IN THE SUPREME COURT OF MISSISSIPPI
2008-CA-00640

LOIS KAIGLER on behalf of herself and her minor child, LESHAN KAIGLER — APPELLANTS

V.

HANCOCK COUNTY, THE CITY OF BAY ST. LOUIS and VCJ GYM — APPELLEES

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APPEAL FROM
THE CIRCUIT COURT OF HANCOCK COUNTY
CIVIL ACTION NO. 04-0121

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# BRIEF OF APPELLEE THE CITY OF BAY ST. LOUIS AND VCJ GYM

**ORAL ARGUMENT REQUESTED**

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II. THE APPELLEES ARE ENTITLED TO STATUTORY IMMUNITY PURSUANT TO THE MISSISSIPPI TORT CLAIMS ACT, MISS. CODE ANN. SECTION 11-46-1, et. seq.

## STATEMENT OF THE CASE

On December 11, 2002, Leshan Kaigler, who was 12 years old at the time, tagged along with his older sister to her basketball practice at the VCJ Gym in Bay St. Louis, Hancock County, Mississippi. (Record Excerpt 4- Deposition of Lois Kaigler p.25-28; Record Excerpt 5 - Deposition of Leshan Kaigler p.5-8) Leshan took his basketball with him in the hope that he would have the opportunity to "shoot a little hoop." (Record Excerpt 5 - Deposition of Leshan Kaigler p.5) Leshan's deposition testimony indicates that, while he was waiting on his sister and her team to finish practice with the coach, two (2) older boys, Danny Dorsey and Dermerik Williams,[1] came and took his basketball. (Record Excerpt 5 - Deposition of Leshan Kaigler p. 7; Record Excerpt 4 - Deposition of Lois Kaigler p. 20) Leshan testified that he ran after them to retrieve it, the boys threw the basketball back and forth and then Danny Dorsey threw the basketball through an opening between the roof and the drop down ceiling tiles. (Record Excerpt 5 Deposition of Leshan Kaigler p. 8,13 ) At Leshan's request, Danny retrieved the ball only to throw it to Dermerik. (Record Excerpt 5 - Deposition of Leshan Kaigler p. 8, 23, 24 and 27; Record Excerpt 4 - Deposition of Lois Kaigler p. 26, 89) Dermerik then threw the ball onto the drop down ceiling tiles. (Record Excerpt 5 - Deposition of Leshan Kaigler p. 8, 23, 24, 27 ) This time both Danny and Dermerik refused to get the basketball. Leshan climbed up and onto the drop down ceiling tiles to retrieve his basketball, fell through the ceiling tiles to the floor below and

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[1] The Bay St. Louis Police Department's Narrative Report indicated that the two young men were Danny Dorsey and Derrek Lewis.

sustained an injury.(Record Excerpt 5 - Deposition of Leshan Kaigler p. 8, 9, 23 and 24; Record Excerpt 4 - Deposition of Lois Kaigler p. 27, 89-90)

Officer Isreal Neff of the Bay St. Louis Police Department completed an incident report on 12/11/02. The Report was later supplemented by the investigation of Officer Ernest Taylor. Officer Taylor's Narrative Report sets forth that "Derreck Lewis threw Kaigler's basketball on top of the false ceiling and Danny Dorsey went and got it for Kaigler. Then "Jr." took the ball from Kaigler and threw it on the ceiling. When Dorsey didn't immediately go get the ball, Kaigler climbed on top of a box and pulled himself over the top of the wall began crawling on the ceiling tile, the ceiling tile broke and Leshan fell 10 - 12 feet before landing head first on the concrete floor in the hallway next to the water fountain." (Record Excerpt 3) The incident occurred at approximately 6:14 p.m. on December 11, 2002.

**PROCEDURAL STATUS**

The Complaint was filed March 26, 2004. (Record p.3-7) On August 3, 2004 the City Bay St. Louis and the VCJ Gym timely filed its Answer, Defenses, and Affirmative Defenses and propounded written discovery to the Plaintiffs. (Record p. 1, 8-13) On August 4, 2005, Hancock County was dismissed. (Record p.14-15) The depositions of Lois Kaigler and Lashan Kaigler were taken on February 9, 2006. The City of Bay St. Louis and the VCJ Gym filed a summary judgment motion, statement of undisputed facts and submitted memorandum brief in support thereof to Judge Simpson, on May 2, 2007. (Record Excerpt 2)

Plaintiffs' took no depositions in this action. Plaintiffs submitted a reply brief on September 4, 2007. Bay St. Louis submitted its rebuttal brief to Judge Simpson on September 28, 2007. The hearing on the Summary Judgment Motion was set on October 5, 2007. Plaintiffs'

counsel was delayed and the hearing did not go forward. Plaintiffs then improperly filed a Sur Rebuttal Brief on October 5, 2007, asserting for the first time that Bay St. Louis failed to maintain the building housing the VCJ Gym in compliance with the Mississippi Fire Prevention Code. Plaintiffs' allegation that the VCJ Gym was not in compliance with the Mississippi Fire Prevention Code was not supported by expert affidavit, and at no time did Plaintiffs' identify an expert witness who would testify in support of this allegation.

Defendants' Motion for Summary Judgment came on for hearing before the Hancock County Circuit Court on October 19, 2007. ( Record Excerpt 9) At that time, Defendants attempted to call Edward Bourgeois, Fire Inspector for the City of Bay St. Louis, to testify that the VCJ Gym was in compliance with the Mississippi Fire Code in December 2002. (Record Excerpt 9, p.4, 17) Plaintiffs objected. (Record Excerpt 9, p. 17-18) The trial court continued the hearing to allow Defendants to supplement the record with an Affidavit from Mr. Bourgeois and to file a response to Plaintiffs' Sur Rebuttal arguments. (Record Excerpt 9, p.18) And to allow Plaintiffs to depose Mr. Bourgeois or otherwise respond to the Affidavit. (Record Excerpt 9, p.18) The Court issued its Opinion and entered a Judgment granting Defendants' Motion for Summary Judgment, on February 21, 2008, before the Defendants' were able to file its Response and Affidavit of Mr. Bourgeois. (Record Excerpt 8)

## SUMMARY OF THE ARGUMENT

At all times relevant to this matter, the VCJ Gym was located in a municipal building owned and maintained by the City of Bay St. Louis, therefore Bay St. Louis is immune from the allegations of negligence asserted by the Kailgers pursuant to the Mississippi Torts Claim Act.

Miss. Code Ann. §11-46-1, *et. seq*. The maintenance and operation of the VCJ Gym was within the discretion of Bay St. Louis.

The Kaiglers cannot defeat this statutory immunity because there are no relevant material facts to support any allegation that Leshan was injured due to a dangerous condition in the VCJ Gym which Bay St. Louis caused by negligence or wrongful conduct, or of which Bay St. Louis had actual or constructive notice and failed to warn.

Leshan was injured after he fell from the hallway ceiling which was suspended 12 feet above the level of the floor. The ceiling was not a dangerous condition. The ceiling was certainly not hidden or camouflaged or otherwise constructed to resemble anything other than ordinary common ceiling tiles. The ceiling was simply that: ceiling tiles placed in a drop down ceiling suspended 12 feet above the level of the floor and clearly visible to anyone that looked up. Unless a ceiling caves in on someone as they walk underneath, a ceiling is not dangerous. The ceiling was not unlike the ceilings found in homes and businesses throughout Mississippi and there is no requirement that warning signs be posted.

Even if the action of the two boys in throwing Leshan's basketball onto the ceiling tiles had been found to have somehow created a dangerous condition, Bay St. Louis had no knowledge that the dangerous condition had been created. Therefore, Bay St. Louis did not have adequate time to warn against the condition. The condition of the ceiling was not the proximate cause of Leshan's injury. The cause of the injury was the independent intervening acts of two boys.

Plaintiffs have raised the issue of whether the VCJ Gym was maintained in compliance with the fire code. Plaintiffs have not offered any evidence to support their allegations that the building

did not meet the applicable fire code. At the hearing on Defendants' Motion for Summary Judgment, Eddie Bourgeois, the City of Bay St. Louis Fire Inspector, was present and prepared to offer testimony that the VCJ Gym was in compliance with the applicable fire code. Plaintiffs objected to this proffer of testimony, and prior to Defendants submission of an affidavit from the Fire Inspector, the trial court entered its Judgment granting the Defendants' Motion for Summary Judgment finding that no issue of genuine fact existed and that the Plaintiffs had failed to provide any affidavit or other evidence to establish that the applicability of the fire codes or how any alleged violation caused or contributed to Leshan's fall.

