367 (Miss. 2004).

n38 928 So. 2d 815 (Miss. 2006).

N39 Id. at 819-20.

n40 Id.

n41 See Easterling, 928 So. 2d at 820 (overruling Tomlinson and its progeny, "but only as to those cases' analysis of the ninety-day notice requirement" contained in 11-46-11(1)).

n42 This was also the date that the Easterling plaintiff's petition for rehearing was denied.

n43 930 So. 2d 1252 (Miss. 2006).

n44 Id. at 1258.

n45 Id.

n46 Id.

n47 Id.

n48 Id. The Court found that the plaintiff's failure to send written notice that addressed the statutory requirements pertaining to the seven information factors, warranted dismissal of her action, and reversed the trial court's failure to grant the hospital's motion to dismiss.

n49 Fraiser, Substantive Provisions of the Mississippi Government Immunity Act, supra note 11.

n50 Id. at 713.

n51 928 So. 2d at 820.

n52 Fraiser, Substantive Provisions of the Mississippi Government Immunity Act, supra note 11.

n53 See MISS. CODE ANN. § 11-46-9 (1)(a-x) (2000).

n54 Fraiser, Substantive Provisions of the Mississippi Government Immunity Act, supra note 11, at 743.

n55 MISS. CODE ANN. § 11-46-9(1) (2000).

n56 MISS. CODE ANN. § 11-46-9(1)(d) (2000).

n57 MISS. CODE ANN. § 11-46-9(1)(v) (2000).

n58 878 So. 2d 1013 (Miss. Ct. App. 2004).

n59 Id. at 1016.

n60 Id.

n61 The Mississippi Supreme Court has yet to hear the case on appeal, so that decision has yet to be written in stone.

n62 2005- CA-00470-COA, 2006 WL 3361190, *11 (Miss. Ct. App. Nov. 21, 2006) (declaring that, since the police protection exemption barred the plaintiff's wrongful death claim, there was no reason to address whether or not the trial court's determination of immunity vis-a-vis the discretionary exemption was proper).

n63 2005- CA-00128-COA, 2006 WL 2671952 (Miss. Ct. App. Sept. 19, 2006).

n64 Id. at *5.

n65 Id. at *6.

n66 415 A.2d 337 (N.J. 1980).

n67 MacDonald, 2006 WL 2671952, at *6.

n68 See Fraiser, Substantive Provisions of the Mississippi Government Immunity Act, supra note 11, at 749-51.

n69 609 A.2d 757 (N.J. 1992).

n70 Id. at 766.

n71 Id. at 763.

n72 776 P.2d 1124 (Colo. Ct. App. 1989).

n73 Id. at 1125. See also Swieckowki v. City of Fort Collins, 923 P.2d 208 (Colo. Ct. App. 1995) (holding dangerous condition allegation defeated by design exemption where the condition was caused by the design, not the subsequent maintenance, of a roadway).

n74 See, e.g., T.M. v. Noblitt, 650 So. 2d 1340, 1343 (Miss. 1995) (discussing a pre-MTCA issue focusing upon the ministerial vs. judgment issue that carried over into post-MTCA considerations).

n75 See, e.g., L.W. v. McComb Sep. Mun. Sch. Dist., 754 So. 2d 1136, 1142 (Miss. 1999) (announcing this mistake for the first time); and Miss. Dep't of Transp. v. Cargile, 847 So. 2d 258, 266-69 (Miss. 2003) (noting the court's final adherence to its mistake).

n76 See Harris v. McRay, 867 So. 2d 188 (Miss. 2004) for an excellent explanation of how the Court made this mistake, and how it chose to correct it, holding that a high school coach's decision as to whether to rest or continue to practice a player who subsequently died during practice was discretionary, because it involved judgment and the policy of letting the coach be the coach, notwithstanding that the decision may not have passed the now-inapplicable ordinary care test.

n77 This judicially-created legal fiction ranks with other legal fictions such as (a) testimony that the breathalyzer is incapable of error, (b) the voir dire assertion that all anyone (including the lawyers and parties) wants is a fair jury; and (c) the oft-made judicial assertion in the early part of the last century that a jury was presumed to have followed the court's instruction to presume, at the beginning of a criminal trial, the innocence of the defendant, clad as he was in jailhouse attire, handcuffs and leg-irons.

