IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2008-CA-01581

GLEN "TREY" MARTIN **APPELLANT**

V.

FRANKLIN COUNTY MISSISSIPPI **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF FRANKLIN COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE, FRANKLIN COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PARTIES

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

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5. Honorable Forrest A. Johnson
   Circuit Court Judge

Respectfully submitted, this the 29th day of July, 2009.

By: _____
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II: STATEMENT OF THE FACTS

On May 29, 2004 at approximately 3:30 a.m., Plaintiff Glen "Trey" Martin ("Martin") alleges that he was riding as a passenger on a All-Terrain Vehicle ("ATV") on Garden City Road (a gravel county road) in Franklin County, Mississippi. Martin claims that Jennifer Boyett Allen ("Allen") was the driver of the ATV. Accompanying Martin and Allen on separate ATVs were Martin's friend, David Hetzinger ("Hetzinger") and Martin's teen-aged step-son, Jon Michael Eschete ("Eschete"). Martin's blood alcohol level at the time of the accident was approximately .13 (nearly twice the legal limit under Mississippi law) and Allen's blood alcohol level was approximately .19 (twice the legal limit under Mississippi law.) (*See* R.E. at 1, T.R. at 242, 243.) The subject accident occurred when the ATV on which Martin was riding fell off an embankment near the Wells Creek Bridge[1] ("the bridge") located on Garden City Road. Martin alleges that he sustained a head injury, as well as other injuries, as a result of the incident.

In February of 2004 the Franklin County Board of Supervisors issued an emergency order to close the bridge due to heavy rains which were causing severe bank erosion. (*See* R.E. at 2, T.R. at 267.) In order to close the bridge and warn traffic that the bridge was closed, Franklin County placed two "Road Closed" signs on Garden City Road, one of which was located

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The Wells Creeks Bridge is located near the Adams County line on the west side of the bridge. The bridge faces Franklin County on the east side. Martin and Allen were approaching the bridge from the Adams County side or west side of the bridge.

approximately 2000 feet away from the bridge, and a "Bridge Out" sign located approximately 30 to 40 feet before the entrance to the Bridge. (*See* R.E. at 2, 3, T.R. at 263, 284, 285, R.E. at 5, T.E. at 15, 19.) These warnings were placed on the Adams County side (west side) of the bridge which was the direction in which Martin and Allen were approaching the bridge. (*See* R.E. at 2, T.R. at 263, 265.) Additionally, Franklin County erected two large dirt embankments (on both sides of the bridge) approximately 4 feet in height which stretched the entire width of the roadway. One dirt embankment was located at the entrance to the Bridge, and the second dirt embankment was located approximately twenty-five to thirty feet away from the Bridge entrance. (*See* R.E. at 2, 3, T.R. at 265, 284.) A "Bridge Out" sign was placed immediately in front of the dirt embankment located 25 to 30 feet away from the Bridge. (*See* R.E. at 3, T.R. at 285, R.E. at 5, T.E. at 15.) In order to reach the bridge, Martin's ATV had to pass one "Road Closed" sign, the "Bridge Out" sign, and he had to either traverse the two large dirt embankments, or go around them off road.

Doreen Norris ("Norris") was one of the first emergency responders to the accident scene. (*See* R.E. at 6, T.R. at 201.) Norris testified that while at the accident scene, she saw the "Bridge Out" sign located in front of the first dirt embankment on Garden City Road. (*See* R.E. at 6, T.R. at 203, R.E. at 5, T.E. 15.) Norris spoke to Martin at the accident scene. She testified that she could detect a very strong odor of alcohol on Martin. (*See* R.E. at 6, T.R. at 205.) Norris also testified that Hetzinger commented to her at the accident scene that prior to the accident, he and Martin had been jumping the dirt embankments on their ATVs, and that Martin knew the bridge was out. (*See* R.E. at 6, T.R. at 209.)

