MISSISSIPPI COURT OF APPEALS

NO. 2008-CA-00605

DEANIE LEE, ET. AL. — APPELLANTS

VERSUS

MISSISSIPPI DEPARTMENT
OF TRANSPORTATION — APPELLEE

BRIEF OF APPELLEE

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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

1. Deanie Lee, Appellant;

2. Summer Jackson, Appellant;

3. Teresa A. Brown, Appellant;

4. Erica Blankinchip, Appellant;

5. Guy Eric Blankinchip, Appellant;

6. J. C. Bell, Trustee for Erica Blankinchip, Ceselie Blankinchip, and Estate of Beverly Blankinchip, Appellant;

7. Ceselie Blankinchip, Appellant;

8. Estate of Beverly Blankinchip, Appellant;

9. Dorothy Sipp, Appellant;

10. A. M. Murphy, Attorney for Appellants;

11. Lawrence Abernathy, Attorney for Appellants;

12. James H. Heidelberg, Esq., Attorney for Appellee; and

13. Harry Schmidt, Esq., Attorney for Appellee

This the 12th day of January, 2009.

JAMES H. HEIDELBERG

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STATEMENT REGARDING ORAL ARGUMENT

Appellee believes that oral argument will be helpful to the Court because the issues of this case deal with the Mississippi Tort Claims Act as well as several of the exceptions to the limited waiver of immunity provided under Mississippi law. These issues can best be decided with the assistance of oral argument before the Court.

STATEMENT OF THE CASE

Factual History

This appeal presents five consolidated cases arising out of personal injuries sustained in an automobile collision. The Plaintiffs sued the Mississippi Department of Transportation, however, because the State of Mississippi and its political subdivisions are provided with statutory immunity, the claims brought by Plaintiffs are barred since the Mississippi Department of Transportation ("MDOT") is immune from these suits.

This lawsuit arose from an accident which occurred on September 21, 2003. Beverly Blankinchip was driving her vehicle south on Highway 63 in George County with passengers Erica Blankinchip, Ceselie Blankinchip and Summer Jackson. Dorothy Sipp also was driving on Highway 63, but in a northerly direction. At the time, there was heavy rainfall in the area.

All of the Plaintiffs claim Ms. Sipp's vehicle hit an area of standing water and hydroplaned, and caused a collision involving the two vehicles. Beverly Blankinchip died as a result of the collision, and Erica Blankinchip, Ceselie Blankinchip, Summer Jackson and Dorothy Sipp suffered personal injuries. (C.P. 562) Plaintiffs all sued the MDOT alleging the MDOT was responsible for the accident and the resulting injuries.

Procedural History

This consolidated case is a result of five lawsuits, filed by: (1) Dorothy Sipp, individually, and (2) on behalf of Summer Jackson, (3) Erica Blankinchip, (4) Cesilie Blankinchip, and (5) Beverly Blankinchip. The suits were separately filed on September 20, 2004, (C.P. 7-9, 333-335, 416-418, 495-497, 561-564) but were consolidated pursuant to Orders of the Circuit Court of George County on January 7, 2005, and February 15, 2005. (C.P. 76-78, 631-633)

Plaintiffs all brought suit against the MDOT alleging a breach of duty in the design and

maintenance of the highway, and Dorothy Sipp additionally alleges in her suit a failure to warn of a danger by the MDOT. (C.P. 7-9, 333-335, 416-418, 495-497, 561-564)

The MDOT filed its Motion to Dismiss or in the Alternative for Summary Judgment on June 1, 2005, with supporting memorandum. (C.P. 92-116) The matter was originally noticed for hearing in 2005, but due to Hurricane Katrina, significant delays were encountered. The MDOT supplemented its Motion to Dismiss on May 31, 2007, and the Court allowed subsequent responses, replies and additional briefing to be made by the Parties. (C.P. 233-237, 238-243, 394-411)[1]

The Motion to Dismiss was again set to be heard on December 6, 2007, but the hearing was continued by the Court. The Court finally heard the matter on January 10, 2008.[2] At the conclusion of the hearing on January 10, 2008, the Court allowed the Plaintiffs yet another opportunity to submit "supplemental material", i.e., material that should have been submitted in a timely fashion prior to the hearing.

