**SUPREME COURT OF MISSISSIPPI**

**CHRISTOPHER JAMES STRANGE, a minor, by and through his mother and next of kin, Judith Leigh Strange** — **PLAINTIFF/APPELLANT**

**VS.** — **CIVIL ACTION NO. 2007-CA-TS-01791**

**ITAWAMBA COUNTY SCHOOL DISTRICT** — **DEFENDANT/APPELLEE**

**ON APPEAL FROM THE CIRCUIT COURT OF ITAWAMBA COUNTY, MISSISSIPPI**

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# BRIEF OF APPELLEE

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**ORAL ARGUMENT IS NOT REQUESTED**

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SUPREME COURT OF MISSISSIPPI

**CHRISTOPHER JAMES STRANGE, a minor,**
**by and through his mother and next of kin,**
**Judith Leigh Strange** **PLAINTIFF/APPELLANT**

**VS.** **CIVIL ACTION NO. 2007-TS-01791**

**ITAWAMBA COUNTY SCHOOL DISTRICT** **DEFENDANT/APPELLEE**

## CERTIFICATE OF INTERESTED PARTIES

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

1. Christopher James Strange, a minor, the Plaintiff/Appellant.

2. Judith Lee Strange, mother and next of kin of Christopher James Strange, Plaintiff/Appellant.

3. Samuel C. Martin, Esq., counsel for Plaintiff/Appellant.

4. Mark E. Brand, Esq., counsel for Plaintiff/Appellant.

5. Itawamba County School District, Defendant/Appellee

6. Mark R. Smith, Esq., counsel for Defendant/Appellee

7. Michelle Floyd, Esq., Board Attorney for the Itawamba County School Board

8. Honorable Thomas J. Gardner, III, Trial Court Judge

ITAWAMBA COUNTY SCHOOL DISTRICT

BY: _____
MARK R. SMITH, ESQ. [redacted]
Counsel for the Defendant

**AMENDED CERTIFICATE OF SERVICE**

I, MARK R. SMITH of Holcomb Dunbar, P.A., do hereby certify that I have this date mailed by United States Mail, Postage Prepaid, a true and correct copy of the above and foregoing **Brief of Appellee** to:

Samuel C. Martin, Esq.
Attorney at Law
Post Office Box 3508
Jackson, MS 39207-3508

Honorable Thomas J. Gardner III
Itawamba County Circuit Court Judge
Post Office Drawer 1100
Tupelo, MS 38802-1100

This the 18th day of June, 2008.

Mark R. Smith

**SUPREME COURT OF MISSISSIPPI**

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**ITAWAMBA COUNTY SCHOOL DISTRICT** — **DEFENDANT/APPELLEE**

## STATEMENT OF ISSUES

1. Whether the trial court properly found that the Itawamba County School District was entitled to the immunity afforded by the "discretionary function" exception of the Mississippi Tort Claims Act located at Miss. Code Ann. §11-46-9(1)(d).

2. Whether the trial court erred by granting Itawamba County School District's Motion for Summary Judgment without conducting a hearing.

**SUPREME COURT OF MISSISSIPPI**

**CHRISTOPHER JAMES STRANGE, a minor, by and through his mother and next of kin, Judith Leigh Strange** — **PLAINTIFF/APPELLANT**

**VS.** — **CIVIL ACTION NO. 2007-TS-01791**

**ITAWAMBA COUNTY SCHOOL DISTRICT** — **DEFENDANT/APPELLEE**

## STATEMENT OF THE CASE

The Plaintiff originally filed this action against Itawamba County School District on October 21, 2005. The Plaintiff's claims arise out of an incident that occurred on February 17, 2005, wherein he was injured when he fell from the bed of a moving truck that another student was driving on Defendant's premises. The Plaintiff's Complaint alleged that the Defendant was liable for Plaintiff's injuries based upon claims of negligence, negligent supervision and breach of fiduciary duty.

The Defendant responded to the Plaintiff's Complaint and denied all liability. After completing discovery the Defendant filed its Motion for Summary Judgment asserting that Section 11-46-9(1)(d) of the Mississippi Tort Claims Act ("MCTA") barred the Plaintiff's claims.

## COURSE OF PROCEEDINGS BELOW

On May 31, 2007, the Defendant filed its Motion for Summary Judgment and Itemization of Undisputed Facts. [R. 36-39]. The Plaintiff filed his response to the Defendant's Motion on June 22, 2007. [R.40-41]. On June 27, 2007, the trial court entered an Order granting the Defendant's Motion for Summary Judgment. [R. 48 ].

On June 28, 2007, the Plaintiff filed his Motion to Set Aside Judgment and For Reconsideration. [R. 50-53 ]. On July 5, 2007, the Defendant filed its Response to the Plaintiff's Motion to Set Aside Judgment and For Reconsideration. [R. 86-93 ]. On August 30, 2007, the trial court entered an Order denying the Plaintiff's Motion to Set Aside Judgment and For Reconsideration, thereby affirming its previous order granting the Defendant's Motion for Summary Judgment. [R 95. ].

On September 28, 2007, the Plaintiff filed this appeal. [R. 96 ].

## STATEMENT OF FACTS

The incident which is the subject of the Plaintiff's Complaint occurred on the property of Itawamba County Agricultural High School in Fulton, Mississippi. On the date of the incident, the Plaintiff left his sixth period class and proceeded to the school parking lot to catch a ride to the football complex for 9th grade football practice. [R. 73]. Students could arrive at the football complex by either walking or driving on an access road which led from the school parking lot to the football complex. [R. 73].