Franklin County Sheriff James Newman ("Sheriff Newman") testified that Hetzinger reported to the investigating officers at the accident scene that he "...observed a dirt mound or

berm across the bridge entry and was told by Martin how to drive around it and then traverse a narrow dirt pathway onto the bridge." (*See* R.E. at 4, T.R. at 281.) Martin's step-son, Eschete, reported to investigating officers that Martin and Allen had been jumping Martin's ATV across a dirt mound prior to the entrance to the bridge. (*See* R.E. at 7, T.E. 20 (¶5).) Martin gave a history at Natchez Community Hospital that he was the driver of the ATV at the time of the accident. (*See* R.E. at 8, T.E. 8.) Additionally, Martin's liability expert George Hammitt ("Hammitt") testified that he spoke with Martin about how the accident happened and Martin admitted to Hammitt that Martin was operating the ATV at the time of the accident, and that Allen was riding as a passenger on the back of the ATV. (*See* R.E. at 9, T.R. at 150, 151.)

Martin alleged that Franklin County was negligent in failing to properly maintain Garden City Road and the bridge, failing to warn of the conditions, and negligently constructing the dirt embankments that were placed prior to the entrance to the bridge. Following the presentation of the Plaintiff's case in chief, the trial court sustained Franklin County's motion to dismiss those portions of Martin's case alleging that Franklin County was negligent in failing to properly maintain Garden City Road and the bridge, and that Franklin County was negligent in constructing the dirt embankments. The sole issue decided by the trial court was whether Franklin County provided adequate warnings to Martin. (*See* R.E. at 10, T.R. at 196, 198.) The trial court ultimately entered an Order finding in favor of Franklin County and dismissing Martin's case with prejudice. (*See* R.E. at 11, C.P. at 519.)

III: SUMMARY OF THE ARGUMENT

The trial court correctly ruled in favor of Franklin County. The Court was provided with substantial and credible evidence that Franklin County provided substantial warnings to Martin that the bridge was out at the time of the accident. There was substantial evidence presented that

either Martin or Allen's negligence constituted the sole proximate cause of the accident, including, but not limited to, Martin's decision to ignore the warnings erected by Franklin County, to operate his ATV on a public road in violation of Mississippi law, at 3:30 a.m., while legally intoxicated. The credible proof also established that Martin knew the bridge was out, and was jumping or ramping the dirt embankments that had been placed on the road by Franklin County. Even if Martin was not the driver of the ATV, which was disputed at trial, Martin still had knowledge the bridge was out and chose to ignore the warnings posted by Franklin County. Therefore, the trial court also correctly found that Martin's actions were the sole proximate cause of the subject accident.

IV: STANDARD OF REVIEW

The circuit court judge sitting in this case without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence. *Donaldson v. Covington County*, 846 So.2d 219, 222 (¶11) (Miss. 2003); *Maldonado v. Kelly*, 768 So.2d 906, 908 (Miss. 2000). A trial judge's finding is entitled to the same deference as a jury verdict and will not be reversed on appeal unless manifestly wrong. *Jones v. Jones*, 760 So.2d 828, 830 (¶10) (Miss.Ct.App. 2000); *(citing R.C. Construction Co., Inc. v. Nat'l Office Systems, Inc.*, 622 So.2d 1253, 1255 (Miss. 1993)).

V: ARGUMENT

I. THE JUDGMENT OF THE LOWER COURT WAS SUPPORTED BY SUBSTANTIAL, CREDIBLE, AND REASONABLE EVIDENCE

A. The Lower Court correctly found that Martin's actions were the sole proximate cause of the subject accident

There was substantial and credible evidence presented to the trial court that Martin knew

the bridge was out prior the May 29, 2004 accident, that a "Bridge Out" sign was placed in the middle of Garden City Road on the night of the accident in front of the first of two dirt embankments, and that Martin and Allen while legally intoxicated deliberately ignored the warnings placed by Franklin County. Evidence was also presented that Martin or Allen was ramping the ATV on which he was riding over the dirt embankments erected by Franklin County. (*See* May 29, 2004 "Offense Report" at R.E. at 7, T.E. 20.)

Franklin County emergency first responder Doreen Norris testified that when she arrived at the accident scene shortly after the accident, she saw a large "Bridge Out" sign placed immediately in front of the first dirt embankment.

Q: Now, you said you looked to see if a sign was there. What were you looking for?

A: The bridge out sign.

Q: Tell the Court whether or not you saw one.

A: Yes, I did.

Q: I am going to show you a sign.

A: Yes, sir.

Q: I am going to ask you if the sign you saw looked like what this sign looks like.

A: Yes, sir. It did.