The Plaintiffs did not offer any evidence to rebut the Summary Judgment motion filed by Defendants. Defendants agree that the Plaintiffs do not have to prove all elements of their case in order to defeat summary judgment; however, they are required to produce evidence to rebut that presented by the Defendants and it is clear that they did not. Plaintiffs contend that they "will prove at trial" yet to proceed to trial Plaintiffs were required to overcome the Defendants' Motion for Summary Judgment, which they have failed to do.

The Judgement entered by Circuit Judge Stephen B. Simpson found that "the maintenance and operation of the VCJ Gym is a discretionary function and within the immunity granted by Miss. Code Ann. §11-46-9 (1)(d)." (Record Excerpt 8). The court also found that "there was no other duty to supervise established by Plaintiffs which could give rise to liability on the part of the City of Bay St. Louis." (Record Excerpt 8).

The trial court, citing *Glorioso v. YMCA,* 540 So.2d 638, 641 (Miss. 1989), found that when Leshan Kaigler entered the gym he was an invitee, and that the City of Bay St. Louis owed

him the duty of ordinary care to keep the gym premises in reasonably safe condition and to warn of dangerous conditions which were not apparent and which the city knew or, through the exercise of reasonable care, should have known about. ( Record Excerpt 8). The court correctly held that the ceiling was not a dangerous condition, and that the Plaintiffs had failed to provide any evidence from which a reasonable finder of fact could conclude that the ceiling constituted a dangerous condition. ( Record Excerpt 8). Therefore, there was no duty to warn, as there was no dangerous condition. The trial court further found that Leshan created the danger to himself when he chose to crawl onto the ceiling tiles to retrieve his basketball; this action and not the premises was dangerous. When Leshan scaled the wall to climb onto the drop down ceiling he also lost his status as an invitee and became a trespasser. Thus, the duty owed to Leshan was to refrain from willfully or wantonly injuring him. No evidence was presented, by the Plaintiffs, which would show that there are material issues of fact in dispute and therefore the Hancock County Circuit Court's grant of summary judgment was proper and should be affirmed.

## SUMMARY JUDGMENT STANDARD

Summary judgment is a viable method of resolving premises liability cases. In *Ratciff v. Rainbow Casino Partnership* the Mississippi Court of Appeals expressly rejected a request by the Plaintiff that the Court adopt a procedural requirement that all premises liability cases must go to a jury holding that "summary judgment was available to help unclog already over crowded dockets by throwing out cases where a Plaintiff is unable to show any genuine issue of material fact." *Ratcliff v. Rainbow Casino Partnership,* 914 So. 2d 762, 767 ¶14 (Miss. Ct. App. 2005).

This Court reviews a trial court's grant of summary judgment de novo, and "examines all the evidentiary matters before it - - admissions, pleadings, answers to interrogatories, depositions, affidavits, etc." *City of Jackson v. Sutton,* 797 So. 2d 977, 979 ¶7 (Miss. 2001). The moving party has the burden of demonstrating that no genuine issue of material facts exists, and the non-moving party must be given the benefit of every doubt concerning the existence of a material fact. *Id.* "If no genuine issue of material fact exist and the moving party is entitled to judgment as a matter of law, summary judgment should be entered in that party's favor." *Monsanto Co. v. Hall,* 912 So. 2d 134, 136 ¶5 (Miss. 2005).

The Mississippi Rules of Civil Procedure authorize the granting of summary judgment where there are no genuine issues of material fact as set forth in pertinent part in Rule 56(c), as follows:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

Miss. R. Civ. P. 56(c).

A party against whom a claim is asserted may move with or without supporting affidavits for summary judgment in his favor, so long as the motion is served at least ten days before the time fixed for the hearing. *Miss. R. Civ. P.* 56. Initially, the party moving for a summary judgment bears the responsibility of providing the court with the basis of its motion and identifying the portions of the record in the case which establish the absence of a genuine issue of material

fact. *Franklin v. Thompson*, 722 So.2d 688, 691 ¶8 (Miss. 1998); *Howard v City of Biloxi*, 943 So.2d 751,754 ¶4(Miss. Ct. App. 2006). However, once the moving party has properly supported his motion for summary judgment, the non-moving party must respond by setting forth specific facts showing there is a genuine issue for trial. *Brown v. Credit Ctr. Inc.*, 444 So.2d 358, 363 (Miss.1983).

The party opposing the motion must be diligent and may not rest upon allegations or denials in the pleadings, but must by allegations or denials set forth specific facts showing that there are genuine issues for trial. *Id. citing* Miss. R. Civ. P. 56(c). In other words, "when a motion for summary judgment is filed, the nonmoving party must rebut by producing significant probative evidence showing that there are indeed genuine issues for trial." *Foster v. Noel*, 715 So.2d 174, 180 ¶35 (Miss.1998) (*citations omitted*). "Mere allegation or denial of material fact is insufficient to generate a triable issue of fact and avoid an adverse rendering of summary judgment. More specifically, the plaintiff may not rely solely upon the unsworn allegations in the pleadings, or arguments and assertions in briefs or legal memoranda." *Palmer v. Biloxi Regional Medical Ctr.*, 564 So. 2d 1346, 1356 (Miss. 1990).

The Mississippi Supreme Court has said that "where a party opposes summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, and when the moving party can show *a complete failure of proof* on an essential element of the claim or defense, then all other issues become immaterial, and the moving party is entitled to judgment as a matter of law." *Grisham v. John Q. Long V.F.W. Post,* 519 So.2d 413, 416 (Miss.1988). Finally, the trial court must carefully review all evidentiary matters in the light most favorable to the non-

moving party. *Delmont v Harrison County School District,* 944 So. 2d 131,133 ¶4 (Miss. Ct. App. 2006); *Brown v. Credit Ctr., Inc.,* 444 So. 2d 358, 363 (Miss. 1983).

The Mississippi Supreme Court has consistently upheld the granting of summary judgment when an analysis of the relevant material facts demonstrates that the non-moving party cannot prevail against the defendant as a matter of law. See *Massey v. Tingle*, 867 So. 2d 235, 238 ¶7 (Miss. 2004) (citing *Hudson v. Courtesy Motors, Inc.,* 794 So. 2d 999, 1002 ¶7(Miss. 2001)).

## ARGUMENT

### I. THE KAIGLERS HAVE FAILED TO SHOW THAT LESHAN WAS INJURED DUE TO A DANGEROUS CONDITION IN THE VCJ GYM WHICH BAY ST. LOUIS CAUSED BY NEGLIGENCE OR WRONGFUL CONDUCT, OR OF WHICH BAY ST. LOUIS HAD ACTUAL OR CONSTRUCTIVE NOTICE AND FAILED TO WARN.

Plaintiffs have asserted that the injuries Leshan suffered on December 11, 2002 were due to the negligence of the Defendants under the theories of negligent supervision and/or premises liability. (Record Excerpt 1) In order to prevail under either of their theories, Plaintiffs must establish, by a preponderance of the evidence, all four elements of negligence, which are duty, breach of duty, proximate cause and damages. *Schepens v. City of Long Beach*, 924 So. 2d 620, 623 ¶9 (Miss. Ct. App. 2006).

Mississippi applies a three step process in determining premises liability: first, the injured party must be classified as an invitee, licensee or trespasser; second, the duty of the business or landowner owes the injured party is determined; and, third, a determination is made as to whether the business or landowner breached its duty. *Thompson v. Chick-Fil-A, Inc.,* 923 So. 2d 1049, 1052 ¶8 (Miss. Ct. App. 2006); *Cook v. Payless Shoesource, Inc.*, 2006 U.S. Dist. LEXIS 33151

( S. D. Miss. 2006). The duty owed by the Defendants to Plaintiffs' depends upon their relationship to each other. *Skelton v. Twin County Rural Electric Assoc.,* 611 So. 2d 931, 936 (Miss. 1992). In order to establish what duty was owed to Leshan by The City of Bay St. Louis and The VCJ Gym, Leshan's status must be determined.

