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III. ARGUMENT

A. Summary of Gammel's Position

On the night of February 4, 2005, in Tate County, Mississippi, the decedent, Anothy W. Gammel, was struck by a vehicle driven by Christa Dean. Gammel died within a few hours as a result of his injuries. Gammel was hit on East Tate Road while walking his children from an East Tate Elementary School parking lot to East Tate Elementary School, located just across the road from the parking lot, to attend the school's Winter Carnival. Tate County School District (TCSD), the Defendant/Appellant, owned and controlled both the parking lot and the elementary school property. Evidence in the record shows that the scene of Gammel's death was a poorly lit area and that Christa Dean did not see Gammel crossing the road. Gammel is entitled to a trial with respect to his claim that TCSD is liable to Gammel's beneficiaries for negligent failure to provide and maintain sufficient outdoor lighting.

The trial court's order of summary judgment in favor of TCSD is due to be reversed for two separate overall reasons. First, the ruling was issued prematurely. Pursuant to MRCP 56(f), the trial court should have allowed Gammel to conduct additional discovery before issuing the order. Second, even as it exists now, the record contains sufficient evidence for Gammel to present his negligence claim against TCSD to the fact finder. There is evidence of duty, breach, causation and damages, and TCSD is not immune from liability. Where there is any doubt as to whether the movant is entitled to summary judgment, the non-movant prevails. Daniels v. GNB, Inc., 629 So. 2d 595, 599 (Miss. 1993).

B. Argument as to Specific Issues on Appeal

1. Summary judgment was inappropriate because the trial court should have allowed additional discovery pursuant to Rule 56(f).

Gammel should have been permitted to conduct additional discovery in response to TCSD's motion for summary judgment. TCSD misled Judge Baker and it has unclean hands

with respect to discovery issues. First, a central component of TCSD's summary judgment evidence was the affidavit of Kaye Adams, the principal of East Tate Elementary School. Plaintiff requested Principal Adams's deposition before TCSD filed its motion for summary judgment. At the summary judgment hearing, counsel for TCSD acknowledged that Gammel's counsel requested Principal Adams' deposition on May 11, 2007. Transcript of June 28, 2007, Hearing on TCSD's and Tate County's Motions for Summary Judgment at 54. The record shows that TCSD served its summary judgment motion on May 18, 2007, and filed it with the trial court on May 22. R. at 338, 340. But TCSD represented to the trial court that it filed its motion for summary judgment before Gammel's attorney sought this deposition. Id.; see also R. at 428 (in the rebuttal memorandum filed in support of the motion for summary judgment, TCSD represented that it filed the motion before Gammel sought Adams' deposition). Notably, TCSD did not address this matter in its appellate brief.

Second, at TCSD's urging, the trial court cited the passing of the 90-day discovery period set out in Uniform Rule 4.04(a) as a reason for the denial of the 56(f) motion. R. at 428. But this rule cannot be employed in this case because TCSD had unclean hands. It took TCSD more than 90 days just to provide Gammel with sworn responses to his interrogatories. See discussion at Brief of Appellant at 15.

Gammel contends that the case at bar is comparable to the Rule 56(f) situations in Owens v. Thomae, 759 So. 2d 1117 (Miss. 1999), and Maxwell v. Baptist Mem. Hospital-Desoto, Inc., 2007 Miss. App. LEXIS 226, *13-*14 (Miss. Ct. App. 2007). Brief of Appellant at 14. TCSD failed to address Owens or Maxwell in its brief.

2. Tate County School District owed Gammel a legal duty.

Pursuant to Miss. Code § 37-9-69, Miss. Code § 37-7-301 and Supreme Court holdings in other cases involving school districts, e.g., Pearl Pub. Sch. Dist. v. Groner, 784 So. 2d 911, 915

(Miss. 2001), Lang v. Bay St. Louis/Waveland Sch. Dist., 764 So. 2d 1234, 1241 (Miss. 1999), and L.W. v. McComb Separate Mun. School Dist., 754 So. 2d 1136 (Miss. 1999), TCSD owed Gammel the duty to make school premises safe for patrons like himself. In Groner, 784 So. 2d at 915, the court held that Miss. Code § 37-9-69 places upon a school district the "duty of ordinary care with respect to providing a safe environment for its patrons." (citing L.W., 754 So. 2d 1136). See also Brewer v. Burdett, 768 So. 2d 920, 923 (Miss. 2000) ("Whatever may be the duties of those in charge of our public streets and roads however, parking lots on school property are a different matter. . . . It must be determined whether [the school district] has exercised ordinary care in both not erecting signs or warnings on the approaches to the driveway and in its construction and maintenance of the parking lot and abutting improvements at the Delisle Elementary School. P.19 The issue of ordinary care is a fact question.").

