

I. CERTIFICATE OF INTERESTED PERSONS

IN THE SUPREME COURT OF MISSISSIPPI, CASE NO. 2007-TS-01489

DEWAYNE GAMMEL, individually and
on behalf of the wrongful death beneficiaries
of Anothly W. Gammel, deceased,

Plaintiff/Appellant,

v.

TATE COUNTY SCHOOL DISTRICT,

Defendant/Appellee.

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

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William Dwight Gammel
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The Honorable Andrew C. Baker


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IV. STATEMENT OF ISSUES

Dewayne Gammel, Plaintiff/Appellant in this cause, submits his statement of the issues on appeal. Gammel is appealing “M.R.C.P. 54(b) Order Granting Motion for Summary Judgment of Defendant Tate County School District,” entered by the trial court on August 2, 2007. The trial court offered four reasons in support of this order and, therefore, Gammel identifies the following four specific issues on appeal:

1. Whether the trial court erred in determining that Gammel could not conduct additional discovery pursuant to MRCP 56(f) before it issued a ruling on Tate County School District’s Motion for summary judgment.
2. Whether the trial court erred in determining that Tate County School District was entitled to summary judgment because it did not owe a duty to the deceased, Anothly W. Gammel.
3. Whether the trial court erred in determining that Tate County School District was entitled to summary judgment because it is immune from liability under the Mississippi Tort Claims Act.
4. Whether the trial court erred in determining that Tate County School District was entitled to summary judgment because of a lack of evidence of causation between the school district’s negligent acts or omissions and the death of Anothly W. Gammel.

V. STATEMENT OF THE CASE

A. Nature of the Case

This is a wrongful death action. 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. He died within a few hours as a result of his injuries. The decedent was hit on East Tate Road while walking his children from a parking lot to East Tate Elementary School, located just across the road. The Gammels were making their way to the school to attend the Winter Carnival. The parking lot and East Tate Elementary School are owned and controlled by Defendant/Appellee, Tate County School District (TCSD). The evidence shows that the accident scene was a poorly lit area. Gammel contends that TCSD is liable to the beneficiaries of the decedent's estate for negligent failure to provide and maintain sufficient outdoor lighting. If appropriate lighting had been present, the accident would have been averted because the vehicle operator and/or decedent would have seen the other in time to take evasive action.

B. Course of Relevant Proceedings

Dewayne Gammel, one of seven beneficiaries of the estate of decedent Anothy W. Gammel, commenced this civil action in the Circuit Court of Tate County, Mississippi, on February 14, 2005, by filing the Complaint. There were two defendants in the initial pleading – Christa Dean, the driver of the vehicle that hit decedent, and State Farm Mutual Automobile Insurance Company, the decedent's underinsured/uninsured carrier.

On May 2, 2006, Gammel filed First Amended Complaint, which added Tate County School District and Tate County as additional defendants. Among other things, Gammel alleged that TCSD owed decedent and other people attending the Winter Carnival a duty to provide adequate and reasonable safety measures and a duty to maintain a safe school environment for foreseeable attendees. R. at 40, First Amended Complaint ¶ 15. Gammel averred that TCSD

was liable in negligence because it failed “to exercise ordinary care in providing and/or maintaining adequate lighting of the roadway and adjacent parking areas located next to the roadway, when [it] knew or should have known that the failure to do so would subject the . . . decedent . . . to an unreasonable risk of harm.” R. at 40-41, First Amended Complaint ¶ 16(a). TCSD filed its Answer to the First Amended Complaint on May 17, 2006. R. at 52.

Gammel and TCSD each served the other with interrogatories and requests for production. TCSD served Gammel with its interrogatories and production requests on May 15, 2006. R. at 50. Gammel served responses on September 27, 2006. R. at 157. Gammel served TCSD with his interrogatories and production requests on November 28, 2006. R. at 104. TCSD served unverified interrogatory responses and production responses on January 26, 2007. R. at 106. TCSD did not serve Gammel with verified interrogatory responses until April 2, 2007. Transcript of June 28, 2007, Hearing on TCSD’s and Tate County’s Motions for Summary Judgment at 25.

Gammel requested the deposition of Kaye Adams, the principal of East Tate Elementary School, on May 11, 2007.