Additionally, the motion heard on January 10, 2008, was noticed for hearing on September 18, 2007, and at no time was any "supplemental" material submitted. On January 9, 2008 at 5:43 in the evening – less than twenty-four (24) hours prior to the noticed hearing – Plaintiffs submitted "supplemental" material, which amounted to a list of ten (10) witnesses supposedly subpoenaed to appear the following morning to give testimony.

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[1]The MDOT notes for the Court the record is apparently hand-numbered by the trial Court Clerk and not in chronological order, therefore, the pages of the record cited in this brief will appear to be in a strange sequence and makes reviewing the record in an orderly fashion difficult.

[2]The transcript for the hearing of January 10, 2008 appears in the record but is not numbered as "R" for Record and "C.P." for Clerk's Papers. The transcript of the January 10, 2008 hearing is contained on pages 3 - 37 of the "Transcript of the Proceedings, et al", bearing a filed stamp of July 1, 2008 and contains not only the January 10, 2008 hearing at pp. 3-37, but also the hearing of March 27, 2008, at pp. 38-49.

Plaintiffs submitted no affidavit, as required by MRCP 56, attesting to why Plaintiffs' counsel were unable to procure these ten witnesses' testimony or why counsel were unable to provide more than twenty-four hours notice to the Defendant, and it became apparent the Plaintiffs' strategy was to "try the case" at a motion hearing by calling ten witnesses, and to try a summary judgment by "ambush".

The Court, properly guided by Rule 43(e) of the Mississippi Rules of Civil Procedure, would not allow the testimony, but out of abundance of caution, allowed Plaintiffs additional time to submit affidavits. Even that time period was violated.[3]

Although they argue they were not allowed to provide live testimony because they had "just found out" this information, they never advised of the identity of some of these witnesses in their answers to the MDOT's discovery. The one witness that was allowed to be called at the hearing had meaningless testimony to the case, and some of the affidavits which the Plaintiffs had "just found out about" were dated long before, some two and three years prior to the date of disclosure to the MDOT and the Court. Several of these affidavits (which were inadmissable for a variety of reasons) were sworn to on dates ranging anywhere from six months to two and one half years prior to the date of the hearing purported to contain two "eyewitnesses" whose names did not appear in the official accident report from the Highway Patrol and were not revealed in discovery.

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[3]Apparently, Plaintiffs sought not only a trial at a summary judgment hearing, but one by ambush as well. They sought to call numerous witnesses never disclosed until 5 p.m. the day before the hearing in a case filed for over two years. The Court took note of the irregularities of this procedure in the record:

> "THE COURT: ... what do you have - who do you plan to call that is going to add anything different than your affidavits?
>
> MR. ABERNATHY: Well, we have a good many things that will be in addition to the affidavits." (Transcript of proceedings, p. 10.)

Also, the Plaintiffs sought to use a Resolution from the Greene County Board of Supervisors as some type of proof in this case, although the Resolution was passed two years after the accident and from the Board of Supervisors of Greene County rather than George County, where the accident actually occurred. (See Record pp. 233-237)

A summary and history of the irregularities with the response and opposition to the MDOT's Motion for Summary Judgment is spelled out in the Defendant's Reply to Plaintiffs' Supplemental Response, filed January 18, 2008, and is contained in the record at pp. 257-269.

The Court entered its Order granting summary judgment on January 30, 2008 (C.P. 270-274) and in so finding for the Defendant, the Court opined that Plaintiffs offered no proof of a defect in the design of the highway and the MDOT was immune from suit "because of the discretionary nature of the duties involved, the open and obviousness of the danger alleged and the weather being the cause of the accident." (C.P. 273)(Emphasis added) Judgment was entered in favor of the Defendant on February 8, 2008. (C.P. 290-291)