In this case, Gammel contends that TCSD failed to provide and maintain sufficient outdoor lighting on and about its parking lot and its elementary school grounds. Gammel was hit on East Tate Road while walking his children from a TCSD school parking lot to East Tate Elementary School, located just across East Tate Road. R. at 172-77 (Deputy Jim Woolfolk's Uniform Crash Report). It is undisputed that the parking lot and East Tate Elementary School are owned and controlled by TCSD. R. at 177.

The scene of the incident – a road bordered on both sides by TCSD property – was dark and unlit. R. at 176 (Deputy Jim Woolfolk's Uniform Crash Report identifies the scene as "Dark-Unlit"); R. at 395 (Plaintiff's Responses to TCSD's First Set of Interrogatories, No. 20). At that time, at least one nearby outdoor light on TCSD property was out; after the incident, TCSD reported the outage and the light was repaired. Transcript of June 28, 2007, Hearing on TCSD's and Tate County's Motions for Summary Judgment at 21 (counsel for TCSD admits these facts to the trial court); R. at 188 (a Tate County Sheriff Department accident investigation

note states that a light near the scene was "not functioning"). Witnesses at the scene, Sonya Darnell and Timothy Algee, heard driver Christa Dean say, "I didn't see him." R. at 185-87.

TCSD had a legal duty to protect people visiting the school by, *inter alia*, providing sufficient outdoor lighting. TCSD is obligated by multiple Mississippi statutory provisions to make its premises safe for patrons. See discussion in Brief of Appellant at part VII.B.2. Separately, the evidence shows that regardless of statutory duties, TCSD undertook a duty to ensure that ample outdoor lighting was provided as reflected in TCSD's interrogatory responses and several written policy statements. See discussion in Brief of Appellant at 9-10. TCSD did not address this point in its brief.

TCSD talks about a failure to warn Gammel of the dangers of crossing the road. "The basis of plaintiff's claims is that TCSD had a duty to warn the decedent that he should look both ways prior to crossing the street . . . ." Brief of Appellee at 12. TCSD presents a red herring. As noted above, this appeal is not about a failure to warn claim.

TCSD attempts to distinguish Groner by arguing that the "non-student patron in *Groner* was on the school premises as an invitee at the time of the accident." And, according to TCSD, Gammel was "an uninvited trespasser." Brief of Appellee at 12. This argument is plainly erroneous. First, it is undisputed that Gammel and his children were on TCSD property for the purpose of attending the school's Winter Carnival. Indeed, TCSD's counsel acknowledged during the summary judgment hearing that Gammel "was invited to the winter carnival and he was invited to park in the parking places around the school that are provided for individuals that visit the school." Transcript of June 28, 2007, Hearing on TCSD's and Tate County's Motions for Summary Judgment at 56-57. Also, in the Uniform Crash Report, Deputy Woolfolk identified the parking lot in question as "School Parking," not as a bus-only parking lot. R. at 195.

Second, Gammel was a public invitee at the time of the incident. See discussion in Brief of Appellant at 17-18. By failing to address this point its brief, TCSD has acquiesced to the fact that Gammel was a public invitee.

Third, in his summary judgment order, the trial judge stated that "[a]t the time the decedent stepped off the [parking lot] his status as a trespasser was relinquished . . . ." R. at 452.

Fourth, TCSD has left un-refuted Gammel's point about the inadequacy of the evidence in support of TCSD's contention that the parking lot was designated by sign as "Bus Parking Only." See Brief of Appellant at 10. The Affidavit of Principal Adams, TCSD's only proffered evidence, does not directly quote the language of the signs posted at the parking lot in question. Adams simply stated that the lot is "designated as bus parking only." Absent is any affiant statement or other evidence that there was a "No Trespassing" sign or that TCSD considers a parent who parks on this lot to attend a school event to be a trespasser.