The Plaintiff got into the back of a pick-up truck which another Itawamba County Agricultural High School student was driving en route to the football complex. [R. 73]. Immediately after the Plaintiff got into the back of the pick-up truck, he stood up and was pretending to "surf" as the driver of the truck drove the vehicle on the access road the short distance from the school parking lot to the football complex. [R. 74].

As the truck rounded a sharp curve in the road leading from the school parking lot to the football complex, the Plaintiff fell from the back of the pick-up truck. [R. 74]. The Plaintiff sustained several injuries as a result of his fall, including cuts and bruises, as well as a fractured

skull.

In his brief the Plaintiff speculatively claims that the Itawamba County High School football coach required that his players arrive at football practice immediately after they are dismissed from school. [Plaintiff's brief at p. 1]. The Plaintiff then further speculates that this means that the football coach wants the students to use any means possible to get to practice in a timely manner and that the coach would rather the students use automotive transportation to get to practice rather than walking. [Plaintiff's brief at p. 1]. These statements are factually inaccurate and do not appear in the record of this matter anywhere. The Itawamba County High School football coach has not testified in this matter. Accordingly, any representations as to what the football coach wanted or did not want are merely fabricated for the purpose of bolstering the Plaintiff's otherwise meritless arguments. Taking the fabrication a further step, the Plaintiff also claims that the Plaintiff and other students rode to football practice in the back of trucks in order to comply with the football coach's wishes and get to practice as quickly as possible. [Plaintiff's brief at p. 2]. Again, these claims lack any record support whatsoever. The record actually reflects that after the Plaintiff completed his classes he would try to find a ride from the parking lot to the football facility because "if we didn't find a ride over there, we'd have to walk, and nobody really wanted to walk." [R. 73].

## SUMMARY OF THE ARGUMENT

The trial court properly granted the Defendant's Motion for Summary Judgment based upon the "discretionary function" exception contained in the Mississippi Tort Claims Act at Miss. Code Ann. § 11-46-9(1)(d). More specifically, the trial court was correct in deciding that the determination of whether to prevent the Plaintiff from participating in the conduct which

ultimately led to his injury was of a discretionary rather than a ministerial nature. Further, the Defendant's decision to allow students to ride in the back of trucks from the school parking lot to the football facility impacts public and social policy because it required a balancing of social and public policy considerations.

Despite the Plaintiff's arguments to the contrary, there is no applicable statute that required the Defendant to prevent the Plaintiff from riding in the bed of a truck from the school parking lot to the football facility. Moreover, the act of riding in the bed of a truck is not generally prohibited by Mississippi statute or common law. As such, the trial court properly held that Defendant was entitled to immunity under the "discretionary function" exception of the MCTA.

The trial court followed Mississippi Rule of Civil Procedure 56 and properly granted the Defendant's Motion for Summary Judgment. Any error the trial court committed by ruling on the Motion without conducting a hearing was harmless because the are no triable issues of fact in this case.

The Plaintiff has no proof to support his claims that the trial court granted the Defendant's Motion for Summary Judgment without considering any of the Plaintiff's filings in response thereto.

## ARGUMENT

### I. NO GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE DEFENDANT IS ENTITLED TO IMMUNITY UNDER THE MCTA.

#### A. The Mississippi Tort Claims Act

The cornerstone of the MTCA is sovereign immunity. That is, the principle that the State of Mississippi and its political subdivisions "are, always have been, and shall continue to be

immune from suit . . . on account of any wrongful or tortuous act or omission." MISS. CODE ANN. § 11-46-3(1). The MTCA provides a waiver of "the immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting in the course and scope of their employment." MISS. CODE ANN. § 11-46-5(1). However, this waiver is subject to certain limitations and requirements. City of Jackson v. Lumpkin, 697 So. 2d 1179 (Miss. 1997). Among these is a notice requirement (Miss. Code Ann. § 11-46-11), a one-year statute of limitations (Miss. Code Ann. § 11-46-11), a "cap" on compensatory damages (Miss. Code Ann. § 11-46-15) and an exclusion of punitive damages, prejudgment interest and attorney's fees (Miss. Code Ann. § 11-46-15).

The MTCA also provides twenty-four (24) separate exemptions to the general waiver of immunity. *See*, MISS. CODE ANN. § 11-46-9; L.W. v. McComb Separate Mun. Sch. Dist., 754 So. 2d 1136, 1139 (Miss. 1999). Each of the exemptions to the general waiver of immunity constitutes "an entitlement not to stand trial rather than a mere defense to liability and, therefore, should be resolved at the earliest possible stage of litigation." Mitchell v. City of Greenville, 846 So. 2d 1028, 1029 (Miss. 2003). Furthermore, the applicability of immunity pursuant to one or more of the exemptions is a question of law and is therefore a proper matter for summary judgment. Mitchell, 846 So. 2d at 1029.

**1. The trial court correctly ruled that the Defendant was entitled to the immunity of the discretionary function exception of the MTCA.**

As stated, the MTCA provides that Mississippi's political subdivisions, including school districts, waive sovereign immunity from tort actions; however, this waiver is subject to

numerous exceptions found in the MTCA. MISS. CODE ANN. § 11-46-9 (Rev. 2002). The Plaintiff's claims in the instant case fall within an enumerated exception to the waiver of sovereign immunity in the MTCA.