Following the Court's grant of summary judgment, the Plaintiffs filed a Motion for a "New Trial, et al" on February 8, 2008, and an Amended Motion for "New Trial" on February 16, 2008. (C.P. 277-281, 284-288) These motions were filed despite the fact there was no "trial", but rather a hearing at which summary judgment was granted. The Defendant MDOT timely filed its response to these motions on March 3, 2008. (C.P. 300-309) On March 27, 2008, the Court heard the motion (see transcript of proceeding, pp. 37-49) and denied the Motion for "New Trial" (C.P. 310-311) and subsequently, on April 4, 2008, Plaintiffs filed their Notice of Appeal. (C.P. 312-313)

This Court dismissed this appeal on May 1, 2008, due to the Appellants' failure to comply with the Mississippi Rules of Appellate Procedure. The Appellants moved to reinstate the case, which the Court granted on May 19, 2008.

SUMMARY OF ARGUMENT

The Mississippi Department of Transportation is immune from the claims made in these consolidated suits and quotes the trial court: "Well, ... I've read it, I've looked over the affidavits and, you know, its just not a real difficult issue." (Transcript of proceedings, p. 9.)

The trial court properly granted summary judgment because MDOT is immune from suit under not one, but multiple provisions of the Mississippi Tort Claims Act. Miss. Code Ann. §11-46-9(1) (d), (p), (v), and (q). Specifically, these statutory provisions provide immunity to governmental entities such as the MDOT when acting in a discretionary capacity, for injuries which result from an open and obvious condition, and/or for injuries caused by the weather.

Because each of the above cited provisions independently provides immunity for the MDOT, immunity is granted even if only one of the following circumstances was present:

(1) Road maintenance is a discretionary function and liability may not be based upon failure to perform a discretionary function, pursuant to Miss. Code Ann. §11-46-9(1) (d);

(2) Miss. Code Ann. §11-46-9(1)(p) provides immunity to governmental entities if road design or construction is performed in accordance with highway design standards in effect at the time;

(3) This accident was caused solely by the effect of weather conditions on the use of a state highway, and as such, the MDOT is immune from suit pursuant to Miss. Code Ann. §11-46-9(1)(q); and

(4) Miss. Code Ann. §11-46-9(1)(v) requires a Plaintiff to show the Department had notice, actual or constructive, of a dangerous condition, but regardless it still immunizes government

entities when the danger is open and obvious to a person exercising due care.[4]

Plaintiff Sipp, unlike the other plaintiffs, argues the MDOT had a duty to "warn" of a dangerous condition on Highway 63, despite the fact that road maintenance is a discretionary act, and even though she admits she was aware of the condition of which she claims she should have been warned.

Nevertheless, all of the Plaintiffs refuse to acknowledge Miss. Code Ann. §11-46-9(1)(v) clearly states "a governmental entity shall not be liable for the failure to warn of a dangerous condition *which is obvious to one exercising due care.*" (Emphasis added). Opinions from the Mississippi Court of Appeals and our federal courts continuously hold the risk of hydroplaning during rainfall is, by common knowledge, an open and obvious danger. Plaintiffs' own pleadings allege hydroplaning was due to water on the road that came from rainfall.

Plaintiffs also make the peculiar argument that although rainwater caused the vehicles to hydroplane, the trial court nevertheless erred by finding "weather" was the cause of the accident. In seeking support for this inconsistent proposition, Plaintiffs procured several affidavits that differ somewhat as to only the amount of rain that fell. Despite this attempt to create an issue of fact as to the amount of rain that fell that day, there can be no dispute that water on the road was the result of a rainstorm, no matter how severe and established "weather" for purposes of this lawsuit and the resulting immunity.

In defining "weather", the statute does not distinguish the immunity provided by Mississippi law based on the amount of water on a roadway. It merely states that a governmental entity is

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[4]The MDOT is technically an improper party to this case. The "Mississippi Transportation Commission" is actually the proper entity this claim should be pursued against. The MDOT advised the Plaintiffs below in its pleadings, but no action was ever taken by the Plaintiffs to change the name of the party.

immune from suit for injuries caused by weather. Again, there is no question that the hydroplaning, which Plaintiffs allege caused the accident, was a result of rainfall or "weather", be it termed "heavy" rain, misting or otherwise.