(*See* R.E. at 6, T.R. at 202, 203.) Franklin County had a photograph of a Bridge Out sign like the one Norris saw on the night of the accident entered into evidence as Exhibit 15. (*See* R.E. at 5, T.E. 15.) Norris's testimony is significant in light of the fact that the Plaintiff's liability expert, George Hammitt, testified in a portion of his deposition testimony that was introduced into evidence that if a "Bridge Out" sign had been placed at the bridge, such would have constituted

adequate warning.

> Q: I'm on page - - guys, I am on page 38. I want you to start reading a statement you made because - - you know - - when I asked questions at your deposition, you gave long answers like you're giving today, but read this answer right here to the Court at your deposition. Starting with " I just."
>
> A: "I just - - it's a publication. I pulled it down from the internet. Also that showed how much signs would cost. I have that in here. They're usually somewhere between $40 and $80 for **a sign to be put up saying things like bridge out or dangerous bridge or something like that would given adequate warning or prewarning.**" (Emphasis added.)

(*See* R.E. at 9, T.R. at 162, 163.) Additionally, Hammitt admitted that an intoxicated driver would be prone to ignore any type of warnings recommended by the Manual on Uniform Traffic Control (hereinafter "MUTCD"), and that a driver is not supposed to ignore posted warnings signs.

> Q: If you have impaired perception, then there is less of a chance you're going to be paying attention to the signs that are supposed to get your attention. That's fair to state, isn't it?
>
> A: It seems logical to me.
>
> [Omitted Lines]
>
> Q: You testified at your deposition that an intoxicated driver would be paying less attention to the sign because of their impairment?
>
> A: I think that's generally true.
>
> [Omitted Lines]
>
> Q: And you can't think of a single instance when a sign is out there, been placed our there, let's say, by a county where an operator is supposed to disobey that sign. That's a fair statement, isn't it?
>
> A: I mean, yes.

(*See* R.E. at 9, T.R. at 165, 166, 167.)

Franklin County's toxicology expert, Dr. Fredrick Carlton, testified that Martin and Allen

were both legally intoxicated at the time of the accident.

Q: [Omitted Lines] I am going to ask you whether or not based upon your education, your background, and experience in this field, based upon your review of the records, whether or not you have an opinion based upon a reasonable degree of toxicological probability what the plaintiff's blood alcohol was at approximately 3:00 a.m. on May 29, 2004, at the time of the accident?

[Omitted Lines]

A: [Omitted Lines] Somewhere between 3:00 and 3:30, and I just picked 3:15 in my report just because it was in the middle and actually made the calculations a little bit easier, but if you back calculate from forty milligrams per deciliter if would put you at 130 milligrams per deciliter at one - - I am sorry. At 3:15 which would be .13 millgrams percent at that time.

Q: And at this time in 2004, the level of legal intoxication was what?

A: I believe that it had already been lowered to .08 milligrams per deciliter at that time.

[Omitted Lines]

Q: Now, I am going to ask you the same question and to shorten it I'm just going to ask the last question about the plaintiff's blood alcohol at approximately 3:00 a.m. on the morning of May 29, 2004. The same question with regard to Jennifer Allen Boyette.

A: Right. Her blood alcohol at 7:05 that morning of May 29th was 112 milligrams per deciliter would be point .12 - - .112 - - I am sorry - - milligrams percent which if you back calculated it at a steady state, and this is making the assumption that she had reasonable, I guess, function of - - you know - - from a cardiovascular standpoint, reasonable profusion, and I am less sure of that number to be honest, but if she was hemodynamically reasonably stable, she should have been close to .19 percent or 190 milligrams per deciliter at the time of the impact.

[Omitted Lines]

Q: So that's more than twice the legal limit?

A: Correct.

(*See* R.E. at 1, T.R. at 241, 242, 243.)

Martin even testified that he had never seen Allen operate an ATV prior to the accident, and that he was not even sure whether she knew how to crank one up.

Q: Pages 125 of your deposition. The question is this. "And so before this night you had no knowledge if Jennifer even knew how to crank one up." Your answer was, "no." Is that right?

A: That's what it says.

Q: You'd never seen her on an ATV before, had you?

A: I had never seen it, no.

Q: I beg your pardon?

A: I said I had never seen her on another ATV. No.

Q: You didn't know what experience she had driving an ATV with a clutch, did you?

A: No. I sure didn't.

(*See* R.E. at 15, T.R. at 77, 78.)