**A. What was Leshan's status at the time he entered the gym and at the time of his injury?**

The parameters of the classification for an invitee, licensee and trespasser were reaffirmed by the Mississippi Supreme Court in *Leffler v. Sharp*, as follows:

> . . . an *invitee* is a person who goes upon the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage. . . A *licensee* is one who enters upon the property of another for his own convenience, pleasure, or benefit pursuant to the license or implied permission of the owner whereas a *trespasser* is one who enters upon another's premises without license, invitation, or other right." *Corley v. Evans*, 835 So. 2d 30, 37 (Miss. 2003) (emphasis added) (*citing Hoffman v. Planters Gin Co.*, 358 So. 2d 1008, 1011 (Miss. 1978) (*citing Langford v. Mercurio,* 254 Miss. 788, 183 So. 2d 150 (1966)); *Wright v. Caffey*, 239 Miss. 470, 123 So. 2d 841 (1960)). The Court has added that a trespasser enters another's property "merely for his own purposes, pleasure, or convenience, or out of curiosity, and without any enticement, allurement, inducement or express or implied assurance of safety from the owner or person in charge." *Titus*, 844 So. 2d at 459 (*citing White v. Miss. Power & Light Co.*, 196 So. 2d 343, 349 (Miss. 1967)).

*Leffler v Sharp*, 891 So. 2d 152, 156 - 157 ¶11 (Miss. 2004).

In Mississippi, a person using municipal property is generally considered an invitee. *Glorioso v. YMCA*, 540 So. 2d 638, 641(Miss. 1989). Although Lois Kaigler, Leshan's mother, admitted that at the time of Leshan's accident the gym was only open for girls who had practice, she also stated that the League Coach had given Leshan permission to be there if he sat quietly.

(Record Excerpt 4 - Deposition of Lois Kaigler sp.28 ) Thus, for the purposes of the Motion For Summary Judgment, and taking the facts in the light most favorable to Leshan, the Defendants did not disagree that Leshan was an "invitee" when he entered the Gym. However, at the time of the accident, Leshan's classification had changed to "trespasser."

The Mississippi Supreme Court has held that a person's classification changes from invitee to trespasser once the person goes beyond the bounds of his invitation. *Leffler v. Sharp,* 891 So. 2d 152, 157 ¶15 (Miss. 2004) (citing *Payne v. Rain Forest Nurseries, Inc.*, 540 So. 2d 35, 38(Miss. 1989)). In *Leffler*, the Mississippi Supreme Court addressed a situation in which the parties had stipulated that Plaintiff Walter Leffler was an invitee when he entered the business premises of the Quarter Inn, but disagreed on his classification at the time he was injured. *Leffler*, 891 So. 2d at 155-156 ¶7. Leffler and some co-workers had been having a night on the town before ending up at the Quarter Inn around 2 a.m. *Id.*, at 155 ¶2. At some point after his arrival, Leffler wanted some fresh air. He had noticed that two other patrons were outside a narrow second story window on an adjacent roof top. When he then observed them re-entering the Quarter Inn by climbing through a small window, he decided that he would climb through the small window out onto the adjacent roof top to escape "the crowd, loud music, heat and smoke a cigarette." *Id.*, at 158 ¶20. After climbing through the window and taking a few steps on the rooftop, Leffler fell through the roof and landed 20 feet below. The *Leffler* Court determined that at the time of the injury Leffler was not an invitee because he was not invited to go onto the roof, and was not a licensee because he had not been given implied permission to go onto the roof. *Id.*, at 158 ¶19. The *Leffler* Court held that when Leffler climbed out of a window and onto the roof, Leffler was a trespasser. *Id.*, at 159-160 ¶24.

In the present case, when Leshan scaled the 12 foot wall to climb onto a drop down ceiling, Leshan lost his status as an invitee and became a trespasser. Leshan had gone beyond the bounds of where he was invited to be. There was no invitation or implied permission for the public to scale the walls of gym and climb on the ceilings. Thus at the time of the accident Leshan was a trespasser.

**B. What duty was owed to Leshan?**

On December 11, 2002, the duty Bay St. Louis initially owed to Leshan, as well as to his sister Tywanna, as "invitees" to the Gym can be compared to the general duty owed by a "business owner" to a "business invitee." Bay St. Louis was charged with a duty of ordinary care to keep the premises in a reasonably safe condition, and to warn of dangerous conditions which were not apparent to the invitee and of which Bay St. Louis knew or through the exercise of reasonable care should have known. However, Bay St. Louis was not the insurer against all injuries which might have occurred at the VCJ Gym. *Miss. Dept. Wildlife, Fisheries & Parks v Brannon*, 943 So. 2d 53, 64 ¶30 (Miss. Ct. App. 2006).

Once Leshan's classification changed to "trespasser," the duty changed and Bay St. Louis was simply charged with the duty "to refrain from willfully or wantonly injuring him." *Leffler*, 891 So. 2d at 159 ¶22. "An owner owes trespassers no duty to keep his premises in a safe condition for their use, and as a general rule is not responsible for an injury sustained by a trespasser upon the premises from a defect therein." *Leffler*, 891 So. 2d at 159 ¶23 (citing *Kelly v Sportsmen's Speedway*,80 So. 2d 785, 791(Miss. 1955).

**C. Did Bay St. Louis breach its duty to Leshan to maintain the premises in a reasonably safe condition or warn of a hidden danger?**

The trial court correctly determined that Leshan did not retain his status as an invitee at the time of his injury, and that the Defendants did not breach their duty to Leshan to maintain the premises in a reasonably safe condition. The VCJ Gym was reasonably safe. Specifically, the ceiling was reasonably safe. The VCJ Gym was not in perfect condition, but perfection is not required. In support of their assertions that the building was not safe, Plaintiffs produced photocopies of photographs of various areas of the VCJ Gym which were in disrepair. These photographs did not create a genuine issue of material fact about the safety of the ceiling because the ceiling did not fall on Leshan injuring him. Plaintiffs cannot support their assertion that the ceiling was unsafe by pointing to an unrelated area of the building.

The ceiling did not fall down upon Leshan injuring him nor did Leshan trip and fall over a defect in the floor. The condition of the ceiling in the hallway of the gym was not the proximate cause of Leshan's injuries. Leshan climbing onto the drop down ceiling was the proximate cause of Leshan's injuries.

Further , the trial court properly held that Leshan was a trespasser when he climbed onto the ceiling and fell because such behavior exceeded the bounds of his invitation. Bay St. Louis neither invited, enticed, allured nor induced him to ascend a 12 foot wall. Bay St. Louis did not throw the basketball onto the drop down ceiling to lure him onto the ceiling tiles. There was no ladder in the hallway that Leshan used to climb onto the ceiling to retrieve his basketball. Leshan testified that he did not climb on anything in order to reach his basketball. (Record Excerpt 5- Deposition of Leshan Kaigler p. 8, 9, 23 and 24; Record Excerpt 4 - Deposition of Lois Kaigler p. 27, 34) A landowners duty to a trespasser is to refrain from willfully or wantonly injuring the trespasser. *Leffler*, 891 So. 2d at 159 ¶22 (citing *Saucier ex. rel. Saucier v Biloxi Reg'l Med.*

*Ctr.*, 708 So. 2d 1351, 1357 (Miss. 1998). There was no express or implied assurance of his safety once he became a trespasser. Clearly, Bay St. Louis did not willfully or wantonly injury Leshan.

The ceiling at issue had been installed in the VCJ Gym at least since 1992 and was in plain sight. (Record Excerpt 7 - Affidavit of Ronald Vanney) The ceiling was constructed of the same ordinary ceiling tiles found in both homes and businesses. The ceiling was certainly not hidden or camouflaged or otherwise constructed to resemble anything other than an ordinary ceiling with ordinary common ceiling tiles. The ceiling was simply a ceiling comprised of ceiling tiles placed in a drop down ceiling suspended 12 feet above the level of the floor and clearly visible to anyone who looked up. Bay St. Louis did not create a "dangerous condition" by installing a ceiling.