The trial court correctly granted summary judgment to the MDOT. The trial court's order properly applied the Mississippi Tort Claims Act to the case alleged by the Plaintiffs and granted summary judgment in light of Plaintiffs' failure to present any genuine issue of material fact.

The Plaintiffs' brief to this Court fails to establish any error on the part of the trial court, fails to show any genuine issue of material fact required by the rules, and fails to show why any of the four exceptions to the limited waiver of statutory immunity do not apply. The trial court's grant of summary judgment was proper, appropriate and should be affirmed because the MDOT is immune from this suit. **The Mississippi Tort Claims Act provides not merely a defense to liability for the MDOT, but immunity from suit.**

STANDARD OF REVIEW

The Court applies a "de novo standard of review to [a] trial court's grant of summary judgment." *Walker v. Whitfield Nursing Ctr., Inc.*, 931 So.2d 583, 587 (Miss. 2006) (citing *Stuckey v. Provident Bank*, 912 So.2d 859, 864 (P8) (Miss. 2005)). Summary judgment is proper where the evidence shows there is no genuine issue of material fact in the case. Id. at 587 (quoting M.R.C.P. 56(c)).

In addition, the exemption from liability created by Miss. Code Ann. § 11-46-9, like that of qualified or absolute immunity, is 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) citing *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).

ARGUMENT

I. The trial court properly granted summary judgment because the MDOT is immune from suit under the Mississippi Tort Claims Act.

There was no error in the Court's grant of summary judgment. The Court properly found MDOT immune because: (a) no proof was offered to show the plan or design of the highway was defective or negligent;[5] (b) discretionary functions were involved; (c) an open and obvious danger was apparent in this incident; and (d) the accident was a result of weather conditions.

This Court has held that immunity is a question of law and is a matter ripe for summary judgment under Miss. R. Civ. P. 56. *Mitchell v. City of Greenville*, 846 So. 2d 1028, 1029 (Miss. 2003). Additionally, the Court has found there to be "no violation of the right of trial [by jury] when judgment is entered summarily in cases where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983).[6]

The non-moving party must produce specific facts showing there is a genuine material issue for trial, and claims must be supported by "more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *Van v. Grand Casinos*

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[5] The Plaintiffs did not argue on appeal, and therefore waive, any argument as to the trial court's grant of immunity based upon the plan or design of the highway. In any event, Plaintiffs offered no proof of a defective design or plan to the trial court and the affidavit of Todd Jordan presented by Defendant stands uncontested that the highway was built to applicable standards. (See R. 109, affidavit of Todd Jordan attached to MDOT's Motion for Summary Judgment filed June 2, 2005 (R. 92-117))

[6] This case does not involve a jury trial, but the legal principles apply to a bench trial under the Mississippi Tort Claims Act. This is referenced because the Plaintiffs filed a Motion for a "New Trial" after the Trial Court entered summary judgment. (See the Court's comments in the Transcript of Proceedings, p. 38.)

of Mississippi, Inc., 767 So. 2d 1014, 1018 (Miss. 2000).

While the Plaintiffs in this case may allege a number of facts are in dispute, summary judgment was proper. Only those disputed facts that "affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[7] *Summers v. St. Andrew's Episcopal School, Inc.*, 759 So. 2d 1203, 1208 (Miss. 2000). Therefore, Plaintiffs cannot overcome the statutory immunity afforded to MDOT.

II. Mississippi law establishes road maintenance as a discretionary action for which immunity is provided. (§11-46-9(1)(d))

It is well settled under Mississippi law that road maintenance is a discretionary function rather than a ministerial one. *Mohundro v. Alcorn County*, 675 So.2d 848, 853-54 (Miss. 1996). In *Mohundro*, the Mississippi Supreme Court cited a multitude of earlier cases which held that road maintenance and repair are discretionary functions. (See *State for the Use and Benefit of Barazeal v. Lewis*, 498 So.2d 321, 322, Miss. 1986; *Coplin v. Frances*, 631 So.2d 752, 754-755 (Miss. 1994); *Brewer v. Burdette*, 768 So.2d 920, 923 (Miss. 2000) and; *Land v. Bay St. Louis-Waveland School District*; 764 So.2d 1234, 1239 (Miss. 1999)).