Thereafter, on May 22, 2007, TCSD filed a motion for summary judgment. R. at 338. A critical evidentiary component of TCSD’s motion was “Affidavit of Principal Kaye Adams,” R. at 356-58, the same person whom Gammel sought to depose 11 days earlier. On June 27, 2007, Gammel filed a brief in opposition to TCSD’s motion for summary judgment and attorney Thomas A. Waller’s Rule 56(f) affidavit. R. at 417-25.

The trial court heard TCSD’s summary judgment motion on June 28, 2007. On August 2, 2007, Judge Baker entered an order granting summary judgment to TCSD and making the order

a final judgment.¹ R. at 451-57. Gammel filed a timely notice of appeal on August 20, 2007. R. at 458.

C. Statement of Facts Relevant to this Appeal

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. R. at 172-77 (Deputy Jim Woolfolk's Uniform Crash Report). He died from his injuries within a few hours. Id.; R. at 184 (Certificate of Death).

The decedent was hit on East Tate Road while walking his children from a parking lot to East Tate Elementary School, located just across the road. R. at 172-77 (Deputy Jim Woolfolk's Uniform Crash Report). The Gammels were making their way to the school to attend the Winter Carnival. R. at 393 (Plaintiff's Responses to TCSD's First Set of Interrogatories, No. 16). The parking lot and East Tate Elementary School are owned and controlled by Defendant/Appellee, Tate County School District (TCSD). R. at 177 (Deputy Jim Woolfolk's Uniform Crash Report); R. at 356-58 (Affidavit of Principal Kaye Adams).

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 ^{broken?} 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").

¹ Tate County also filed a motion for summary judgment. On July 17, 2007, the trial court granted Tate County's motion and made it a final judgment. R. at 446-50. Gammel did not appeal this ruling.

TCSD had a legal duty to protect people visiting the school by, *inter alia*, providing sufficient outdoor lighting. First, TCSD is obligated by multiple statutory provisions to make its premises safe for patrons. See discussion infra at part VII.B.2. Second, the evidence shows that regardless of statutory duties, TCSD undertook a duty to ensure that ample outdoor lighting was provided. In response to Gammel's interrogatory No. 4, TCSD stated under oath that

the outdoor premises lighting on East Tate Elementary School property is owned and maintained by Tallahatchie Valley Electric Power Association. When, and if, school personnel, including Principal Adams or the TCSD maintenance department, discover a problem with a light, the problem is reported to Tallahatchie Valley Electric Power Association. Principal Adams lives on the campus of East Tate Elementary School and inspects the lighting on a daily basis.

Gammel's Designation of the Record, Ex. 5 at 2. Also, in response to Gammel's interrogatory No. 9, TCSD, through District Superintendent Gary Walker stated: "Principal Adams inspects the lighting on the East Tate Elementary School property on a daily basis. The maintenance department of TCSD inspects the lighting on the East Tate Elementary School property on a regular basis." See also id. at 5. Notably, however, in her own affidavit, Principal Adams does not say that she inspects the lights on a daily basis. Far from that, she merely stated that that she "is aware of the lighting present on campus." R. at 356 ¶ 3. Adams said that she "routinely walk[s] to and from school after sunset and/or before sunrise" but this is a far cry from Superintendent Walker's claim that Principal Adams "inspects the lighting . . . on a daily basis."

Further, the evidence shows that TCSD, through its own written policies, undertook a duty to make school grounds safe for patrons. TCSD has a non-delegable duty to supervise functions, like the Winter Carnival, that occur on school property. In response to Gammel's requests for production, TCSD produced its "School Facility Rental" policy. At produced page TCSD000047, TCSD declares that "[u]nless otherwise noted the use of any [school] facility shall be supervised at [user's] expense during such use by at least one employee of the school district" and that "supervision is required to the extent necessary to protect the interest of the school

district.” Gammel’s Designation of the Record, Exhibit 4 at TCSD000047-55. Also in its “School Facility Rental” policy, TCSD states that the PTA² may use school facilities without charge or application when the event is approved in advance and “supervised by the school principal or administrator having responsibility for the facility or his designee who is an employee of the school district.” Id. at TCSD000048. In addition, TCSD undertook the duty by way of its “School Occupational Safety & Crisis Response Plan,” which states that “[e]very effort shall be made to provide all reasonable precautions to protect the safety of all students, employees, visitors, and those present on district property or at school-sponsored events.” Gammel’s Designation of the Record, Exhibit 6 at TCSD000116.