Section 11-46-9(1)(d) of the MTCA states 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 . . . based upon the exercise 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." MISS. CODE ANN. § 11-46-9(1)(d) (Rev. 2002).

Governmental conduct is discretionary if it meets the "public policy function" test. Jones v. Miss. Dept. of Transp., 744 So. 2d 256, 260 (Miss. 1999). The "public policy function" test determines that a governmental function is discretionary if the activity requires the use of the employee's discretion and involves social, economic, or political policy. Id. at 260; *see also*, Harris v. McCray, 867 So. 2d 188, 191 (Miss. 2003) (holding that conduct is discretionary when official is required to use his own judgement or discretion in performing duty). On the other hand, if governmental conduct is not discretionary it is considered "ministerial." Governmental conduct is ministerial if it is "imposed by law and its performance is not dependent on the employee's judgement." Jones, 744 So. 2d at 259-60. When determining whether a decision is ministerial, the Court's inquiry is basically whether or not the governmental entity's actions violated any "**specific duties required by law**." Id. (emphasis added). Simply stated, if a statute exists that requires a specific type of conduct in a particular situation, a decision is not discretionary and the discretionary function exemption does not apply.

In his brief the Plaintiff avers that the trial court erred in granting the Defendant's summary

judgment motion because "[m]aterial fact questions remain as to whether or not the coach's actions involved social, economic, or political policy and whether or not the coach used ordinary care to minimize the risk of personal injury to the players." [Plaintiff's brief, pp. 2-3]. Both of Plaintiff's assertions in this regard are erroneous.

First, the question of whether the school district's action (or in this case inaction) involved social, economic, or political policy is a question of fact the trial court may easily determine at the summary judgement stage. This case is one where the MCTA governs the Plaintiff's claims. Pursuant to the provisions of the MCTA the Plaintiff is not entitled to a jury trial, but only to a bench trial. *See*, Miss. Code Ann. § 11-46-13(1). Accordingly, the trial judge in this matter is not only charged with reaching conclusions of law, but also is charged with the fact finding duties usually reserved for the jury. Thus, the trial court may properly determine all aspects of whether the Defendant is entitled to discretionary function immunity at the summary judgment stage.

Next, it is axiomatic that the trial court determined that school district's decision not to prevent the Plaintiff from riding in the bed of a truck on school property was one that involved social, economic or political policy. The trial court did not err in this determination.

In determining whether governmental conduct is discretionary, Mississippi courts employ the two-part public policy function test. Dotts v. Pat Harrison Waterway Dist., 933 So. 2d 322, 326 (Miss. Ct. App. 2006)(citing Jones v. Mississippi Dept. of Transp., 744 So. 2d 256, 260 (Miss. 1999)). This test requires a determination of (a) whether the activity at issue involves an element of choice or judgment, and if so, (b) whether the choice or judgment involves social, economic, or political policy. Dotts, 933 So. 2d at 326 (citations omitted).

**a. The activity of the school district involved an element of choice or judgment.**

Mississippi has no statutory requirements relating to or prohibiting individuals riding in the back of pick up trucks. Therefore, the school district had discretion in making the judgment regarding whether to allow students to ride in the back of trucks on its premises. The Mississippi Court of Appeals faced a similar situation in Dotts v. Pat Harrison Waterway Dist., 933 So. 2d 322 (Miss. Ct. App. 2006) when it upheld a trial court's determination that a waterway district had discretion in making judgments regarding the exercise of its powers and functions in operating a water park because Mississippi had no statutory requirements regarding the operation of swimming facilities like the one at issue in that case. Dotts, 933 So. 2d at 326.

The Plaintiff in the present matter mistakenly argues that Miss. Code Ann. § 37-9-69 controls the school district's actions in this case. Section 37-9-69 generally provides that "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. CODE ANN. § 37-9-69 (2001). The Plaintiff's argument essentially attempts to convince this Court that Miss. Code Ann. § 37-9-69 is applicable in all "school law" cases. This Court's prior rulings belie the Plaintiff's argument in this regard.

It is significant to note the distinction between the present case and a number of the other scenarios where the Mississippi Supreme Court has found that the discretionary function exemption did not apply in "school law" cases. More specifically, in L.W. v. McComb Sep. Muni. Sch. Dist., 754 So. 2d 1136 (Miss. 1999), upon which the Plaintiff relies heavily in his brief, the Mississippi Supreme Court determined that the discretionary function exemption did not apply in a case where a student was assaulted by another student. It is extremely important to

carefully examine the basis of the Court's ruling in L.W., as a cursory review of the decision and its progeny (as well as Plaintiff's misplaced argument) could lead this Court to conclude that the discretionary function exemption can never apply when a student is injured on campus and alleges the school district caused the injury by failing to provide a safe school environment. As more recent decisions from the Mississippi Supreme Court have explained, such a conclusion would be a severe misconstruction of the MTCA.