n78 As eloquently noted in Robert F. Walker, Comment, Mississippi Tort Claims Act: Is Discretionary Immunity Useless?, 71 MISS. L.J. 695, 696 (2001).

n79 See the marvelously reasoned decision of Dozier v. Hinds County, 354 F. Supp. 2d 707, 713-15 (S.D. Miss. 2005), for an insightful discussion of the metamorphosis of the Mississippi Tort Claims Act's discretionary exemption as interpreted by Mississippi's appellate courts.

n80 See Willing v. Benz, No. 2005-CA-00470-COA, 2006 WL3361190, at *9 (Miss. Ct. App. Nov. 21, 2006), for an excellent definition of the first prong of this exemption-the ministerial/discretionary analysis: "If the duty at issue is imposed by law and the time, manner, and conditions for carrying out that duty are specified, leaving no room for discretion," that "duty does not involve an element of choice or judgment, i.e., is ministerial and not discretionary."

n81 See Stewart v. City of Jackson, 804 So. 2d 1041, 1048 (Miss. 2002).

n82 876 So. 2d 284, 289 (Miss. 2004) (reversing cases imposing ordinary care requirement).

n83 859So. 2d 350, 356-57 (Miss. 2003).

n84 913 So. 2d 351, 355-57 (Miss. Ct. App. 2005).

n85 Doe, 859 So. 2d at 356-57; See also Ladner v. Stone County, 938 So. 2d 270, 275-77 (Miss. Ct. App. 2006) (the court notes the policy aspect of the exemption but focuses only upon the judgment/ministerial aspect); and Johnson v. Alcorn State Univ., 929 So. 2d 398 (Miss. Ct. App. 2006) (holding a dormitory director's decision on how to deal with dangers to students presented by outsiders is within his discretion and thus immunized, but not addressing the policy issue).

n86 804 So. 2d 1041 (Miss. 2002).

n87 Id. at 1048.

n88 Dotts v. Pat Harrison Dist., 933 So. 2d 322, 327 (Miss. Ct. App. 2006) (quoting Berkowitz v. U.S., 486 U.S. 531, 536-37 (1988)).

n89 Id.

n90 Id. at 327-38.

n91 468 F.3d 281, 306 (5th Cir. 2006).

n92 Id.

n93 Id.

n94 See Willing v. Benz, No. 2005-CA-00470-COA, 2006 WL3361190, at *10 (Miss. Ct. App. Nov. 21, 2006). Remand was held unnecessary, however, since another exemption was found to have barred the plaintiff's claim. Id. at *10.

n95 Legal scholars have long argued that this public function policy test should be applied to all state and federal discretionary exemptions since the United States Supreme Court's decision of United States v. Gaubert, 499 U.S. 315, 322 (1991), but some states still utilize other tests which do not include a policy analysis. See infra note 98 and accompanying text.

n96 See Fraiser, Substantive Provisions of the Mississippi Government Immunity Act, supra note 11, at 777-79 (1999) (detailing the analysis of this two pronged policy oriented test, and differing tests utilized in other jurisdictions).

n97 See, for example, Mississippi Department of Mental Health v. Hall, 936 So. 2d 917, 925 (Miss. 2006), where a patient fell from a third story window while attempting to escape a state mental facility, the court declared that § 41-21-102(6) required all such facilities to keep their inmates safe, and the failing to check potentially unlocked doors or installing security screens on windows were ministerial acts. The Court consulted Black's Law Dictionary in defining "ministerial" as "functions as to which there is no occasion to use judgment or discretion." Id.

n98 Fire protection has not been the source of extensive litigation as has police protection and is consequently not covered here. See Fraiser supra note 13, at 766-767 (1999).

n99 McGrath v. City of Gautier, 794 So. 2d 983, 985 (Miss. 2001) (citing Fraiser, Substantive Provisions of the Mississippi Government Immunity Act, supra note 11, at 758-71).

n100 Id.

n101 Id.

n102 Reynolds v. County of Wilkinson., 936 So. 2d 395, 397 (Miss. Ct. App. 2006).