In an attempt to contest the existence of a duty, TCSD argued that decedent was a trespasser who was owed no duty of care. The trial court agreed, stating that “when the decedent parked his vehicle in the parking lot labeled ‘bus parking only,’³ he maintained the status as a trespasser.” R. 452. In actuality, the decedent was not a trespasser. TCSD’s counsel acknowledged this during the hearing that held on TCSD’s motion for summary judgment. Counsel for TCSD admitted that decedent “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. Furthermore, it is undisputed that decedent was injured on East Tate Road – the thoroughfare that bisects East Tate Elementary School property – while making his way to the school. R. at

² TCSD has contended that the Winter Carnival was the sole responsibility of the school’s PTA.

³ Notably, the Affidavit of Principal Adams does not directly quote the language of the signs posted at the parking lot in question. Adams just says that the lot is “designated as bus parking only.” Curiously absent is evidence that there was a “No Trespassing” sign or that TCSD considers a parent who parks on the lot to attend a school event to be a trespasser.

176, 195. So, even if the law were to bestow trespasser status on decedent while he was on the parking lot itself, decedent could not have been a trespasser at the time Dean's car hit him. At the moment of impact, decedent was on East Tate Road (not the parking lot) making his way to the elementary school.

TCSD breached its duty of care with respect to the provision of ample lighting. 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. 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.

The record contains evidence that TCSD's failure to provide adequate outdoor lighting was the proximate cause of decedent's death. Christa Dean, the driver of the vehicle that hit decedent, told Deputy Woolfolk that she did not see decedent. R. at 185. Witnesses at the scene, Sonya Darnell and Timothy Algee, heard Dean say, "I didn't see him." R. at 185-87.

The element of damages is undisputed. Anothy Gammel died as a result of injuries sustained when he was hit by Dean's car in front of East Tate Elementary School. R. at 184 (Certificate of Death).

The record reflects that Gammel should have been permitted to conduct additional discovery in response to TCSD's motion for summary judgment. A central component of TCSD's summary judgment evidence was the affidavit Kaye Adams, the principal of East Tate Elementary School. Gammel 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's deposition on May 11, 2007. Transcript of June 28, 2007, Hearing on TCSD's and Tate County's Motions for Summary

Judgment at 54. 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). TCSD misled Judge Baker. 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.

VI. SUMMARY OF THE ARGUMENT

The trial court granted TCSD's motion for summary judgment prematurely. It should have delayed its ruling to permit Gammel to conduct discovery on issues raised by TCSD's motion. Of special importance was Gammel's need to depose Kaye Adams, the principal at Tate County Elementary School. Gammel's counsel requested her deposition on May 11, 2007. Eleven days later, on May 22, TCSD filed its motion for summary judgment. The most important piece of evidence that TCSD submitted in support of its motion was an affidavit from Principal Adams. The trial court granted the motion before Adams' deposition could be taken.

The record shows that Gammel should be allowed to proceed with his negligence claim against TCSD. There is evidence of duty, breach, causation and damages. Pursuant to Miss. Code § 37-9-69, Miss. Code § 37-7-301 and this Court's holdings in other cases involving school districts, TCSD owed decedent the duty to make school premises safe for patrons like himself.

Contrary to TCSD's contention, the school district is not immune from liability. Under 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).

VII. ARGUMENT

A. Standard of Review

This Court “conducts de novo review of an order granting or denying summary judgment and examines all the evidentiary matters before it – admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence is viewed in the light most favorable to the party against whom the motion has been made.” Stewart v. City of Jackson, 804 So. 2d 1041, 1046 (Miss. 2002) (citing Gant v. Maness, 786 So. 2d 401, 403 (Miss. 2001)). Where there is any doubt as to whether the movant is entitled to summary judgment, the non-movant prevails.