The Mississippi Court of Appeals decision in *Willingham v. Mississippi Trans. Comm'n*, 944 So. 2d 949 (Miss. Ct. App. 2006) reiterated the point that immunity is granted if an employee's act is discretionary, "regardless of whether due care was exercised in the execution of the duty." *Willingham, supra*, 944 So. 2d 949 (Miss. Ct. App. 2006) citing *Collins v. Tallahatchie County*, 876 So.2d 284, 289 (¶ 17) (Miss. 2004).

Road maintenance is considered to be a discretionary function for which immunity is granted

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[7]A party cannot create a "dispute" merely by arguing his own witnesses disagree with each other on a non-material issue.

under Miss. Code Ann. §11-46-9(1)(d) and is well settled under Mississippi law. The *Willingham* opinion clarified the nature of certain duties established by law regarding road maintenance and stated Miss. Code Ann. §63-3-303, which appellants claimed created a ministerial statutory duty to place warning signs, actually created "a statutory duty that must be carried out in a discretionary matter." *Willingham* at ¶ 11.

Mississippi precedent provides "[w]hen an official is required to use his own judgment or discretion in performing a duty, that duty is discretionary," and holds the statutory language "*as it shall deem necessary*" requires Mississippi Transportation Commission (MTC) employees to use their own discretion about when and where to place the highway signs. *Id.* Citing *Harris v. McCray*, 867 So.2d 188, 191 (¶ 12) (Miss. 2003). Because this duty is discretionary, under Miss. Code Ann. § 11-46-9(1)(d), the MDOT is immune from suit.

In addition to the discretionary duty established by law, the procedure by which funds are allotted to each MDOT project establishes a discretionary funding mechanism. Richard Lee, District Engineer for MDOT, stated by sworn affidavit that "[t]he District is allotted a finite amount of funds annually for road maintenance. At the discretion of the Agency, those finite available funds are used where the Agency believes they are needed the most, particularly on the roads of the State in the most need of repair." (Affidavit, Richard Lee, District Engineer for MDOT at C.P. 402-3)

Because road maintenance has been determined by the Mississippi Supreme Court to be a discretionary function and the funding procedure for road projects grants discretion to the Agency to determine which projects should be funded, it is clear that MDOT's actions were discretionary in nature.[8]

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[8]The MDOT does not concede that road maintenance was the cause of this accident.

III. Mississippi law immunizes the State and its political subdivision from an open and obvious condition. (§11-46-9(1)(v))

The Plaintiffs maintain that *Frazier v. Miss. Dept. of Transp.*, 970 So. 2d 221 (Miss. 2006) establishes a duty to warn of a known dangerous condition.[9] However, the Plaintiffs seem to ignore the fact that Mississippi law provides a clear caveat to any duty to warn. Mississippi law states:

> (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:
>
> (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*. (emphasis added) Miss. Code Ann. §11-46-9(1)(v)

The *Willingham* decision firmly places the facts of this case within the open and obvious exception.[10] Plaintiffs assert that hydroplaning due to weather conditions is not open and obvious, and the court ignored the facts provided by the Plaintiff and singled out facts asserted by the Defendant. This statement is certainly unfounded, particularly in light of the Mississippi Supreme Court's holding in *Willingham*:

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[9] The *Frazier* decision does not involve an open and obvious condition as is found in the matter at hand, but *Willingham* and *Rosales v. Mississippi Transportation Comm.*, No. 3:01-CV-39WS (S.D. Miss. 2002) do. These cases have nearly identical facts to this matter and must be considered as the applicable law regarding the application of the immunity provided by the Mississippi Tort Claims Act in hydroplane car accident cases. Furthermore, the Mississippi Court of Appeals upheld summary judgment in *Frazier* because the Plaintiff never established that MDOT had notice of a dangerous condition.

[10] The Court should recall four of the five plaintiffs do not even assert a failure to warn claim as their cause of action, only plaintiff Sipp makes such an allegation.