Even if the ceiling could be construed as a"dangerous condition" the ceiling was "open and obvious." The duty Bay St. Louis owed Leshan Kaigler was to warn of a dangerous condition that was not open and obvious. Although Mississippi has adopted the doctrine of comparative negligence and abolished the "open and obvious" defense as an absolute bar to recovery for non-governmental cases, the open and obvious defense remains a complete bar for recovery against a governmental entity. The Mississippi Tort Claims Act shields governmental entities for liability for an open and obvious condition as reaffirmed by the Mississippi Court of Appeals in *Howard v City of Biloxi*, 943 So. 2d 751 (Miss. Ct. App. 2006):

> The doctrine of comparative negligence prevails in Mississippi. With the adoption of that doctrine came the supreme court ruling of *Tharp v. Bunge Corp.*, 641 So.2d 20, 24 (Miss. 1994), abolishing the "open and obvious" defense which acts as a complete bar on recovery in negligence actions. However, actions brought against an entity invoking the protection of the Mississippi Tort Claims Act differ from the general negligence action. Suits brought against municipalities for injuries caused by a dangerous condition on its property require a showing of the entity's failure to warn. Miss. Code Ann. § 11-46-9(1)(v)(4). We have already found that in this case there was no duty to warn of the condition of the sidewalk as cities have no legal mandate

> to inspect and repair raised sidewalks. *See supra.* **The open and obvious defense is an absolute bar to recovery in a case brought under the Tort Claims Act for the failure to warn of a dangerous condition.** *City of Natchez v. Jackson*, 941 So. 2d 865, 2006 Miss. App. LEXIS 686 at *25 (P33) (Miss. Ct. App. 2006) (citing *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So.2d 60, 64 (P11) (Miss. 2005)). Because this court finds that the condition of the sidewalk was open and obvious, and because there existed no duty for the City of Biloxi to warn of the condition, this finding operates as an absolute bar to recovery under the Act.

*Howard v City of Biloxi*, 943 So. 2d at 756 - 757 ¶16 **(emphasis added)**.

Plaintiffs' attempt to divert this Court's attention from the ceiling suspended 12 feet above the floor in a "spare room" has no merit. After arguing that Leshan Kaigler was an invitee at the VCJ Gym, Plaintiffs assert that a "spare room" where the ceiling was located was used to store "old furniture, office equipment and trash, presenting an attractive nuisance and unsafe condition for minors." (Appellant's Brief page 9) Even if the theory of an "attractive nuisance " could be found to apply in a Tort Claims Act case, the Mississippi Supreme Court has restricted the application of "attractive nuisance" to a trespassing child who enters upon the land of another wherein is housed a dangerous instrumentality, as follows:

> Thus, in order for a condition of premises to constitute an attractive nuisance there must be a dangerous instrumentality maintained on the premises which is easily accessible to children. *Hughes,* 379 So. 2d at 305. We will not apply the attractive nuisance doctrine unless the instrumentality complained of was inherently dangerous. *Jackson v. City of Biloxi*, 272 So. 2d 654, 658 (Miss. 1973). We have held that such instrumentalities include a railroad turntable, live shells such as an unexploded anti-aircraft shell, dynamite or dynamite caps, other explosives such as fireworks, and electrical conduits. *See Shemper v. Cleveland*, 212 Miss. 113, 54 So. 2d 215 (1951); *Hercules Powder Co. v. Wolf*, 145 Miss. 388, 110 So. 842 (1927); *McTighe, Hughey & McTighe v. Johnson*, 114 Miss. 862, 75 So. 600 (1917); *Dampf v. Yazoo & M. V. R. Co.*, 95 Miss. 85, 48 So. 612 (1909).

*Keith v Peterson*, 922 So. 2d 4, 11 ¶26 (Miss. Ct. App. 2005).

The Plaintiffs have failed to identify anything that could be deemed to be a dangerous instrumentality.

Plaintiffs cannot prove any set of relevant material facts to prove that the City of Bay St. Louis or the VCJ Gym proximately caused the injury to Leshan, and the trial courts grant of Summary Judgment should be affirmed. The VCJ Gym was in a reasonably safe condition.

**D. Did Bay St. Louis breach its duty to Leshan to warn of a hidden danger?**

Since the VCJ Gym was reasonably safe, the next issue is whether Bay St. Louis failed to warn of a known, dangerous condition. The short answer is no. The drop down ceiling was not "dangerous." The ceiling was constructed of the same ordinary ceiling tiles found in both homes and businesses. The ceiling was certainly not hidden or camouflaged or otherwise constructed to resemble anything other than ordinary common ceiling tiles. The ceiling was simply that, ceiling tiles placed in a drop down ceiling suspended 12 feet above the level of the floor and clearly visible to anyone who looked up.

Lois Kaigler's assertions that several of the ceiling tiles were broken would only be material or relevant had the ceiling caved in on Leshan. To the contrary, the presence of broken ceiling tiles, if any, should have served as warning to anyone that even thought about climbing onto the ceiling. Plaintiffs have failed to produce any relevant material evidence upon which any reasonable finder of fact could construe that the ceiling, in and of itself, was dangerous, or that the location of the ceiling was dangerous.

The Mississippi Supreme Court and the Mississippi Court of Appeals have upheld the lower courts' decisions for Defendants in cases similar to this matter. In *Delmont v. Harrison Co. Sch Dist.*, 944 So. 2d 131, 133 ¶5, the Mississippi Court of Appeals upheld the grant of summary

judgment[2] for Defendant since Plaintiff, who had tripped over a cheerleading mat, "failed to provide the trial court any evidence from which a reasonable fact-finder could conclude that the cheerleading mat itself or its placement on the stage floor constituted a dangerous condition" thus the Harrison County School District was immune from liability under Miss. Code Ann. §11-46-9(1)(v).

Likewise, in *Thompson v. Chic-Fil-A,* the Mississippi Court of Appeals upheld a summary judgment for the Defendant holding that an unmarked curb adjacent to the parking lot was not a dangerous condition but one that is commonly encountered. *Thompson*, 923 So. 2d 1049, 1053 ¶15 (Miss. Ct. App. 2006*); Stanley v. Morgan & Lindsey, Inc.*, 203 So.2d 473 (Miss. 1967)(directed verdict for Defendant upheld - seven and ½ inch unmarked curb was not dangerous). In *Ratcliff v. Rainbow Casino-Vicksburg Partnership*, the Mississippi Court of Appeals upheld summary judgment for Defendant on the issue of liability since the Plaintiff had failed to proffer any evidence that the stool she tripped over "was dangerous, or that the location of the stool was dangerous, or that the lighting was dangerous, etc." *Ratcliff v Rainbow Casino-Vicksburg Partnership*, 914 So. 2d 762, 767 ¶14 (Miss. Ct. App. 2005)(citing *McGovern v Scarborough*, 566 So. 2d 1225, 1228(Miss. 1990). In *McGovern v. Scarborough*, the

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In March 2006, the Mississippi Court of Appeals appeared to have concluded that what constituted a "dangerous condition" was not defined by Mississippi law and thus required submission to the fact finder. However, in December 2006 in *Delmont v Harrison Co. Sch. Dist.*, 944 So. 2d 131(Miss. Ct. App. 2006), the Court of Appeals upheld the grant of summary judgment to Harrison County School District by Judge Kosta N. Vlahos reasoning that Plaintiff had failed to provide any evidence that would support a finding that Delmont's fall over a cheerleading mat was the result of a dangerous condition.

Mississippi Supreme Court upheld a directed verdict for the Defendant finding that Plaintiff had failed to prove that the doorway she tripped over was dangerous, finding that:

> . . . By any stretch of the imagination can it be said that the entrance to this building was not reasonably safe? And, it is impossible to envision this doorway as creating a danger of some kind, in some way different from thousands of like doorways. Moreover, it was open and obvious.
>
> If this Court were to hold a jury question was made on whether this doorway was not reasonably safe, we would have to say a jury question is made as to any doorway from the street which is not on the same level as the street. Property owners would indeed be insurers of invitees' safety.

*McGovern v. Scarborough*, 566 So. 2d 1225, 1228 (Miss. 1990)

In the present matter, there is no evidence in the record from which a reasonable fact-finder could conclude that the ceiling itself or its location 12 feet above the level of the floor constituted a dangerous condition. Putting a ceiling in a building does not create a hidden "dangerous condition" that requires a warning sign.

The Kaiglers' have failed to produce any relevant evidence that The City of Bay St. Louis or The VCJ Gym breached any duty it may have had to Leshan, or that the breach of this duty is the proximate cause of Leshan's injury. As the trial court held, "[t]here is no question that Leshan Kaigler was injured in this fall, but that does not determine the outcome of this action." (Record Excerpt 11). "It is the plaintiffs' burden to establish that the City of Bay St. Louis was negligent and liable to Kaigler." (Record Excerpt 11) "The basis of liability is negligence and not injury." *Rod v. Home Depot USA, Inc.*, 931 So. 2d 692, ¶12 (Miss. Ct. App. 2006). Plaintiffs failed to rebut the Motion for Summary Judgment and meet their burden of establishing that there is a genuine issue of material fact and the trial courts' Judgment should be affirmed. Furthermore, the

Defendants are statutorily immune from liability for Leshan's injuries under Miss. Code Ann. §11-49-9(1)(d), (g) and (v). The Defendants immunity will be discussed in detail *supra.*

## II. THE DEFENDANTS ARE ENTITLED TO STATUTORY IMMUNITY PURSUANT TO THE MISSISSIPPI TORT CLAIMS ACT, MISS. CODE ANN. SECTION 11-46-1, *ET. SEQ.*

### A. The Defendants are immune from liability in this matter pursuant to the Mississippi Tort Claims Act.

Plaintiffs and Defendants agree that the City of Bay St. Louis owns the municipal building that houses the VCJ Gym, the police station and the fire station, therefor the Mississippi Tort Claims Act provides the exclusive tort remedy available to the Plaintiffs. *Howard v City of Biloxi*, 943 So. 2d 751, 754 ¶5 (Miss. Ct. App. 2006).