n103 Hayes v. Univ. of S. Miss., No. 2004- CA-02277-COA, 2006 WL 2406224, at *4 (Miss. Ct. App. Aug. 22, 2006).

n104 In re Foust, 310 F.3d 849, 864-65 (5th Cir. 2002).

n105 Broome v. City of Columbia, No. 2005- CA-0000605-COA, 2006 WL 2947886, at *4 (Miss. Ct. App. Oct 17, 2006).

n106 See Willing v. Benz, No. 2005-CA-00470-COA, 2006 WL3361190, at *8 (Miss. Ct. App. Nov. 21, 2006).

n107 Stone v. Damons, No.1:05CV102, slip op. at 7 (N.D. Miss. Nov. 2, 2006).

n108 Lee County v. Davis, 838 So. 2d 243, 245 (Miss. 2003).

n109 WILLIAM SHAKESPEARE, HAMLET, act 3, sc 1.

n110 310 F.3d 849 (5th Cir. 2002) (stating federal court precedent is persuasive but not binding on Mississippi courts, but is certainly acceptable "grist for the mill").

n111 861 So. 2d 990 (Miss. 2003).

n112 922 So. 2d 48 (Miss. Ct. App. 2006).

n113 735 So. 2d 226 (Miss. 1999).

n114 Id. at 229. A recent Mississippi Court of Appeals case focused upon whether an officer's act evinced a refusal to exercise "any care" or that his actions "evinced 'almost a willingness that harm should follow,'" in Willing v. Benz, No. 2005-CA-00470-COA, 2006 WL3361190, at *10 (Miss. Ct. App. Nov. 21, 2006). (noting that an officer's decision to radio-in information on a dangerous condition on a roadway rather than remaining on the scene and warning oncoming traffic of the danger, while possibly not even negligent, was certainly not an indication of a refusal to exercise "any care").

n115 I say personal injury, because injury to property cannot be the source of liability under this statute. See Lee County v. Davis, 838 So. 2d 243, 245-46 (Miss. 2003) (holding reckless disregard actionable only where personal injury is involved, not damage to property).

n116 Maldonado v. Kelly, 768 So. 2d 906, 911 (Miss. 2000).

n117 See Brown v. City of McComb, 84 F. App'x 404 (5th Cir. 2003).

n118 As occurred in City of Jackson v. Calcote, 910 So. 2d 1103 (Miss. Ct. App. 2005).

n119 See City of Jackson v. Powell, 917 So. 2d 59 (Miss. 2005).

n120 See Blackmon v. Carroll County Sheriff's Office, No. Civ.A. 3:05 CV91LN, 2006 WL 286783 (S.D. Miss. Feb. 3, 2006) (arresting a woman based upon her statement that she is guilty, where no reason exists to disbelieve her, was held not to be reckless disregard).

n121 See Smith v. Brookhaven, 914 So. 2d 180 (Miss. Ct. App. 2005).

n122 See Craddock v. Hicks, 314 F. Supp. 2d 648 (N.D. Miss. 2003).

n123 Id. at 655.

n124 919 So. 2d 85 (Miss. Ct. App. 2005).

n125 856 So. 2d 548 (Miss. Ct. App. 2003).

n126 827 So. 2d 39 (Miss. Ct. App. 2002).

n127 838 So. 2d 274, 280 (Miss. 2003).

n128 Id. at 280. A more recent case citing these factors is Broome v. City of Columbia, No. 2005- CA-00605-COA, 2006 WL 2947886, *3 (Miss. Ct. App.), in which the court found that an officer's decision to pursue a driver suspected of having committed a mere misdemeanor, who later collided with the plaintiff, was held not to be reckless disregard because the officer was familiar with the route taken during pursuit, the characteristics of the neighborhood allowed a chase, the visibility of the suspects was good at all times, the length of the chase was not excessive, and most importantly, the officer suspected that the driver was intoxicated, and had a legitimate basis, apart from the outstanding misdemeanor warrant, to pursue him.

n129 834 So. 2d 687 (Miss. 2003); see also Jackson v. Brister, 838 So. 2d 274 (Miss. 2003).