In L.W., a student threatened another student with physical violence within five feet of a teacher. Subsequently that student sexually assaulted the student he had previously threatened. L.W., 754 So. 2d at 1137. The Mississippi Supreme Court cited Section 37-9-69 of the Mississippi Code which requires superintendents, principals and teachers to "hold [their] students to strict account for disorderly conduct at school, on the way to and from school, on the playgrounds and during recess." Id. The Court found that this statute mandates school personnel to maintain appropriate control and discipline of students while the children are in their care. Id. at 1142. Since a teacher saw and heard the assaulting student threaten the eventual victim and did nothing, the Court found that the statute requiring teachers to "hold students to strict account for disorderly conduct at school" applied to the situation and eliminated any discretion. Id. at 1143. The application of the statute made the decision ministerial and, accordingly, there was no immunity under the MTCA. Id.

In subsequent school law cases where the Supreme Court has held that a school district was not entitled to immunity under the discretionary function exemption, the factual circumstances were virtually identical to those in L.W. All of those decisions involved scenarios where students took illegal action against other students and the school district's failure to control

students' conduct, as required by Miss. Code Ann. Section 37-9-69, resulted in an injury to a student. For example, in Henderson *ex rel* Henderson v. Simpson County Public School District, 847 So. 2d 856 (Miss. 2003), the Supreme Court held that the discretionary function exemption did not apply when a student who loudly taunted and made threatening gestures toward another student, in the presence of a teacher, eventually assaulted the student. Henderson, 847 So. 2d at 858. The Court reasoned that because the teacher in question failed to hold the student to "strict account for disorderly conduct" and intervene in the altercation between the students, Miss. Code Ann. Section 37-9-69 applied and the duty was ministerial and the discretionary function exemption did not apply. Id.

The common thread running through the school law cases disallowing immunity under Section 11-46-9(1)(d) is that all involved injuries to students caused by other students where the school district's failure to impose lawful orderly conduct on its pupils enabled the injury causing conduct. If the school districts in these cases had held their students to strict account for their unlawful and disorderly conduct, one could conceive that the injuries complained of would not have occurred.

The Supreme Court's recent decision in Harris v. McCray, 867 So. 2d 188 (Miss. 2003), further illuminates the distinction between discretionary and ministerial functions. In Harris, a student of the Jefferson County school system suffered a heat stroke while participating in high school football practice. Harris, 867 So. 2d at 189. The plaintiff brought suit against the coach and the school district alleging that negligent acts and omissions of the football coach and the school district caused the plaintiff's heat stroke and resulting damages. Id. The school district argued that the football coach's decisions as to the times of practice and the nature of water

breaks during practice were discretionary functions. Id. The circuit court entered judgment for the school district holding that decisions and acts of high school coaches are considered discretionary and therefore the school district was immune from liability pursuant to the discretionary function exemption. Id. at 188.

The Mississippi Supreme Court upheld this decision reasoning that since the coach's actions and duties in coaching his football team were discretionary, Section 11-46-9(1)(d) operated to shield the school district from liability. Id. at 193. Mississippi Code Annotated Section 37-9-69 did not apply to the situation presented in Harris, and as such, could not serve as the basis for construing the coach's and school's decisions as ministerial rather than discretionary. Simply put, since Section 37-9-69 did not apply and no other statute dictated how the coach determined practice hours and water breaks, the decision was discretionary rather than ministerial and immunity applied even if that discretion was abused.

The Harris decision establishes that the logic and holding which the Supreme Court espoused in the L.W. case are not applicable in all school law cases. Rather, the normal discretionary function analysis must take place wherein the Court determines whether how a municipality carries out a particular function is prescribed by law. If there is no statutorily imposed duty requiring a governmental entity to take specified actions, then the decision is discretionary and the immunity provided in Section 11-46-9(1)(d) is applicable.

**b. The school district's choice or judgment involved social, economic or political policy.**

This prong of the discretionary function test protects only those discretionary actions or decisions based on considerations of public, social or economic policy. Dotts, 933 So. 2d at

327(citations omitted). The purpose is to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic or public policy through the medium of an action in tort." Id. The pertinent inquiry is whether the decision "implicates the exercise of a policy judgment of a social, economic, or political nature." Id.

The school district's decision to allow students to ride in the back of pick up trucks from the school parking lot to the football facility impacts public and social policy because it requires a balancing of social considerations. In the agricultural deep south riding in the back of a truck is a way of life for some individuals. In the absence of a statutory prohibition on this activity, the determination of whether to allow children or young adults to ride in the back of a truck is a determination that lies with the discretion and judgement of parents or, in this case, those acting *in loco parentis*, the administrators of the Itawamba County School District.

Since the trial court correctly determined that the actions of the Defendant in this case were discretionary, and grounded in social, economic and political policy, this Court should uphold its decision that the School District is immune from liability pursuant to Mississippi Code Annotated § 11-46-9(1)(d).