All motions for summary judgment should be viewed with great skepticism and if the trial court is to err, it is better 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. A motion for summary judgment should be overruled unless the trial court finds, beyond any reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim.

Daniels v. GNB, Inc., 629 So. 2d 595, 599 (Miss. 1993) (citations omitted).

B. Argument as to Specific Issues on Appeal

The 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.

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

As noted in the Statement of Facts, supra, the record reflects that Gammel should have been permitted to conduct additional discovery in response to TCSD’s motion for summary

judgment. A central component of TCSD's summary judgment evidence was the affidavit 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's deposition on May 11, 2007. Transcript of June 28, 2007, Hearing on TCSD's and Tate County's Motions for Summary Judgment at 54. 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). TCSD misled Judge Baker. 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.

The case at bar is comparable to Owens v. Thomae, 759 So. 2d 1117 (Miss. 1999), where this Court ruled that the trial judge erred in denying the plaintiff's Rule 56(f) request.

While Owens offered a minimal amount of evidence in opposition to summary judgment, given her request for a continuance in order to conduct discovery on the status issue, coupled with her having previously attempted to conduct discovery on this issue and the fact that the discovery needed was in the possession of the party moving for summary judgment, we find that the trial court erred in not granting a continuance for further discovery on the status issue with regard to Dr. Thomae.

759 So. 2d at 1123. See also Maxwell v. Baptist Mem. Hospital-Desoto, Inc., 2007 Miss. App. LEXIS 226, *13-*14 (Miss. Ct. App. 2007) ("Further, considering the totality of the pleadings, the answers to interrogatories, and the affidavits submitted by the Maxwells in opposition to the motion for summary judgment and in support of their request for a thirty-day continuance, we find that the court erred in not permitting supplementation of the affidavits and in not continuing the hearing pursuant to Rule 56(e) and (f) of Mississippi Rule of Civil Procedure.").

The trial court's rationale for denying Gammel's Rule 56(f) request was as follows:

The record of this case establishes that as of the date Tate County School District sought summary judgment, there were no outstanding requests for discovery to Tate County School District and the period provided for discovery by the Uniform Rules of Circuit and County Court Practice 4.04(a) had expired without extension.

R. at 451. The trial court was misguided on both points. First, as previously noted, there was an outstanding request by Gammel for the deposition of Kaye Adams, the principal of East Tate Elementary School.

Second, invocation of Uniform Rule 4.04(a)'s 90-day discovery period was inappropriate. The trial court looked to this rule at TCSD's urging. R. at 428. But TCSD cannot invoke the rule because it has unclean hands. It took TCSD more than 90 days just to provide Gammel with sworn responses to his interrogatories. Gammel served TCSD with his interrogatories and production requests on November 28, 2006. R. at 104. TCSD served unverified interrogatory responses and production responses on January 26, 2007. R. at 106. TCSD did not serve Gammel with verified interrogatory responses until April 2, 2007. Transcript of June 28, 2007, Hearing on TCSD's and Tate County's Motions for Summary Judgment at 25.

2. Tate County School District owed the decedent a legal duty.

Pursuant to Miss. Code § 37-9-69,⁴ a "school district has a duty of ordinary care with respect to providing a safe environment for its patrons." Pearl Pub. Sch. Dist. v. Groner, 784 So. 2d 911, 915 (Miss. 2001) (citing L.W. v. McComb Separate Mun. School Dist., 754 So. 2d 1136

⁴ Under Miss Code § 37-9-69, school district personnel have the duty "to observe and enforce the statutes, rules and regulations prescribed for the operation of schools". The full text of § 37-9-69 is as follows:

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.

(Miss. 1999)). Like the case at bar, Groner concerned injuries sustained by a non-student patron. Rita Groner was a fan of Pearl Public School District athletic events. 784 So. 2d at 913. On the day in question, Groner was attending a school basketball game with her husband when a fight of unspecified origin spontaneously broke out in the stands and she was thrown from the stands onto the gymnasium floor. Id. This Court held that the school district owed Groner a duty of ordinary care, noted that “the issue of ordinary care is a question of fact” and remanded the case to the lower court because the “judge made no reference to ordinary care in his findings of fact and conclusions of law.” Id. at 915-16.