Defendants direct this Court's attention to these pertinent provisions of Miss. Code Ann. §11-46-9 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:
>
> (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 the 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;
>
> . . .
>
> (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;

. . .

(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 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;

. . .

*Miss. Code Ann.* §11-46-9 (1972, as amended).

**B. The Defendants decision to operate the VCJ Gym, as well as the decisions concerning maintenance of the VCJ Gym were discretionary.**

Pursuant to Miss. Code Ann §17-1-1, *et. seq.*, Bay St. Louis was granted permissive authority to operate parks and recreational facilities for the public. Bay St. Louis made the decision to maintain the VCJ Gym as a community gym. The decision was discretionary and thus Bay St. Louis is immune from liability under Miss. Code Ann. §11-46-9(1)(d).

To determine whether a decision made by a governmental entity was discretionary, the Mississippi Supreme Court employs a two-part public policy function test reviewing first (1) whether the activity involves an element of choice or judgment, and, if yes, then (2) whether the choice or judgment involves social, economic, or political policy. *Dotts v. Pat Harrison Waterway District*, 933 So. 2d 322, 326 ¶9 (Miss. Ct. App. 2006)(internal citations omitted). Since there was no statutory requirement to operate the VCJ Gym, Bay St. Louis' operation of the gym was discretionary under the first part of the test. *Id.* Likewise, since the decision necessarily "implicate[d] the exercise of a social, economic, or political nature" the decision was discretionary. *Id.*, at 327 ¶15. The Court's analysis of a decision of a governmental entity under of the public policy prong of the test does not require proof of the thought processes of the

decision makers; instead, the focus is on the nature of the action taken and whether the action was susceptible to policy analysis. *Id.*, at 327-328

¶16.

The immunity granted by Miss. Code Ann. §11-46-9(1)(d) to the operational decisions concerning the VCJ Gym extended to the discretionary decisions made by Bay St. Louis concerning the maintenance of the municipal building as set forth in Miss. Code Ann. §11-46-9(1)(g), which provides immunity for claims against a governmental entity acting within the course and scope of their duties if such claim arose "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." *Miss. Code Ann.* §11-46-9(1)(g).

When Bay St. Louis made the discretionary decision to allow the public to enjoy the Gym, the decisions as to how to operate the Gym were also discretionary and grounded in social economic and political policy. Since the decision to operate the VCJ Gym was discretionary, the decisions concerning the maintenance of the Gym were likewise discretionary.

The affidavits of Gus McKay, Recreational Director for the City of Bay St. Louis Department of Parks and Recreation Department, and Ronald Vanney, Public Works Director for the City of Bay St. Louis, conclusively established that there were no statutes or ordinances that required the City of Bay St. Louis to operate the VCJ Gym. Plaintiffs cannot create an issue of fact merely through argument of counsel. Plaintiff failed to establish the existence of a dispute of material fact which would preclude this court from upholding the grant of summary judgment. The City of Bay St. Louis allowed the community to use the gym, this decision was clearly

discretionary. Likewise, the decisions concerning maintenance were discretionary. The trial court's judgment granting summary judgment correctly found that the Defendants were immune from liability pursuant to the Mississippi Tort Claims Act and that Judgement should be affirmed.

### C. Any Decision Concerning Supervision Was Discretionary.

Plaintiffs have asserted that Defendants were negligent due to their "failure and/or lack of supervision." (Record Excerpt 1). Since decisions concerning the operation of the VCJ Gym were discretionary, any decisions concerning supervision were also discretionary and fall under the immunity granted by Miss. Code Ann. §11-46-9(1)(d). *Dotts v. Pat Harrison Waterway District*, 933 So. 2d 322, 327-328 ¶16(Miss. Ct. App. 2006).

On December 11, 2002, when Leshan was injured, Leshan was at the gym with his sister for her basketball practice. ( Record Excerpt 4 - Deposition of Lois Kaigler p.25-28; Record Excerpt 5 - Deposition of Leshan Kaigler p.7-8) Leshan's sister was on a team sponsored by the Bay City Youth Basketball League. The League was neither organized nor operated by the City of Bay St. Louis. (Record Excerpts 6 and Record Excerpt 7). The League was organized and operated and otherwise managed by a group of parent volunteers. (Record Excerpts 6 and Record Excerpt 7; and Appellants' Brief p. 20) At the time of the accident at issue, at least one volunteer League Coach was present and supervising Tywanna's basketball practice. (Record Excerpt 4 - Deposition of Lois Kaigler p 26; and Appellants' Brief p.20).

As a matter of law, Plaintiffs cannot establish that Leshan suffered his injuries due to the lack of supervision by the Defendants because the Defendants simply had no statutory duty to

supervise. The decision to allow the League to use the VCJ Gym as well as any decision concerning supervision was discretionary, thus Bay St. Louis is immune from liability.

Plaintiffs concede that the Bay City Youth Basketball League is neither organized nor operated by the City of Bay St. Louis. (Appellants' Brief p. 20) Yet, the Plaintiffs argue that this case is similar to those which involve a public school premises. This argument overlooks the fact that a different standard is applied to public schools which are required to provide a safe environment for students because a school's duty to supervise is mandated by statute. *Pearl Pub. Sch. Dist. v. Groner*, 784 So. 2d 911, 915 ¶13 (Miss. 2001) (citing *L. W. v. McComb Separate Mun. Sch. Dist.* 754 So.2d 1136 (Miss. 1999)).

As explained in *Lang v. Bay St. Louis/Waveland School District,* 764 So, 2d 1234, 1240 ¶24 (Miss. 1999), Miss. Code Ann §37-9-69 "positively imposes upon school premises the duty to hold students to strict account for disorderly conduct at school as follows:

> [i]t shall be the duty of each superintendent, principal, or teacher in the public schools of this state to enforce in schools . . . . Such superintendents, principals and teachers shall hold 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.

Schools are Required to exercise ordinary care in exercising decisions to supervise children since that duty was mandated by statute. *Summers v. St. Andrews Episcopal School, Inc.* 759 So. 2d 1203, 1213 ¶40 (Miss. 2000) *But See, Harris v. McCray*, 87 So. 2d 188, 192 (Miss. 2003) (A football coach's action and duties in coaching his football team were clearly discretionary and he and the school were immune from liability under Miss. Code Ann §11-46-9(1)(d) without any discussion as to whether he exercised ordinary care.)

The City of Bay St. Louis and the VCJ Gym had no statutory duty to operate or maintain the VCJ Gym, but rather were acting in their discretionary capacity to allow the public to use the gym, and are therefore entitled to immunity.

### D. Discretionary decisions are not reviewed under the "ordinary care" standard.

Plaintiffs argue that the actions or inactions of Bay St. Louis concerning the operation and maintenance of the VCJ Gym must be reviewed under the "ordinary care" standard of Miss. Code Ann. §11-49-9(1)(b), citing as authority *Leflore County v Givens*, 754 So. 2d 1223 (Miss. 2000). In response, the Defendants agree that the *Leflore County* Court mis-interpreted the provisions of the Mississippi Torts Claim Act in reaching its decision that discretionary decisions of governmental entities must be reviewed under the provisions of Miss. Code Ann.§11-49-9(1)(d) in conjunction with the "ordinary care" standard of Miss. Code Ann. §11-49-9(1)(b). *Id.*, 754 So. 2d at 1226-1227.