Fifth, TCSD's position has already been nullified by the Supreme Court of Mississippi. The case of Brewer v. Burdett, 768 So. 2d 920 (Miss. 2000), concerned a vehicular collision that occurred on a public roadway in front of a public elementary school. Plaintiff Brewer was operating a motorcycle on a the road in front of the school. "Burdette drove her 1984 Chevrolet automobile out of the [school district's] Delisle Elementary School parking lot on to West Wittman Road. Brewer crashed into the left side of Burdette's vehicle with his body coming to rest insider her vehicle." Id. at 921. Reversing order of summary judgment for the school district, the court held that the school district owed Brewer, a passing motorcyclist, a legal duty, and that Brewer was entitled to a trial on the issue of whether the school district exercised ordinary care with respect to warning him of the dangers of driving near the school and the school district's construction and maintenance of the school parking lot and abutting improvements. Id. at 923.

In its brief, TCSD makes much of the case of Albert v. Scott's Truck Plaza, Inc., 2008 Miss. LEXIS 121 (Miss. Feb. 28, 2008). Albert is easily distinguished. First, the defendants in Albert were private entities who did not owe the plaintiff any statutory duties. As previously explained, per statute, TCSD owed Gammel the duty to provide safe premises. Second, unlike the case at bar, in Albert there was no evidence that the defendants undertook duties to protect persons traversing the road from the truck stop to the parking lot. Third, in Albert there was no evidence that one of the defendants owned the land on both sides of the road. In this case, it is undisputed that TCSD owned and controlled both the parking lot and the elementary school grounds across East Tate Road.

3. The trial court erred in concluding that Tate County School District was entitled to summary judgment pursuant to the Mississippi Tort Claims Act.

As Gammel noted in his initial brief, TCSD is liable and lacks MTCA immunity pursuant Miss. Code § 11-46-9(1)(b). In order to obtain immunity from suit, a school district must exercise ordinary care in exercising its statutory duties. Lang v. Bay St. Louis/Waveland Sch. Dist., 764 So. 2d 1234, 1240 (Miss. 1999); L.W. v. McComb Separate Mun. Sch. Dist., 754 So. 2d 1136, 1143 (Miss. 1999). As noted above, TCSD was statutorily obligated to make school premises safe for patrons like Gammel.

According to Miss. Code § 11-46-9(1)(b), where a school district owes someone a statutory duty, there can be no finding of immunity absent express findings of fact and conclusions of law reflecting that the district performed its statutory duties with reasonable care. Pearl Pub. Sch. Dist. v. Groner, 784 So. 2d 911, 915-16 (Miss. 2001). The trial court summarily stated that TCSD "used ordinary care in performing any statutory duties it owed to Gammel" (R. at 453), however, it said nothing else on the subject and made no findings of fact or conclusions of law to support this statement. The trial court's failure to make findings of fact and conclusions of law on this point is reversible error. Groner, 784 So. 2d at 915-16. See also

Stewart v. City of Jackson, 804 So. 2d 1041, 1049 (Miss. 2002) ("the fact that the trial court did not address the issue of ordinary care [is] itself grounds for reversal"). TCSD failed to address this point of law in its brief.

TCSD contends that Gammel "failed to address any of the remaining MTCA issues" in his initial brief, namely, the trial court's rulings that, Miss. Code § 11-46-9(1)(b) aside, TCSD was alternatively immune pursuant to Miss. Code § 11-46-9(1)(d), § 11-46-9(1)(g), § 11-46-9(1)(p), § 11-46-9(1)(v) and/or § 11-46-9(1)(w). TCSD's contention is without merit. Gammel directly addressed these MTCA provisions at pages 19 and 20 of his initial brief. As noted there, where § 11-46-9(1)(b) is at issue, as it is in this case, a school district cannot escape liability through other provision of the MTCA. Lang v. Bay St. Louis/Waveland Sch. Dist., 764 So. 2d 1234, 1240-41 (Miss. 1999); L.W. v. McComb Separate Mun. Sch. Dist., 754 So. 2d 1136, 1142 (Miss. 1999). See also Pearl Pub. Sch. Dist. v. Groner, 784 So. 2d 911, 914-17 (Miss. 2001) (held that where the a school district is under a statutory duty, to gain immunity under the MTCA, there must be a finding that ordinary care was used in carrying out the statutory duty with respect to the incident in question; the court rejected contentions that immunity could be granted pursuant to Miss. Code § 11-46-9(1)(d), (1)(g) or (1)(u)).