**2. The Plaintiff's argument that the "ordinary care" standard is applicable to the determination of whether the school district is entitled to immunity under Miss. Code Ann. § 11-46-9 (1)(d) is erroneous.**

The main issue in this case is whether the Defendant enjoys immunity under Miss. Code Ann. § 11-46-9(1)(d) based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty. In his brief the Plaintiff cites to L.W. v. McComb Separate School District, 754 So. 2d 1136 (Miss. 1999) and Henderson *ex rel.* Henderson v. Simpson County Public School District, 847 So. 2d 856 (Miss. 2003) for the erroneous

proposition that one must use ordinary care in performing a discretionary function to retain immunity. The Plaintiff also relies on Justice McRae's dissent in Harris v. McCray, 867 So. 2d 188 (Miss. 2003), to bolster his argument. The Plaintiff's reliance on Justice McRae's dissent in Harris misplaced insofar as it was diametrically opposed to the majority's ruling and is not consistent with the Court's more recent pronouncements in this area. The Plaintiff's reliance on L.W. is erroneous because while the Court in L.W. recognized that the school's conduct was of a discretionary nature, the Court never found that the school officials were performing a discretionary function. L.W., 754 So. 2d at 1139-43. The L.W. Court actually found that the school officials were performing a function that was required by statute. Id. Accordingly, the Court analyzed the school's actions under Miss. Code Ann. § 11-46-9(1)(b) which addresses ministerial functions, rather than Miss. Code Ann. § 11-46-9(1)(d), which addresses discretionary acts. Id. Subsection (b) clearly carries an ordinary care standard while subsection (d) does not.

This Court's opinion in Harris v. McCray, 867 So. 2d 188 (Miss. 2003) further illuminates this point. In Harris, this Court held that "[w]hen an official is required to use his own judgment or discretion in performing a duty, that duty is discretionary." Harris, 867 So. 2d at 191. Mississippi Code Ann. § 11-46-9(1)(d) exempts governmental entities from liability for a discretionary function or duty "whether or not the discretion be abused." Id. at 189-90. Therefore the ordinary care standard is not applicable to Miss. Code Ann. § 11-46-9(1)(d). Id. *See also,* Collins v. Tallahatchie County, 876 So. 2d 284 (Miss. 2004)(holding that ordinary care standard is not applicable to discretionary functions under Miss. Code Ann. § 11-46-9(1)(d)).

## II. THE TRIAL COURT FOLLOWED MRCP 56 AND PROPERLY GRANTED DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

### A. Any error the trial court committed by not conducting a hearing is harmless.

The Defendant does not dispute that the trial court did not conduct a hearing on Defendant's Motion for Summary Judgment. Rule 4(f) of the Local Rules for the First Circuit Court District of Mississippi, codified by Order of this Court effective May 18, 2006, provides that "[a]ll motions shall be decided by the Court without a hearing or oral argument unless otherwise ordered by the Court on its own motion, or, in its discretion, upon written motion made by either counsel." Accordingly, the trial court simply followed its own local rules when it granted Defendant's Motion for Summary Judgment without conducting a hearing.

The Defendant does not concede that the trial court committed error by ruling on its Motion for Summary Judgment without conducting a hearing. The Mississippi case law that provides that ruling on a motion for summary judgment without conducting a hearing is error and the First Circuit Court District's Local Rules seem to be at odds on this issue. However, any error the trial court may have committed was harmless error because as the Defendant's arguments contained herein establish, there are no triable issues of fact in this case. *See*, Croke v. Southgate Sewer Dist., 857 So. 2d 774, 778 (Miss. 2003)(holding that error in granting summary judgment motion without hearing may be harmless error if there are no triable issues of fact); Adams v. Cinemark USA, Inc., 831 So. 2d 1156, 1163 (Miss. 2002)(declaring that court may decide summary judgment motion upon written briefs if it appears that there are no genuine issues of material fact).

### B. There is no proof in the record to support the Plaintiff's claim that the trial court granted the Defendant's Motion for Summary Judgment without considering the Plaintiff's response.

The Plaintiff also argues that the trial court erred by granting Defendant's Motion for Summary Judgment without considering Plaintiff's response in opposition thereto. The Plaintiff's argument in this regard lacks merit. In fact, the Plaintiff's own statements in his brief contradict his argument. As the Plaintiff correctly points out, the Order granting the Defendant's Motion for Summary Judgment was not filed with the circuit clerk until June 27, 2007. The Plaintiff also states that by the time the Order was filed by the clerk, his response to the Defendant's Motion for Summary Judgment was on file. Thus, the Plaintiffs own statements establish that the Court had possession of the Plaintiff's response in opposition to the Defendant's Motion for Summary Judgment before the clerk entered the Order granting the Defendant's motion.

Any suggestion that the trial court did not consider the Plaintiff's response in opposition to the Defendant's Motion for Summary Judgment is purely speculation by the Plaintiff and is not supported by any record evidence. Moreover, the trial court's Order Denying Plaintiff's Motion for Reconsideration clearly states that the court reviewed all of the Plaintiff's submissions prior to reaching its decision in this case. [R. 95].

## CONCLUSION

The record evidence in this matter shows that the trial court made the correct decision when it granted Defendant's Motion for Summary Judgment. Mississippi Code Ann. §11-46-9(1)(d) protects the Itawamba County School District from liability if a claim arises from the performance or nonperformance of a discretionary function by the district even where the

discretion be abused. The decision not to prohibit students from riding in the back of pick up trucks from the school parking lot to the football facility was one that required the judgment or discretion of school district administrators. The decision was also one grounded in social policy considerations. Thus, the school district was entitled to the immunity that Miss. Code Ann. §11-46-9(1)(d) affords.

The Plaintiff cannot prove that the trial court granted Defendant's Motion for Summary Judgment without considering the Plaintiff's submissions in response thereto. Thus, this Court should disregard any such allegations because they are conclusory in nature and lack any record evidence or support whatsoever. Moreover, if the trial court erred in granting Defendant's summary judgment motion without conducting a hearing then such error was harmless and does not merit reversal because as the Defendant has established and the record reflects, there are no genuine issues for trial in this matter.