Plaintiffs' reliance on this case is misplaced in that the *Leflore County* Court's application of the ordinary care standard to a discretionary duty has been over ruled by the Mississippi Supreme Court and is no longer good law. In 2004 in *Collins v Tallahatchie County*, 876 So. 2d 284 (Miss. 2004), the Mississippi Supreme Court corrected its prior mis-interpretation of the provisions of the Mississippi Torts Claim Act. The *Collins* Court determined that if government officials were performing a function required by statute then their actions were to be reviewed under the provisions of Miss. Code Ann §11-46-9(1)(b). However, if a government official was required to use his own judgment or discretion to perform a duty that was not mandated by statute,

ordinance or regulation, the performance of that duty was discretionary and thus exempt from liability pursuant to the provisions of Miss. Code Ann §11-46-9(1)(d) whether or not the discretion was abused. *Id.*, 876 So. 2d at 289 ¶15. *See also, Barrentine v Mississippi Department of Transportation*, 913 So 2d. 391, 394 (Miss. Ct. App. 2005) (Although the factual context of *Collins* is different from the one in the present case, *Collins* has expressly rejected the proposition that discretionary duties must contain a duty of ordinary care. "The ordinary care standard is not applicable to Miss. Code Ann. §11-46-9(1)(d)."); *Dozier v Hinds County*, 354 F. Supp. 2d 707, 715 (S.D. Miss. 2005)("because *Collins* did not state that its new reading of §11-46-9(1)(d) applied only to the facts before the Supreme Court [in the *Collins* case], the fairest reading of *Collins* is that there is no duty of ordinary care under §11-46-9(1)(d), regardless of the context in which it applies. Hinds County cannot be liable for negligence when performing a discretionary duty, which is all that the Plaintiffs have alleged.")

The operation of the VCJ Gym was discretionary and thus Bay St. Louis is immune from liability pursuant to Miss. Code Ann. §11-46-9(1)(d) which provides 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:
>
> . . .
>
> (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;

The maintenance of the VCJ Gym was discretionary and thus Bay St. Louis is immune from liability pursuant to Miss. Code Ann. §11-46-9(1)(g) which provides 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:
>
> . . .

> (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;

There is simply no duty of "ordinary care" for discretionary duties of a governmental entity[3] under the provision of Miss. Code Ann. §11-46-9(1)(d) or (g). Only if the governmental entity is specifically mandated by a separate statute to perform a duty does the ordinary care standard of Sub Section (b) come into play.

### E. Plaintiffs Cannot Defeat Defendants Immunity Defense.

Plaintiffs have failed to establish any relevant material fact that could defeat the statutory immunity granted to Defendants by the Mississippi Tort Claims Act.

The Mississippi Court of Appeals recently discussed the statutory hurdle of a Plaintiff attempting to defeat the immunity of a governmental agency in a premises liability case, *Miss. Dept. Wildlife, Fisherier & Parks v. Brannon*, as follows:

> If this case were not against a governmental entity, Mrs. Brannon's claim would be considered under our laws of premises liability. We, like the trial judge, would conclude that Mrs. Brannon was an invitee. Thus, the business owner (the Department) owes a business invitee (Mrs. Brannon) a duty of ordinary care to keep the business premises in a reasonably safe condition. *Waller v. Dixieland Food Stores, Inc.*, 492 So.2d 283, 285 (Miss.1986). The owner has a duty to warn invitees of dangerous conditions which are not apparent to the invitee, of which the owner or occupier knows or through the exercise of reasonable care should know. *Id.* However, the owner is not an insurer against all injuries which may occur on

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[3] Defendants mis-spoke in its initial brief when it stated on page 12 that "Bay St. Louis was charged with a duty of ordinary care to keep the premises in a reasonably safe condition, and to warn of dangerous conditions which were not apparent to the invitee and of which Bay St. Louis knew or through the exercise of reasonable care should have known." This is not the law. "Suits brought against municipalities for injuries caused by a dangerous condition on its property require a showing of the entity's failure to warn. Miss. Code Ann. § 11-46-9(1)(v)(4)." *Howard v City of Biloxi*, 943 So. 2d at 756 - 757.

> the premises. *Jerry Lee's Grocery, Inc. v. Thompson*, 528 So.2d 293, 295 (Miss. 1988).
>
> However, since the Mississippi Tort Claims Act grants immunity under certain circumstances, we must consider whether Section 11-46-9(1)(v) is applicable. Under this statute, Mrs. Brannon may defeat the immunity defense if she can prove: (1) a dangerous condition, (2) on the government entity's property, (3) which the government entity caused by negligence or wrongful conduct, or of which it had actual or constructive notice and adequate time to protect from or warn against, and (4) the condition was not open and obvious. *Id.; Lowery v. Harrison County Bd. of Supervisors*, 891 So.2d 264, 267 (P12) (Miss. Ct. App. 2004). There was absolutely no evidence that the Department either caused or had actual notice of the drop-off, i.e., the dangerous condition. Miss. Code Ann. § 11-46-9(1)(v). Hence, our analysis must focus on whether the Department had constructive notice and an adequate opportunity to warn against.

*Miss. Dept. Wildlife, Fisheries & Parks v Brannon*, 943 So. 2d 53, 64 ¶¶30-31(Miss. Ct. App. 2006).

In the present case, the Kaiglers cannot defeat Defendants statutory immunity because there are no relevant material facts to support any allegation that Leshan was injured due to (1) a dangerous condition, (2) in the VCJ Gym, (3) which Bay St. Louis caused by negligence or wrongful conduct, or of which Bay St. Louis had actual or constructive notice. The ceiling in an of itself was not dangerous. Even if a dangerous condition was created by Danny Dorsey and Dermerik Williams when they threw the basketball onto the ceiling suspended 12 feet above the floor, Bay St. Louis had no knowledge that the dangerous condition had been created. Bay St. Louis did not have and adequate time to protect from or warn against the condition. Presuming of course that the dangerous condition was not found to have been open and obvious.

1. **Bay St. Louis did not create a dangerous condition by constructing a ceiling in the hallway adjacent to the gym.**

As discussed herein above, the construction of a ceiling did not create a dangerous condition. To hold otherwise would be tantamount to a requiring every owner or occupier of a home or building to post warning signs on every wall, warning that the ceiling may fall if you climb onto it.

**2. If Danny Dorsey and Dermerik Williams created a dangerous condition, Bay St. Louis had no knowledge and could not have warned.**

Should this Court determine that a dangerous condition was created by Danny Dorsey and Dermerik Williams when they took Leshan's basketball and threw it onto the drop down ceiling in the hallway adjacent to, but outside of the gym; Bay St. Louis had no knowledge, either actual or constructive of the existence of this condition, and could not have warned Leshan. Leshan did not tell an adult that the basketball had been thrown onto the ceiling. (Record Excerpt 5 - Deposition of Leshan Kaigler p.9-10)

Defendants are statutorily immune from Leshan's claims of negligence.

**3. Even if Danny Dorsey and Dermerik Williams created a dangerous condition, the basketball was placed on the ceiling, 12 feet above the floor, and the condition was open and obvious.**

The location of the ceiling was 12 feet above the floor and the ceiling was open and obvious to Leshan. Pursuant to Miss. Code Ann. §11-49-9(1)(v), Bay St. Louis has an absolute defense to the Kaiglers' claims of negligence because the ceiling was open and obvious.

In November 2006, the Court of Appeals reaffirmed that the open and obvious defense is an absolute bar to recovery in a case brought under the Tort Claims Act as follows:

> The doctrine of comparative negligence prevails in Mississippi. With the adoption of that doctrine came the supreme court ruling of *Tharp v. Bunge Corp.*, 641 So.2d 20, 24 (Miss. 1994), abolishing the "open and obvious" defense which acts as a

> complete bar on recovery in negligence actions. However, actions brought against an entity invoking the protection of the Mississippi Tort Claims Act differ from the general negligence action. Suits brought against municipalities for injuries caused by a dangerous condition on its property require a showing of the entity's failure to warn. Miss. Code Ann. § 11-46-9(1)(v)(4). We have already found that in this case there was no duty to warn of the condition of the sidewalk as cities have no legal mandate to inspect and repair raised sidewalks. *See supra.* **The open and obvious defense is an absolute bar to recovery in a case brought under the Tort Claims Act for the failure to warn of a dangerous condition.** *City of Natchez v. Jackson*, 941 So. 2d 865, 2006 Miss. App. LEXIS 686 at *25 (P33) (Miss. Ct. App. 2006) (citing *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So.2d 60, 64 (P11) (Miss. 2005)). Because this court finds that the condition of the sidewalk was open and obvious, and because there existed no duty for the City of Biloxi to warn of the condition, this finding operates as an absolute bar to recovery under the Act.