The duty of care is also found in other statutory provisions. Mississippi Code § 37-7-301 provides, in pertinent part:

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

See generally Lang v. Bay St. Louis/Waveland Sch. Dist., 764 So. 2d 1234, 1241 (Miss. 1999)

(“The school board is required by statute to erect, repair and equip school facilities as well as maintain, control and care for the same.”).

Besides holding that TCSD did not owe the decedent a duty, the trial court also declared that TCSD “had no duty to warn Mr. Gammel . . . of the potential dangers of crossing a roadway, as it is undisputed . . . that said danger was open and obvious.” R. at 452. 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.

This Court should discourage unreasonably dangerous conditions rather than fostering them in their obvious forms. It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger.

We now abolish the so-called “open and obvious” defense and apply our true comparative negligence doctrine. The jury found that there was negligence in the case at hand; the trial judge erred in construing the open and obvious defense as a complete bar when it really is only a mitigation of damages on a comparative negligence basis under Miss. Code Ann. § 11-7-15. The general verdict the jury returned in favor of Tharp shall be reinstated.

Tharp v. Bunge Corp., 641 So. 2d 20, 25 (Miss. 1994). Besides, even if TCSD did not owe decedent a duty to warn him of dangers, it still owed him and other school patrons the affirmative duty to provide safe premises. *This wasn't school premises.*

With respect to the duty question, the trial court also declared that the decedent held the status of a trespasser while he was on the parking lot. R. at 452. Even if this were true, it must be recognized as immaterial. The trial judge himself went on to acknowledge that “[a]t the time the decedent stepped off the [parking lot] his status as a trespasser was relinquished . . .” Id. In any event, when decedent was on the school parking lot, he was a public invitee, not a trespasser. In Clark v. Moore Memorial United Methodist Church, 538 So. 2d 760 (1989), this Court adopted § 332 of the Restatement (Second) of Torts which defines “invitee” to include a person is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

Restatement (2d) of Torts, § 332 (1965) defines “invitee” as:

(1) An invitee is either a public invitee or a business visitor.

(2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

538 So. 2d at 763-64. It is undisputed that decedent, his children and other East Tate Elementary School parents and students were invited to enter and remain on TCSD grounds to attend the Winter Carnival. The decedent was a public invitee, not a trespasser.

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

Undoubtedly, claims against school districts fall within the scope of the Mississippi Tort Claims Act (MTCA). Miss. Code § 11-46-1 (defining “political subdivision” to include, *inter alia*, a “school district”). See also Brown v. Houston Sch. Dist., 704 So. 2d 1325, 1327 (Miss. 1997) (“Miss. Code Ann. § 11-46-1 et seq. provides legislative sovereign immunity to the State and its political subdivisions, including local school districts.”).

In this case, TCSD is liable under § 11-46-9(1)(b) of the MTCA. This subsection reads 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 ...

Pursuant to this subsection, a school district must exercise ordinary care in exercising statutory duties in order to obtain immunity from suit.

P27. Section 11-46-9(1)(b) provides that a governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim “arising out of any act of 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(b) (Supp. 1998) (emphasis added). Accordingly, the school district and its employees are protected from liability while performing or failing to perform a statutory duty so long as ordinary care is exercised. However, when ordinary care is not exercised, neither the school district nor its employees will be protected from liability for performing or failing to perform a statutorily imposed duty.

P28. The District’s administrators and teachers in the case sub judice had a statutorily imposed duty to hold students to strict account for disorderly conduct at school. See L.W. v. McComb Separate Municipal School Dist., 1999 Miss. LEXIS 128, * 16-17, 1999 WL 174267, at * 6, 7. If they failed to exercise ordinary care in either performing or failing to perform this duty, then sovereign immunity will not protect the District. See Id. The question of whether ordinary care was, in fact, exercised is for the trial court, sitting without a jury, to decide. See Miss. Code Ann. § 11-46-13(1) (Supp. 1998).

Lang v. Bay St. Louis/Waveland Sch. Dist., 764 So. 2d 1234, 1240 (Miss. 1999). See also L.W. v. McComb Separate Mun. Sch. Dist., 754 So. 2d 1136, 1143 (Miss. 1999) (“Schools have the responsibility to use ordinary care to provide a safe school environment.”). As noted in part VII.B.2., TCSD was statutorily obligated to make school premises safe for patrons like the decedent.