ITAWAMBA COUNTY SCHOOL DISTRICT

BY: _____
MARK R. SMITH, ESQ. MSB#10217
Counsel for the Defendant

**SUPREME COURT OF MISSISSIPPI**

**CHRISTOPHER JAMES STRANGE, a minor, by and through his mother and next of kin, Judith Leigh Strange** — **PLAINTIFF/APPELLANT**

**VS.** — **CIVIL ACTION NO. 2007-TS-01791**

**ITAWAMBA COUNTY SCHOOL DISTRICT** — **DEFENDANT/APPELLEE**

# ADDENDUM

Miss. Code Ann. § 11-46-9

West's Annotated Mississippi Code Currentness
Title 11. Civil Practice and Procedure
Chapter 46. Immunity of State and Political Subdivisions from Liability and Suit for Torts and Torts of Employees (Refs & Annos)

**§ 11-46-9. Governmental entities and employees; exemption from liability**

<Text of section effective until the later of July 1, 2007 or from and after effectuation of Laws 2007, Ch. 582, § 21 under Section 5 of the Voting Rights Act of 1965, as amended and extended>

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

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

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

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

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

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

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

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

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

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

(j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such

detention is of a malicious or arbitrary and capricious nature;

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

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

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

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

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

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

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

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

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

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

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

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

(w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning

device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice; or

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

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

(a) Is inactive and dormant;

(b) Receives no revenue;

(c) Has no employees; and

(d) Owns no property.

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

CREDIT(S)

Laws 1984, Ch. 495, § 6; Laws 1985, Ch. 474, § 5; Laws 1987, Ch. 483, § 5; Laws 1993, Ch. 476, § 4; Laws 1994, Ch. 334, § 1; Laws 1995, Ch. 483, § 1; Laws 1996, Ch. 538, § 1; Laws 1997, Ch. 512, § 2, eff. July 1, 1997.

<For text of section effective on the later of July 1, 2007 or from and after effectuation of Laws 2007, Ch. 582, § 21 under Section 5 of the Voting Rights Act of 1965, as amended and extended, see § 11-46-9, post>

Miss. Code Ann. § 11-46-9, **MS ST § 11-46-9**

Current through all 2007 Sessions and Chs. 302, 309, 312, 373 and 376 of the 2008 Reg. Sess.



END OF DOCUMENT

Miss. Code Ann. § 37-9-69

C West's Annotated Mississippi Code Currentness
Title 37. Education
Chapter 9. District Superintendents, Principals, Teachers, and Other Employees
In General (Refs & Annos)

**→§ 37-9-69. General responsibilities**

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.

CREDIT(S)

Laws 1953, 1st Ex. Sess., Ch. 20, § 24, eff. July 1, 1954.

HISTORICAL AND STATUTORY NOTES

**Derivation:**
Code 1942, § 6282-24.

LAW REVIEW AND JOURNAL COMMENTARIES

Free speech and the end of dress codes and mandatory uniforms in Mississippi public schools. Shepherd, 24 Miss. C. L. Rev. 27 (Fall, 2004)

Legal aspects of school violence: Balancing school safety with student's rights. Watkins, Hooks, 69 Miss.L.J. 641 (2000).

RESEARCH REFERENCES

ALR Library

36 ALR 3rd 330, Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Caused by Acts of Fellow Students.

38 ALR 3rd 830, Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting from Lack or Insufficiency of Supervision.

Encyclopedias

Am. Jur. 2d Munic., County, School & State Tort Liab. § 69, Schools and Related Bodies.

# LOCAL RULES
# FOR
# FIRST CIRCUIT COURT DISTRICT OF MISSISSIPPI

[Renumbered and codified by order of the Supreme Court effective May 18, 2006.]

## RULE 1. CASE ASSIGNMENT PROCEDURE

**(a)** All Civil Cases filed after December 31, 1989, in the Circuit Courts of this district shall be assigned at the time of filing by such method as to insure that such assignment shall be random; that no discernable pattern of assignment exists and that no person shall know to whom the case will be assigned until such time as it has been accomplished.

**(b)** Each Civil Case filed in this Court after December 31, 1989 shall bear a number as follows: The last two digits of the year in which the case is filed followed by the sequential number of the case for the county and year, followed in parenthesis by the first letter of the name of the Judge to whom the case is assigned. The suffix (G) designates Gardner; the suffix (PF) designates Funderburk; the suffix (A) designates Aycock. In addition, the first letter of the County name shall be added. Pontotoc County shall be (PO), Prentiss County shall be (PR).

**(c)** The Circuit Clerks of each of the Counties of this district shall immediately adapt a method of making assignments contemplated by this Order and have same approved by the Court prior to the effective date of this rule. In addition the Court Administrator's shall maintain a trial calendar so the Court, the Court Administrator and the Attorneys may schedule the trial of cases at times other than regularly scheduled term times.

## RULE 2. TRIAL SETTINGS, DOCKET SETTINGS

**(a)** All Civil matters assigned to a Judge will be scheduled for trial by the Judge at such time, in term or otherwise, as shall insure the rapid disposition of the Court's business and in accord with the rules of discovery.

**(b)** All Criminal Cases shall be set by the Court on regularly scheduled docket setting on the suggested trial calendar prepared by the Office of the District Attorney. In the event the Court Administrator's Office is unable to resolve any conflicts concerning trial dates, the attorney for the Defendant will seek a continuance from the date scheduled by the trial docket prepared by the District Attorney.