*Howard v City of Biloxi*, 943 So. 2d at 756-757 ¶16. **(emphasis added)**

The ceiling was not transformed into a dangerous condition due to the actions of the two boys throwing the basket ball onto the ceiling tiles. The height of the ceiling was just as open and obvious after they threw the basketball as it was before.

**4. Alternatively, if Danny Dorsey and Dermerik Williams created a dangerous condition by throwing the basketball onto the ceiling tiles, their actions were the independent, intervening cause of Leshan's fall. The condition of the ceiling was not the proximate cause of Leshan's injury.**

As set forth herein above, neither the location nor the condition of the ceiling where Leshan fell could be considered dangerous. The proximate cause of Leshan's fall was not the condition of, or the location of, the ceiling. And it was not foreseeable that two boys would take Leshan's basketball and throw it onto the ceiling tiles. Neither Gus McKay nor Ronald Vanney, who had worked for Bay St. Louis since 1997 and 1992 respectively, had ever heard of, or had any complaints of, any prior incident in which something onto the drop down ceiling tiles or someone climbed onto the ceiling tiles. (Record Excerpts 6 and 7).

Bay St. Louis had no knowledge that Leshan's basketball had been thrown onto the ceiling tiles. The incident occurred at a location that was out of sight of the gym where the parent volunteer League Coach was leading his team in a practice. Leshan did not tell any adult about what had occurred. (Record Excerpt 5 - Deposition of Leshan Kaigler p. 9-10)

Neither the construction of the ceiling nor the maintenance of the ceiling put in motion the series of events that led to Leshan's injuries. Leshan would never have climbed up the wall and onto the ceiling tile if not for the independent, intervening acts of Danny Dorsey and Dermerik Williams. When these boys took Leshan's basketball, threw it onto the drop down ceiling and refused to retrieve it they set in motion "an intervening cause which led unbroken in sequence to an injury." *MDOT v Johnson*, 873 So. 2d 108, 113-114 ¶15(Miss. 2004).

In *MDOT v Johnson*, the Mississippi Supreme Court reviewed a negligence claim of a motorist who asserted that MDOT had a failed its duty to remove hay that a farmer had placed on the highway. The facts established that a farmer had placed bales of hay on the right of way of a highway 100 feet from the roadway. The Plaintiffs had been injured when their vehicle struck a cow in the middle of the highway. *Id.*, at 109-110 ¶3. Plaintiffs asserted that, because of a drought, the cow had broken through the fence to get to the hay and that MDOT was negligent in not having removed the hay from the right-of-way as authorized by statute. *Id.*, at 112 ¶12. MDOT acknowledged that the bales of hay were an encroachment but not a hazard because the hay was not within 30 feet of the roadway. *Id.*, at 113 ¶13. The trial court held that MDOT had breached its duty to keep the right-of-way free of any encroachments, i.e. the hay, since Miss. Code Ann §65-1-169 granted MDOT permissive authority to clear the right of way of any

obstruction or encroachment. *Id.*, at 112.¶12 The trial court found that it was foreseeable that a cow would break through a fence to get to hay during a period of drought. *Id.*, at 110.

The Mississippi Supreme Court reversed the decision of the trial court and held that MDOT had no duty to remove the hay, and further held that even if MDOT had had a duty to remove the hay, MDOT's failure to act was not the proximate cause of the accident. *Id.*, at 113. In its opinion the Court reaffirmed the "Mississippi rule of law regarding independent, intervening causes . . ." and explained its prior decision in *Glorioso v. YMCA*, 556 So. 2d 293 (Miss. 1989), as follows:

> Further, even if MDOT had a duty to have the hay removed, the "Mississippi rule of law regarding independent, intervening causes more or less establishes an active/passive dichotomy." *Glorioso v. Young Mens Christian Ass'n*, 556 So. 2d 293, 296 (Miss. 1989). In *Glorioso*, we refused to impose liability upon a party whose actions or omissions were passive in nature where another party actively placed into motion an intervening cause which lead unbroken in sequence to an injury. *See also Saucier v. Walker*, 203 So. 2d 299 (Miss. 1967), *Stewart v. Kroger Grocery Co.*, 198 Miss. 371, 21 So. 2d 912 (1945); *Louisville & N. Railroad Co. v. Daniels*, 135 Miss. 33, 99 So. 434 (1924).
>
> * * * * *
>
> In *Glorioso*, a young boy was killed by a large pole left lying on the ground in the park by the city. The young boy and the other members of his baseball team were offered the prize of ice cream by a YMCA counselor to the one who could stay on the pole the longest while the counselor and others shook the pole. The shaking of the pole caused it to become extracted from the small indentation where it had been positioned and to also roll down the hillside, crushing and killing the boy. This Court found that even if the city had been negligent in placing the pole, the act of shaking the pole was an independent, intervening cause. In finding that the city was not liable for the death, we said:
>
> Although one may be negligent, yet if another, acting independently and voluntarily, puts in motion another and intervening cause which efficiently thence leads unbroken in sequence to the injury, the later is the proximate cause and the original negligence is relegated to the position of a remote and, therefore, a non-actionable cause. Negligence which merely furnishes the condition or occasion

> upon which injuries are received, but does not put in motion the agency by or through which the injuries are inflicted, is not the proximate cause thereof. *Glorioso*, 556 So. 2d at 296 (quoting *Miss. City Lines, Inc. v. Bullock,* 194 Miss. 630, 13 So. 2d 34, 36 (1943)).

*MDOT v Johnson*, 873 So. 2d 108, 113-114 ¶14, 15(Miss. 2004).

In the present matter, even if this Court were to find that Bay St. Louis breached a duty to Leshan, the discretionary decisions made by Bay St. Louis in maintaining and operating the municipal building were not the proximate cause of Leshan's fall. Leshan's fall was caused by the independent intervening acts of the two boys who threw Leshan's basketball onto the ceiling tiles.

**F. Defendants were not in violation of the Mississippi Fire Prevention Code**

The arguments of counsel contained in a Sur Rebuttal Brief concerning the Fire Prevention Code do not present any relevant material facts that could defeat the trial courts grant of summary judgment.

Miss. Code Ann. §§ 45-11-101 - 111 (1972, as amended) sets forth the Mississippi Fire Prevention Code and provides that the State Fire Marshall is charged with the promulgation of rules and regulations for the implementation of the Code. The Code applies to "new or remodeled buildings, installations, equipment or conditions" and to "existing buildings, installations, equipment, conditions and occupancies where safety to life requires compliance . . .". Miss. Code Ann. § 45-11-107. Pursuant to its statutory authority, the State Fire Marshall promulgated Rules and Regulations for the Mississippi Fire Prevention Code which were adopted in accordance with the provisions of the Mississippi Administrative Procedures Act. Miss. Code. Ann. 25-43-1, *et. seq.*

The Rules and Regulations provide in Part II - Definitions, Section 200 - B, that "any local government adopting the Standard Fire Prevention Code published by the Southern Building Code Congress International beginning with the 1976 edition up to and including the 1994 edition and Appendix A will be regarded by the State Fire Marshal as being in full compliance with these Rules and Regulations for the Mississippi Fire Prevention Code and as such will assume responsibility for local code enforcement for places of public assembly within their respective jurisdictions. . ." .

Pursuant to Part V - Enforcement, Section 502 - Local Enforcement, A., "Municipalities which have adopted a Fire Prevention Code not less stringent than the Mississippi Fire Prevention Code shall enforce the provisions of said codes in their respective jurisdictions, except for buildings owned by the State or State Agencies."

There are no genuine issue of material fact. As a matter of law, Bay St. Louis is immune from liability under the provisions of the Mississippi Tort Claims Act.

Plaintiffs point to various provisions of the Mississippi Fire Prevention Code and assert: (1) That Bay St. Louis was required to comply with the Fire Prevention Code; (2) That the "vertical opening[4]" between the ceiling and the doorway in the hallway adjacent to the Gym was a violation of the Fire Code; (3) That Bay St. Louis did not exercise "ordinary care" when it failed to comply with the Fire Code; and, (4) That Bay St. Louis is not immune under the provisions of

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[4] Plaintiffs' Brief contains various provisions of the Life National Fire Protection Association's "Life Safety Code" to support this assertion; however, the provisions relate to "vertical openings" between the floors in a building such as stairwells, elevator shafts, etc. The VCJ Gym building was/is a one story building.

the Torts Claim Act since it failed to maintain the premises "in a reasonably safe condition to an invitee."