n130 861 So. 2d 990 (Miss. 2003).

n131 Id. at 997 ("We cannot equate making a left turn operating a vehicle with a .20 blood alcohol content level. Durn's left turn was not the criminal activity that caused [the officer] to give chase.")

n132 764 So. 2d 373 (Miss. 2000).

n133 Id. at 379.

n134 Id.

n135 878 So. 2d 1013 (Miss. Ct. App. 2004).

n136 See also, Pasco v. Holly Springs, 101 F. App'x 6, 8 (5th Cir. 2004) (holding that a sufficient nexus existed by virtue of the plaintiff's driving under the influence and fleeing arrest, even though the officer who struck the plaintiff intentionally bumped him off the road with his cruiser during a high speed chase. The officer's act certainly constituted reckless disregard, but the plaintiff was engaged in criminal activity, so the officer's act was immunized by the police protection exemption); and Stone v. Damons, No. 1:05 CV102, 2006 WL 3147725, at *6 (N.D. Miss.) (finding the plaintiff's act of resisting of arrest, itself a misdemeanor, was the reason that the officer used reasonable force to subdue her, and thus constituted "criminal activity" with supporting nexus sufficient to immunize the officer under this exemption).

n137 Miss. Dept. of Safety v. Durn, 861 So. 2d 990 (Miss. 2003).

n138 Id. at 997-98.

n139 910 So. 2d 1103 (Miss. Ct. App. 2005).

n140 Id. at 1108-11.

n141 904 So. 2d 1207 (Miss. Ct. App. 2004); see also Lowery v. Harrison Co. Bd. of Supervisors, 891 So. 2d 264 (Miss. Ct. App. 2005) (stating that a gravel road, however dangerous, is not itself a dangerous condition without proof of violation of a standard or failure to inspect).

n142 Jenkins, 904 So. 2d at 1210-11.

n143 929 So. 2d 398 (Miss. Ct. App. 2006).

n144 Id. at 408-09.

n145 See, e.g., City of Natchez v. Jackson, 941 So. 2d 865, 869 (Miss. Ct. App. 2006) (stating that where a coal grate on a sidewalk was adjudged to be a dangerous condition because (a) the city was shown to have installed it, and (b) the city director of public works admitted that it constituted a "dangerous trip hazard").

n146 929 So. 2d 381 (Miss. Ct. App. 2006).

n147 Id. at 382.

n148 Id. at 384; see also Howard v. City of Biloxi, 943 So. 2d 751, 754 (Miss. Ct. App. 2006) (holding that the plaintiff's failure to prove that a crack in a sidewalk was caused by the negligent or wrongful conduct of the city doomed her claim).

n149 851 So. 2d 408 (Miss. Ct. App. 2003).

n150 Id. at 413-14.

n151 Hodges v. Madison Co. Med. Ctr., 929 So. 2d 381 (Miss. Ct. App. 2006).

n152 Id. at 384.

n153 939 So. 2d 270 (Miss. Ct. App. 2006).

n154 Id. at 276-77

n155 431 So. 2d 475 (Miss. 1983).

n156 Id. at 480.

n157 920 So. 2d 516 (Miss. Ct. App. 2006).

n158 943 So. 2d 53 (Miss. Ct. App. 2006).

n159 Id. at 65-66.

n160 903 So. 2d 60 (Miss. 2005).

n161 Id. at 65-66.

n162 See Howard v. City of Biloxi, 943 So. 2d 751, 756-57 (Miss. Ct. App. 2006) (citing Tharp v. Bunge Corp., 641 So. 2d 20, 24 (Miss. 1994) for the general rule and City of Jackson v. Internal Engine Parts Group, Inc., 903 So. 2d 60, 64 (Miss. 2005) for the MTCA rule). The Howard court found that a sidewalk crack with 1" to 1 1/2" of unevenness was an open and obvious danger for which the plaintiff pedestrian should have taken note and used caution when negotiating it.

n163 See Brannon, 943 So. 2d at 53.

n164 840 So. 2d 833, 836 (Miss. Ct. App. 2003).

n165 Id. at 836.

n166 861 So. 2d 323 (Miss. 2003).

n167 Id. at 327.