**(c)** The matter of scheduling all cases for trial shall be under the direction and control

of the Administrator, subject to approval of the Judges.

## RULE 3. SCHEDULING ORDER

**(a)** Within thirty (30) days after issue is joined in a case, but no later than 120 days after the complaint is filed, counsel are required to present the Court a proposed Order setting forth deadlines for the joining of other parties and amending the pleadings; service of motions; and the completion of discovery. If more than six months discovery time is requested, the proposed Order should be accompanied by an explanation of the necessity for the protracted period. The proposed order shall provide that motions to add parties or amend the pleadings must be served no more than thirty (30) days after the date scheduled for completion of discovery. All counsel are required to make a realistic estimate of the time needed for discovery, but all requested periods of discovery shall remain under the supervision of the Court, and lengthened or shortened as the case dictates, and the Court shall enter a Scheduling Order accordingly. In the event counsel are unable to agree upon the terms of the scheduling order or fail to submit a proposed order to the Court within the time required by this paragraph, discovery shall be limited to the time provided in the Mississippi Rules of Civil Procedure. Extensions of deadlines will be granted by the Court only upon a showing of good cause.

**(b)** Within thirty (30) days after expiration of the time provided for discovery, Counsel are required to present an order to the Court setting a date for status conference or pretrial conference or providing that no pretrial conference is needed or required.

**(c)** If no pretrial conference is to be had the parties shall file with the Court an agreed pretrial order or note in the form previously provided by the Court. A copy of said form is appended to this rule.

**(d)** Following the pretrial conference or status conference, counsel shall submit to the Court an order setting the cause for trial and reflecting any ruling by the Court during such meeting.

## RULE 4. MOTION PRACTICE

**(a) Applicability**. The provisions of this rule apply to all written motions filed in civil actions.

**(b) Filing; Proposed Orders**. The original of each motion, and all affidavits and other supporting documents shall be filed with the Clerk where the action is filed. The moving party at the same time shall mail a copy thereof to the Judge presiding in the action at his home office mailing address.

A proposed Order shall accompany the court's copy of any motion which may be heard ex parte or is granted by consent.

**(c) Responses.** The original of any response to the motion, all opposing affidavits, and other supporting documents shall be filed with the Clerk where the action is filed and any response to the motion and all objections shall be filed and copies distributed as provided in Paragraph (B) of this rule.

**(d) Memoranda; Documents Required With Motions to Dismiss or for Summary Judgment; Failure to Submit Required Documents.** At the time the motion is served, other than motions or applications which may be heard ex parte or those involving necessitous or urgent matters, counsel for movant shall mail to the Judge the original of a memorandum of authorities upon which he relies and pertinent portions of the pleadings filed in the case. Counsel for respondent shall submit the original memorandum of authorities in reply, and shall do so within (10) days after service of movant's memorandum. Counsel for movant desiring to submit a rebuttal memorandum may do so within (5) days after the service of the respondent's memorandum. Any requests for extension of time shall be made in writing to the Judge before whom the motion is noticed. Memoranda submitted in connection with any dispositive motion shall be accompanied by separate proposed findings and conclusions. Failure to timely submit the required motion documents may result in the denial of the motion and/or the imposition of appropriate sanctions.

**(e) Length of Memoranda.** Movant's original and rebuttal memoranda together shall not exceed a total of thirty-five (35) pages, and respondent's memorandum shall not exceed thirty-five (35) pages. Memoranda and other submissions required by Paragraph (D), except as therein provided, are not to be filed with the Clerk's office.

**(f) Notice and Hearings.** All Motions in which a hearing is requested shall be noticed for hearing "as soon as counsel can be heard" but no date certain shall be set by the moving party except as approved by the Court Administrator's Office.

All motions shall be decided by the Court without a hearing or oral argument unless otherwise ordered by the Court on its own motion, or, in its discretion, upon written motion made by either counsel.

The scheduling of an evidentiary hearing or oral argument, where allowed, shall be set at such time and place as may suit the convenience of Counsel and the Judge assigned to the case. The Court may, in its discretion, hear oral argument by telephone conference.

**(g) Urgent or Necessitous Matters.** Where the motion relates to an urgent or necessitous matter, counsel for the movant shall, prior to the filing the motion, contact the

Judge to whom the action has been assigned, and arrange a definite time and place for the hearing of the motion. In such cases, counsel for movant shall endorse upon the motion a separate certificate giving notice to the other parties of the time and place fixed by the Court for hearing of the motion. The Court, upon receipt of the motion, may in its own discretion direct counsel as to the submission of memoranda of authorities for the Court's consideration.

**(h) Service**. Movant and respondent shall serve copies of all motions, responses, and/or memoranda upon opposing counsel. When service is by mail, three (3) days shall be added to the periods prescribed in Paragraph (D) of this rule.

**(i) Court Reporters**. If the hearing of a motion, whether at a regular motion day, pretrial conference, or special setting, requires the presence of a court reporter, the party requesting a court reporter shall obtain prior approval from the Judge before the motion is set.

**(j) Untimely Motions**. Any motion served beyond the motion deadline imposed in the Scheduling Order entered pursuant to Rule 3, may be denied solely because the motion is served untimely.