Finally, TCSD's open and obvious argument – see Brief of Appellee at 23 – is off the mark. First, the open and obvious defense in the context of the MTCA applies only to failure to warn claims. City of Jackson v. Internal Engine Parts Group, Inc., 903 So. 2d 60, 64 (Miss. 2005). Gammel's appeal is not about a failure to warn; rather, it is about whether TCSD used reasonable care in exercising its non-delegable statutory duties to care for patrons. Second, the open and obvious case cited by TCSD, Howard v. City of Biloxi, 943 So. 2d 751 (Miss. Ct. App. 2006), concerned a claim under Miss. Code § 11-46-9(1)(v), not § 11-46-9(1)(b). As noted

previously, (1)(b) controls the case at bar and obtaining immunity under (1)(b) requires proof of TCSD's exercise of reasonable care.

4. **Gammel is entitled to a trial on the issue of proximate cause.**

The record contains evidence that the failure to provide adequate outdoor lighting was a proximate cause of Gammel's death. The scene was dark and unlit, and at least one nearby outdoor light on TCSD property was out. R. at 176, 188, 395; Transcript of June 28, 2007, Hearing on TCSD's and Tate County's Motions for Summary Judgment at 21. Christa Dean, the driver of the vehicle that struck Gammel, told Deputy Woolfolk that she did not see Gammel. R. at 185. Witnesses at the scene, Sonya Darnell and Timothy Algee, heard Dean say, "I didn't see him." R. at 185-87. Even if an existing light was not out, an issue remains as to whether TCSD provided adequate lighting for patrons visiting the school at night to attend school functions like the Winter Carnival. Proximate cause is a question of fact that must be determined at trial. Entrican v. Ming, 962 So. 2d 28, 36-37 (Miss. 2007).

IV. CONCLUSION

For these reasons and those set forth in Gammel's initial brief, Gammel prays that the Court reverse the trial court's order of summary judgment in favor of Tate County School District and remand the case to Tate County Circuit Court for additional discovery and trial.

PHILIP A. STROUD
S. ANDREW SCHARFENBERG
Attorneys for Plaintiff/Appellant

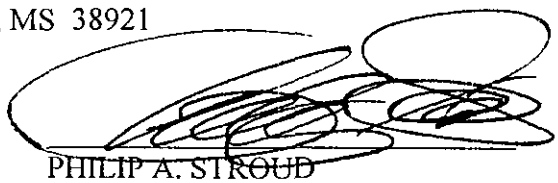
Stroud & Harper, P.C.
5779 Getwell Rd., Ste. C-1
Southaven, MS 38672
Tel. (662) 536-5656
Fax (662) 536-5657
Email philip@stroudandharper.com

V. CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the foregoing document was served upon the following via first-class U. S. Mail, postage prepaid, on the 9th day of June, 2008:

Brooke Newman
DANIEL COKER HORTON & BELL, P.A.
P.O. Box 1396
Oxford, MS 38655-1396

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



PHILIP A. STROUD
Attorney for Plaintiff/Appellant

VI. CERTIFICATE OF FILING

The undersigned attorney for Appellant certifies that:

(1) the original of the foregoing document, Reply Brief of Appellant, and three true and correct copies of Reply Brief of Appellant, and

(2) an electronic disk containing Brief of Appellate in Word format (see MRAP 28(m)),

will be personally deposited by me with UPS for overnight delivery, costs prepaid, on June 9, 2008, addressed to the Clerk of Court as follows:

Betty W. Sephton
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450 High Street
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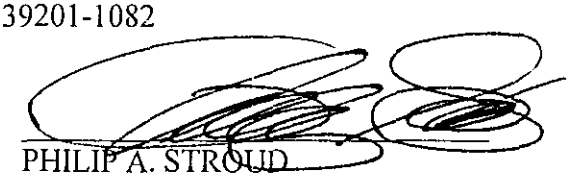

PHILIP A. STROUD
Attorney for Plaintiff/Appellant

Stroud & Harper, P.C.
5779 Getwell Rd.
Bldg. C, Ste. 1
Southaven, MS 38672
Tel. (662) 536-5656
Fax (662) 536-5657
Email philip@stroudandharper.com