> It is elementary, common knowledge that driving is more dangerous and should be approached more carefully during bad weather, such as the weather at the time of the accident in question. Although the pavement at question in this case was rutted and may have heightened the risk for hydroplaning, the risk of hydroplaning during rainfall is an open and obvious danger, such that the MTC is shielded under the MTCA. *Willingham v. Mississippi Trans. Comm'n*, 944 So. 2d 949 (Miss. Ct. App. 2006). (Emphasis added)

Additionally, in her Complaint, Plaintiff Sipp alleges, "she encountered standing water in the road surface due to the road surface being 'rutted'. The weather conditions prevailing at the time in question was a light rain, that *[sic]* had previously rained in the area of the accident, but the rain had diminished significantly. Plaintiff was driving her vehicle at a reduced speed because of the wet conditions." (TR 562) By Plaintiff Sipp's own admission she acknowledges she was aware of the rainwater on the road which created the alleged "dangerous condition" of which she now complains. Yet she argues she should have been "warned" of what she admits she already knew.

Likewise, in *Rosales v. Miss. Trans. Comm.*, 2:01-CV-39WS, at 8 (S.D. Miss. 2002), the United States District Court for the Southern District of Mississippi granted summary judgment in a nearly identical hydroplane case.[11] The *Rosales* Court, in applying the Mississippi Tort Claims Act, held that "water standing in a roadway at issue during a sudden downpour of rain is a dangerous condition obvious to any driver exercising due care." *Id.* (Emphasis added)

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[11] The Plaintiffs cite *Howard v. City of Biloxi*, as the standard as to establish a duty to warn of a dangerous condition. Plaintiffs fail to acknowledge that the Mississippi Court of Appeals upheld summary judgment in Howard, specifically noting that the condition of the sidewalk was open and obvious and therefore operated as an absolute bar to recover under the Mississippi Tort Claims Act. *Howard v. City of Biloxi*, 943 So.2d 751, 756 (Miss. 2006).

IV. The trial court was correct in holding that weather was the cause of the accident, therefore, immunizing the MDOT. (§11-46-9(1)(q))

Plaintiffs' case is premised on their claim it rained at the accident site, and it rained heavily in the surrounding area prior to the accident. This being the case, there can be no question that "weather" created an obviously more dangerous road condition than normal and Mississippi courts have found the MDOT immune from suits resulting from such conditions. The exception, even from the limited waiver of liability is for "weather", not from "heavy" versus "light" rain, but weather, no matter the severity. Miss. Code Ann. §11-46-9(1)(q). Clearly *Willingham* and *Rosales* are dispositive of Plaintiffs' contention that water on the road was not the cause of the accident. It is after all the Plaintiffs who assert the accident was due to rainwater on the roadway!

The trial court did not err in finding weather to be the cause of the accident, in fact, it agreed with Plaintiffs' contention that weather was the cause. In fact, the Court's order states that "a heavy downpour occurred causing water to puddle on the highway." (C.P. 270-274) This is confirmed by the Plaintiffs' own statements in the Supplemental Investigation Report prepared by the Mississippi Highway Patrol where Plaintiff Summer Jackson was reported to have stated, "it was raining heavy when the collision occurred," and Plaintiff Cesilie Blankinchip stated, "Beverly was driving about 50-55 mph during a heavy rainstorm." (C.P. 110-115) In fact, the Order clearly states that rain caused water to puddle on the highway. This point is clearly made by the Plaintiffs and any discrepancy as to the characterization of the rainfall on this point, as legally irrelevant as they may be, are attributed to the inconsistencies in the various affidavits submitted by the Plaintiffs. The assortment of affiants relied on and produced by the Plaintiffs stated as follows:

> "A heavy rain had passed just prior to the accident and that [sic] a light rain was falling, the road was full of water." Affidavit of Lorena Clark (C.P. 146).