The trial court was justified in finding for Franklin County based upon Miss. Code § 11-46-9(1)(v). This section states, in relevant part, 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." Code section 11-46-9(1)(v) is predicated upon Martin exercising due care. Franklin County presented substantial evidence that Martin did not exercise due care with regard to a dangerous condition of which he was aware. Martin ignored the substantial warnings posted by Franklin County, including a "Road Closed" sign posted approximately 1500 feet from the entrance to the Bride, a "Bridge Closed" sign posted in front of the first dirt embankment, and the two dirt embankments placed across the roadway before the entrance to the bridge. (*See* R.E. at 5, 12,

T.E. 9, 15, 19.) Additionally, Franklin County presented evidence that Martin knew the bridge was out. (*See* R.E. at 6, T.R. at 209.) Also, even if Allen was operating the ATV in question, which is disputed, Martin admitted that he had no idea whether she even knew how to operate an ATV prior to the subject accident. (*See* R.E. 15, at T.R. at 77, 78.) The trial court, sitting as the finder of fact, was presented with substantial, credible, and reasonable evidence in support of its finding that that the sole proximate cause of the accident in question were the actions of Martin and Allen in deliberately proceeding past warning signs and dirt embankments placed at the bridge they knew to be closed and out. (*See* R.E. at 13, C.P. at 517.)

B. The trial court correctly found no negligence on the part of Franklin County

Martin argues that the trial court erred by not finding that Martin was only contributorily negligent. Martin's argument ignores the substantial proof presented that Martin knew the bridge was out and chose to ignore the warnings that were in place at the bridge entrance. Martin purports that Newton v. Lofton, 840 So.2d 833 (Miss.Ct.App. 2003), supports his argument that the trial court should have placed only comparative fault on him. A examination of *Newton* reveals it has no application to the case at bar.

Lofton was injured while attempting to cross a City construction site near a school gymnasium. Newton v. Lofton, 840 So.2d 833, 835 (¶ 2) (Miss.Ct.App. 2003). Lofton presented several witnesses who were present at the time of the injury and shortly thereafter, who testified that there was an absence of warnings signs and that the construction on the curb was not completed. Id. The City of Newton presented no witnesses who were present immediately after the accident and who could testify that any warning signs were present. Likewise, there was no mention in the opinion that Lofton was aware of the construction site or had prior knowledge of the faulty curb upon which she fell. Based upon these facts, the trial court found for Lofton. On

appeal, the Court of Appeals, applying the same standard of review which applies to the case at bar, found that "after weighing all the evidence, the trial court determined that Lofton's injury was caused by the negligence of the City of Newton, by failing to warn and protect Lofton..." *Id* at (¶ 8.) Therefore, the Court of Appeals found the trial court had examined the proof before it and was justified in reaching its decision.

In the case *sub judice* the trial court was presented with evidence that Martin knew the bridge was out prior the subject accident, that substantial warnings were in place to alert Martin that the bridge was out, including a "Bridge Out" sign that was placed immediately in front of the first of two substantial dirt embankments. Also, Doreen Norris testified, while the parties were still at the accident site, she saw the Bridge Out sign in its proper place in the middle of Garden City Road, and that Hetzinger commented to her at the accident scene that Martin knew the bridge was out. (*See* R.E. at 6, T.R. at 203, 209.) The facts and proof in the case at bar, when compared to *Lofton*, demonstrate that *Lofton* lends no support to Martin's case.

Martin also argues that Franklin County's toxicology expert admitted at trial that Martin's intoxication had nothing to do with the dirt embankment collapsing. Martin's argument ignores how Martin attempted to get onto the bridge in the first place. While Martin and Allen's legal intoxication is certainly a substantial factor in regard to their negligence, this was not the only basis upon which the trial court found for Franklin County. In fact, in the third paragraph of the Court's August 8, 2008 order the Court states as follows:

> The Court further finds that the plaintiff and the other individual on the four wheeler in question, both adults, were under the influence of alcohol, **knew the bridge was out prior to that date, and knowingly proceeded past warning signs and dirt barricades.** The Court further finds that the sole proximate cause of the accident in question was [sic] the actions of the plaintiff and the other individual in **deliberately proceeding past warning signs and dirt barriers upon the end of a bridge they knew to be closed and out.** (Emphasis added.)

(*See* R.E. at 13, C.P. at 517.)