The trial court, following TCSD’s lead, pointed to various other sections of the MTCA, i.e., § 11-46-9(1)(d), § 11-46-9(1)(g), § 11-46-9(1)(p), § 11-46-9(1)(v) and § 11-46-9(1)(w), and held that TCSD was immune from suit pursuant to these provisions, separate and apart from § 11-46-9(1)(b). R. at 453. This was error. 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. See Lang v. Bay St. Louis/Waveland Sch. Dist., 764 So. 2d 1234, 1240-41 (Miss. 1999) (holding that where school administrators “failed to exercise ordinary care in either performing or failing to perform [a statutory] duty, then sovereign immunity will not protect the District” and rejecting the school

why rejected? ✓

district's contention that it could be found immune under § 11-46-9(1)(d) or § 11-46-9(1)(g)).

See also L.W. v. McComb Separate Mun. Sch. Dist., 754 So. 2d 1136, 1142 (Miss. 1999)

("Under this statute [§ 11-46-9(1)(b)], as long as ordinary care is used while performing a statutory duty, immunity exists. But when the state actor fails to use ordinary care in executing or performing or failing to execute or perform an act mandated by statute, there is no shield of immunity.").

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.

P17. "Both state and federal law support our conclusion that public schools have the responsibility to use ordinary care and take reasonable steps to minimize risks to students thereby providing a safe school environment." [L.W. v. McComb Separate Mun. Sch. Dist., 754 So. 2d 1136 (Miss. 1999)] at 1141. As earlier stated, the issue of ordinary care is a question of fact. "The trial court, confronted with all the relevant facts, should then under our law, decide whether or not those responsible used ordinary care as required by the statute." Id. at 1142.

P18. The trial court judge made no reference to ordinary care in his findings of fact and conclusions of law. For this reason, this case must be remanded to the trial court for a factual determination on ordinary care.

Pearl Pub. Sch. Dist. v. Groner, 784 So. 2d 911, 915-16 (Miss. 2001). 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").

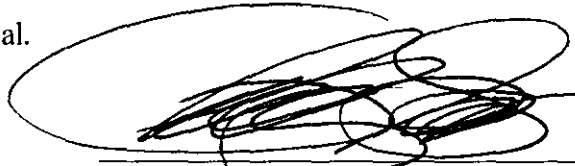
4. Gammel is entitled to a trial on the issue of proximate cause.

The record contains evidence that TCSD's failure to provide adequate outdoor lighting was the proximate cause of decedent's death. Christa Dean, the driver of the vehicle that struck decedent, told Deputy Woolfolk that she did not see Mr. 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.

Proximate cause is a question of fact that must be determined at trial. Entrican v. Ming, 962 So. 2d 28, 36-37 (Miss. 2007).

VIII. CONCLUSION

For these reasons, 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.

A handwritten signature in black ink, appearing to read 'Philip A. Stroud', is written over a horizontal line.

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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 28th day of January, 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

A handwritten signature in black ink, appearing to read 'Philip A. Stroud', written over a horizontal line.

PHILIP A. STROUD
Attorney for Plaintiff/Appellant

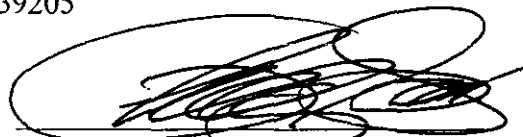
CERTIFICATE OF FILING

The undersigned attorney for Appellant certifies that:

- (1) the original of the foregoing document, Brief of Appellant, and three true and correct copies of Brief of Appellant,
- (2) an electronic disk containing Brief of Appellate in Word format (see MRAP 28(m)), and
- (3) the original Record Excerpts of Appellant and four true and correct copies of Record Excerpts of Appellant,

will be personally deposited by me in the United States Mail, first-class and postage prepaid, on January 28, 2008, addressed to the Clerk of the Supreme Court of Mississippi as follows:

Betty Sephton
Mississippi Supreme Court Clerk
P.O. Box 117
Jackson, MS 39205



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