"At least 4 or 5 hours prior to the wreck the weather was a drizzle or light rain. It was not storming nor was there any heavy rain." Affidavit of Steve Capello (C.P. 230)

"On the day of the accident it did not rain hard, just a drizzle, light type rain." Affidavit of Hollis Welford (C.P. 231)

"It had been raining heavily up until about 10 minutes before the accident, and at that time the rain was a light rain." Affidavit of Roosevelt Love, Jr., (C.P. 136-7)

"It had rained heavily from Beaver Dam Road and U.S. Highway 98 to U. S. 98 and its intersection with State Highway No. 63 North. As I crossed the intersection of U. S. 98 and State Highway 63, the rain had changed from heavy to a light rain." Affidavit of Dorothy Sipp (C.P. 149)[12]

Regardless of the language in the affiants' various descriptions as to the amount of rain, (presumably all prepared by Plaintiffs' counsel), it does not create a question of material fact - it is undisputed the alleged pooling water in the roadway was caused by rainfall, be it heavy or light.

Plaintiffs attempt to shift a burden to the MDOT by arguing the MDOT never put forth evidence the water was the sole cause of the accident. This is a strange argument since Plaintiffs' entire case is based on hydroplaning from rainwater. Plaintiff Sipp alleges in her Complaint that the water pooled in the roadway and the water was a result of rainfall. (C.P. 561-564) The Plaintiffs' very own allegation asserts that the condition causing the accident was caused by the effect of "weather" conditions. (C.P. 561-564) It certainly follows there would be no water in the roadway had it not rained. She does not allege or even imply an accident would have occurred without the rainfall.

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[12]The MDOT moved to strike the numerous affidavits as inadmissible for a variety of reasons. Regardless, even if the Court relied on these affidavits, it found that none met the legal standard required of the Plaintiffs.

Just as in *Rosales* where our District Court held that "the alleged standing water was a condition caused solely by the effect of the weather conditions," and likewise in *Willingham*, where the Court of Appeals stated "the risk of hydroplaning during rainfall is an open and obvious danger," the rainwater on the roadway was a result of weather conditions and thus the Mississippi Tort Claims Act exempts this claim. *Rosales* at 10; *Willingham*, 944 So. 2d at 953.

CONCLUSION

The trial court properly granted summary judgment based on a total lack of proof as to a defect in the design of the highway, the fact that discretionary functions were involved, and that an open and obvious danger was created by weather conditions. The Mississippi Tort Claims Act clearly establishes a caveat to any duty to warn of a dangerous condition when the condition is open and obvious to one exercising due care. The Mississippi Court of Appeals specifically defines hydroplaning during rainfall as an open and obvious danger. Furthermore the Act provides immunity when an injury is caused by weather. No genuine issue of material fact exists disputing the fact the water on the road was the result of rainfall, which is "weather".

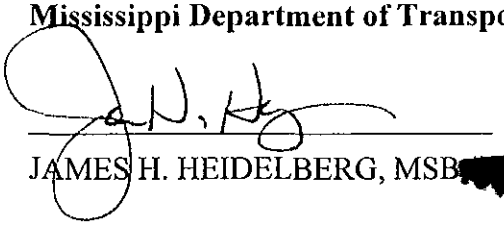
The Court must further recall the Mississippi Court of Appeals has held that each immunity provision under Miss. Code Ann. §11-46-9(1) is independent of the other, so if any of the provisions apply, then the State and its political subdivisions such as the MDOT are immune from suit. *Pearl River Valley Water Supply District v. Bridges*, 878 So.2d 1013 (Miss. Ct. App. 2004). MDOT is immune under at least four provisions of Miss. Code Ann. §11-46-9(1), specifically subsections (d), (p), (v) and (q), as its actions were discretionary and the accident was the result of an open and obvious danger caused by weather.

Because there is no genuine issue of material fact to take this case out of the exception to

even the limited waiver of sovereign immunity, and the Plaintiffs fail to establish any error in the judgment of the Circuit Court of George County, the MDOT respectfully requests this Court affirm the judgment granted by the Circuit Court of George County.

Respectfully submitted,

Mississippi Department of Transportation

BY: 

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CERTIFICATE

I, JAMES H. HEIDELBERG, of the firm of Heidelberg, Steinberger, Colmer & Burrow, P.A., do hereby certify that I have served a true and correct copy of Appellee's Brief to:

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Hon. Kathy Jackson
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THIS, the 12th day of January, 2009.

JAMES H. HEIDELBERG