In response, Bay St. Louis asserts: (1) That in 2002, Bay St. Louis maintained the building that housed the VCJ Gym in compliance with the minimum requirements of the Mississippi Fire Prevention Code as set out by statute and administrative rules and regulations[5]; (2) That at the time of the incident in December 2002, the VCJ Gym was in compliance with the Mississippi Fire Prevention Code which compliance would have been established through the testimony of Edward Bourgeois, Fire Inspector for the City of Bay St. Louis Fire Department, at the hearing; (3) That the

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Plaintiffs assert that the condition of the ceiling was a violation of a the Fire Code and constitutes negligence per se. Even if this case did not fall within the immunity granted by the Torts Claim Act, and Plaintiffs could establish a violation of the Fire Code, the mere violation of a statute without more does not establish all elements of negligence: duty, breach, causation and damages. In *Delahoussaye v. Mary Mahoney's, Inc.*, 783 So. 2d 666 (Miss. 2001), the Mississippi Supreme Court stated that liability cannot be imposed simply based upon a violation of a statute, negligence *per se* satisfies only the elements of duty and breach but not causation:

> Nevertheless, a finding of negligence per se is only the first step in the equation, and does not, in and of itself, establish liability on the part of the defendant. Negligence per se supplies only the duty and the breach of a duty elements tort. The plaintiff must also prove by a preponderance of the evidence that the breach of the duty owed proximately caused the injury or damages sustained.
>
> Proximate cause of an injury is that cause which is natural and continuos sequence unbroken by any efficient intervening cause produces the injury and without which the result would not have occurred. Foreseeability is an essential element of both duty and causation . . .

*Id.*, at 671 (citations omitted).

In the present matter, the proximate cause of Leshan's injuries was not an alleged violation of the Fire Code. Bay St. Louis could not have reasonably foreseen that Leshan would climb up a wall and crawl onto ceiling tiles suspended 12 feet above the floor.

standard of care for fire protection is "reckless disregard"; and, (4) That the building housing the VCJ Gym was in maintained in a "reasonably safe condition" since it was in compliance with the Fire Code.

**1. Pursuant to Miss. Code Ann. §11-46-9(1)(c), Bay St. Louis is immune from claims of negligence "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."**

Bay St. Louis is a governmental entity, thus the establishment and maintenance of its Fire Department is a governmental function. This rule was first announced in 1918 by the Mississippi Supreme Court in a case that predated the Mississippi Torts Claim Act styled *City of Hattiesburg v Geigor*, 79 So. 846 (Miss. 1918). Geigor had sued the City for injuries he received while he was driving a fire engine out of a storage shed. Geigor was stuck by a board that was attached to the shed in such a manner that it protruded into the opening through which the fire engine was driven. *Id.*, at 684. The "gravamen" of the complaint was the negligence of the fire chief in storing the fire engine in a shed that was not properly maintained. *Id.* Hattiesburg responded that it was not responsible in damages for negligence in the maintenance or operation of a fire department. *Id.* The *Geigor* Court agreed with Hattiesburg and held that the City of Hattiesburg was not responsible for its negligence or that of its employees since the operation of a fire department is a governmental function:

> In the establishment, maintenance, and operation of its fire department a municipality is in the performance of its governmental functions and is not responsible for the negligence of its employees in this department.

*City of Hattiesburg v Geigor*, 79 So. 846, 847(Miss. 1918).

In 2001, in a case that post-dated the Torts Claim Act, the Mississippi Supreme Court held that the *Geigor, supra,* decision is still good law. In *McGrath v City of Gautier*, 794 So. 2d 983, 986 ¶13-14 (Miss. 2001), the Mississippi Supreme Court was asked to review the grant of summary judgment to Gautier by the trial court for an accident that occurred due to the failure of the police car's brakes. The trial court had held that both Gautier and its police officer were immune and exempt from liability as a matter of law for negligence in the "maintenance and inspection of police vehicles" since these acts were related to police protection. *Id.*, at 985 ¶10.

The *McGrath* Court confirmed that pursuant to the Mississippi Torts Claim Act, a municipality is immune from any claims "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 the injury." *Id.*,984 - 985 ¶8; *Miss. Code Ann.* §11-46-9(1)(c). The Court opined that under this statutory grant of immunity, both Gautier and the police officer involved in the accident which occurred due to faulty brakes in a police car would be immune if negligent maintenance of brakes was an activity that fell within the definition of "police protection." *McGrath*, 794 So. 2d 983,at 985 ¶9.

In affirming the trial court's decision, the *McGrath* Court that even if the city or its employees may have been negligent in the maintenance of a police vehicle, the maintenance of a police vehicle is an activity relating to "police protection." *Id.* The Court cited *City of Hattiesburg v. Geigor*, 79 So. 846 (Miss. 1918) as the first case to set out the rule that the

establishment and maintenance of police and fire departments are governmental functions. *Id.*, at 986.

In the present case, Plaintiffs have produced no relevant material fact that would support any allegation that Bay St. Louis violated the Fire Code or was negligent in the maintenance of the VCJ Gym. However, even if Appellant could produce relevant material facts that established that Bay St. Louis had been negligent in performing an inspection of the building or that Bay St. Louis had been negligent in the maintaining the building to fire code, negligence does not defeat the immunity provided by Miss. Code Ann. §11-46-9(1)(c) for any claim "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."

**2. Reckless disregard must be proven to defeat the immunity granted by Miss. Code Ann. §11-46-9(1)(c).**

Even if Plaintiffs could assert a factual basis to support their negligence argument, Bay St. Louis, its Fire Department and its Fire Inspector are immune from liability for negligence since the maintenance of the building housing the VCJ Gym was/is a governmental function and fell/falls within the immunity granted for "fire protection" as set forth in Miss. Code Ann. §11-46-9, 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:
>
> . . .
>
> (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 the injury;

*Miss. Code Ann.* §11-46-9(1)(c) (1972, as amended).

In order to defeat the immunity granted by the Torts Claim Act for fire protection, Plaintiffs would have prove by a preponderance of the evidence that: (1) Bay St. Louis acted in reckless disregard for the safety and well-being of Leshan; (2) the reckless disregard was a proximate contributing cause of Leshan's injuries; and, (3) damages. *Id.*

The standard for reckless disregard is high. Unlike the tort of negligence, reckless disregard involves more than disregard of a reasonable, foreseeable risk of harm. *Maldonado v. Kelly*, 768 So. 2d 906, 910 (Miss. 2000). Reckless disregard is only found when "the actor has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." *Id.* Reckless disregard is usually accompanied by "a conscious indifference to consequences, amounting almost to a willingness that harm should follow." *Id.*

"Reckless disregard is associated with conduct which is so far from a proper state of mind that it is treated in many respects as if harm was intended. *Maldonado*, 768 So. 2d at 910 (Miss. 2000). Wanton and reckless disregard are just a step below specific intent." *Turner v City of Ruleville*, 735 So. 2d 226,230 ¶17(Miss. 1999).

Plaintiffs cannot meet the first two elements for reckless disregard. There is no relevant material fact that could establish that Bay St. Louis acted with "a conscious indifference to consequences, amounting almost to a willingness that harm should follow" in its maintenance of the building housing the VCJ Gym. The only relevant fact is that at the time of the incident, the building was in compliance with the Fire Code. Therefor, the injuries sustained by Leshan were

not proximately caused by a violation of the Fire Code or due to the maintenance of the building housing the VCJ Gym.

## III. CONCLUSION

There are no genuine issues of any relevant material fact in this matter and the Kaiglers did not meet the burden of proof necessary to survive summary judgment as a matter of law. Summary Judgment was appropriately granted in favor of Bay St. Louis and the VCJ Gym as they are immune from all assertions of negligence under the Tort Claims Act, and this Court should affirm the trial court's judgment.

RESPECTFULLY SUBMITTED, this the 3rd day of October, 2008.

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IN THE SUPREME COURT OF MISSISSIPPI

LOIS KAIGLER on behalf of herself and her minor child, LESHAN KAIGLER — APPELLANTS

V. — CASE NO: 2008-TS-00640

HANCOCK COUNTY, THE CITY OF BAY ST. LOUIS and VCJ GYM — APPELLEES



**CERTIFICATE OF SERVICE OF APPELLEES' BRIEF**

I, the undersigned counsel for Defendants, the City of Bay St. Louis and VCJ Gym, do hereby certify that on October 3, 2008, a true and correct copy of the *Appellees' Brief* was mailed, via First Class mail, postage prepaid, to:

Matthew Pepper, Esq.
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THIS, the 6th day of October, 2008.

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