**(k) Sanctions-Frivolous Motions or Opposition.** A patently frivolous motion or opposition to a motion on patently frivolous grounds may result in the imposition of appropriate sanctions, including the assessment of costs and attorney fees.

**(l) Sanctions-Unreasonable Delays.** Delays, or continuances, or waste of the Court's time occasioned by the failure of a party to follow the procedures outlined in this rule may result in the imposition of appropriate sanctions, including assessment of costs and attorney's fees. In this regard, counsel shall notify the appropriate Judge immediately if a submitted motion is resolved by the parties or the case in which the motion has been pending is settled.

**(m)** All pleadings shall, in addition to other requirements, clearly indicate the complete name, mailing address and phone number of counsel filing same.

## RULE 5. PRETRIAL CONFERENCES AND PRETRIAL ORDERS

**(a) Cases In which Conference to Be Held; Scheduling**. A pretrial conference may be held in all civil actions pursuant to a calendar periodically prepared by the Court Administrator's Office at the direction of the Court Administrator or the Judge and furnished by mail to counsel for all parties.

**(b)** Whenever possible, pretrial conferences shall be separately scheduled at a date, place and hour and for such period of time as the subject matter of the particular case may

require, but in all events, pretrial conferences shall be scheduled in such manner as not to cause undue or inordinate inconvenience to counsel scheduled for pretrial conferences in other cases.

## RULE 6. CONTINUANCES

No Continuance of any case may be agreed to by the parties after the cause has been scheduled for trial. Unless an order is entered by the Court prior to the date set for trial, the matter will proceed to trial as to all parties. This provision shall apply to civil and criminal matters.

## RULE 7. CONFLICTS, RECUSAL

In the event a case is assigned to a Judge having a conflict as contemplated by the Canon (3) et seq. Code of Judicial Conduct which requires that he disqualify himself, then he shall advise the Clerk of the Court making the assignment of such conflict and return all materials connected with the matter.

Upon receipt of such notification the Clerk shall proceed to reassign the case to another of the judges, returning the disqualified Judges name to the pool so that he will draw another case to replace that one returned.

In the event all Judges of the District disqualify themselves the Senior Circuit Judge shall make proper application for appointment of a Judge from without the District.

## RULE 8. NON-FILING OF DISCOVERY MATERIALS

**(a)** Interrogatories under Rule 33, M.R.C.P., and the answers thereto, Request for Production of Inspection under Rule 34, M.R.C.P., Request for Admissions under Rule 36, M.R.C.P., and responses thereto, and depositions under Rule 30 and 31, M.R.C.P., shall be served upon other counsel or parties as provided by the Rules, but *shall not* be filed with the Circuit Court Clerks. The party responsible for service of the discovery material shall retain the original and become the custodian.

**(b)** If relief is sought under the Mississippi Rules of Civil Procedure concerning any interrogatories, requests for production or inspection, request for admissions, answers to interrogatories, responses to request for admission or depositions, copies of the *portions* of the interrogatories, requests, answers, responses or depositions *in dispute* shall be filed with the appropriate Circuit Court Clerk and with the assigned Judge contemporaneously with any motion filed under said Rules.

**(c)** If interrogatories, requests, answers, responses or depositions are to be used at trial or are necessary to a pre-trial motion which might result in a final order on any issue, the portions to be used shall be considered an exhibit and filed with the Clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated.

**(d)** When documentation of discovery not previously in the record is needed for appeal purpose, upon an application and order of the Court, or by stipulation of counsel, the necessary discovery papers shall be filed with the Clerk.

**(e)** The Clerks of this Court are authorized and directed to return forthwith any discovery materials submitted for filing which does not comply with the requirements set forth hereinabove. This order shall be spread on the minutes of this Court and a copy thereof made available to any attorney and/or party requesting same.

## RULE 9 VIDEOTAPE DEPOSITIONS

The videotaping of a deposition in addition to the preparation of the usual written transcript shall be permitted as a matter of course provided the order or stipulation authorizing such deposition contains the following requirements:

**(a)** The time and place of the taping of the deposition shall be set by notice served in the same manner as for a regular deposition, except it shall state that a videotape deposition is being taken.

**(b)** The videotape operation technician shall certify as to the correctness and completeness of the videotape.

**(c)** At the beginning of the deposition the parties and counsel shall be shown in the visual portion of the deposition.

**(d)** During the deposition the witness shall be recorded in as near to courtroom atmosphere and standards as possible. There will not be any "zoom in" procedures to unduly emphasize any portion of the testimony, but "zoom in" will be allowed for exhibits and charts to make them visible to the jury. The camera shall focus as much as possible on the witness. The attorneys may be shown on introduction, the beginning of examination and during objections.

**(e)** It shall not be necessary for a witness to view and/or approve the videotape of a deposition.

**(f)** Any party may purchase a duplicate original or edited tape from the video operator

technician at any time.

[Adopted by order entered December 27, 1989 and approved by the Supreme Court by order entered on February 14, 1990.]

## CERTIFICATE OF SERVICE

I, MARK R. SMITH of Holcomb Dunbar, P.A., do hereby certify that I have this date mailed by United States Mail, Postage Prepaid, a true and correct copy of the above and foregoing **Brief of Appellee** to:

Samuel C. Martin, Esq.
Attorney at Law
Post Office Box 3508
Jackson, MS 39207-3508

This the 17th day of June, 2008.

Mark R. Smith