The Mississippi Supreme Court has refused to place liability on a governmental entity where the plaintiff has knowledge of the alleged dangerous condition and decides to proceed anyway. *See* City of Clinton v. Smith, 861 So.2d 323, 328 (¶ 19) (Miss. 2003)(finding the City immune from liability in a slip and fall action where the plaintiff admitted that he knew ice and snow was located on the exit ramp); (*see also* City of Natchez v. Jackson, 941 So.2d 865, 876 (¶ 32) (Miss.Ct.App. 2006)(finding that "open and obvious" condition, when not caused by the government's negligent maintenance or repair, is a complete bar to recovery in a Tort Claims Act case);(*citing* City of Jackson v. Internal Engine Parts Group, Inc., 903 So.2d 60, 64 (¶ 11)(Miss. 2005);(*see also* Howard v. City of Biloxi, 943 So.2d 751, 757 (¶ 16)(Miss. 2006)). Accordingly, Martin's argument that he should have been found only partially at fault is unsupported by the facts and without merit.

C. The trial court correctly excluded from evidence a newspaper article dated March 29, 2007

During trial, Martin's counsel attempted to have a newspaper article from the Franklin Advocate, (**published three years post-accident**), admitted into evidence. The trial court correctly refused to admit this article into evidence as it is irrelevant to the issue of what warnings were present on May 29, 2004. The Trial Judge noted that the March 29, 2007 article was not relevant to the issue of what warnings were present during the early morning hours of May 29, 2004. The Trial Judge correctly ruled to exclude the newspaper article on the basis that its admission into evidence was not relevant. (*See* R.E. at 9, T.R. at 136 to 138);(*see also* Fielder v. Magnolia Beverage Co., 757 So.2d 925, 929 (Miss. 1999)(holding that evidence must be relevant in regards to making the "...existence of any fact that is of consequence to the

determination of the action more probable or less probable then it would be without the evidence.");(*citing* M.R.E. 401.))

Martin provides no substantive explanation as to how or why the trial court's refusal to admit the March 29, 2007 article adversely affected Martin's rights. In fact, Martin's argument is discredited by Martin's own liability expert, George Hammitt. Hammitt testified that a "Bridge Out" sign like the one Doreen Norris testified was present on the night of the accident would have been sufficient warning. (*See* excerpts from George Hammitt's testimony set forth above.) It is well settled that "the admissibility of evidence rests within the trial court's discretion." *City of Natchez*, 941 So.2d at (¶ 11);(*citing* *Crawford v. State*, 754 So.2d 1211, 1215 (¶ 7)(Miss.2000)(overruled on other grounds)). "Unless her judicial discretion is abused, this Court will not reverse her ruling." *Id.*

The Trial Judge was well within his discretion to refuse to admit the article into evidence. The bridge's condition three years after the accident is of no consequence to a determination of whether Franklin County provided adequate warnings on May 29, 2004. Alternatively, for the sake of argument, even if the trial court was in error in not admitting the article, which it clearly was not, such error was harmless error as Martin was allowed to present his evidence as to the condition of the bridge before the accident and at the time of the accident. Accordingly, this issue is without merit.

II. FRANKLIN COUNTY PROVIDED ADEQUATE WARNINGS

A. Warnings

Martin argues that no warning signs were present at the time of the subject accident. Martin's argument completely ignores the testimony presented on behalf of Franklin County as to the warnings present at the time of the subject accident. Doreen Norris testified that a "Bridge

Out" sign was present in front of the first dirt embankment on the night of the subject accident. (*See* R.E. at 6, T.R. at 202, 203.) Norris also testified that Martin's friend, David Hetzinger, commented to her at the accident scene that he and Martin had been jumping the dirt berm, and that Martin knew the bridge was out. (*See* R.E. at 6, T.R. at 209.) Martin's step-son, Eschete, reported to investigating officers that Martin and Allen had been jumping Martin's ATV across a dirt mound prior to the entrance to the bridge. (*See* R.E. at 7, T.E. 20, at ¶5.)

Franklin County Chancery Clerk Jimmy Jones (hereinafter referred to as "Jones") testified that prior to the May 29, 2004 accident, he had personally observed several warnings signs on Garden City Road on the approach to the bridge.

Q: Prior to May 29, 2004, had you been to the Well's Creek Bridge on the Adams County side?

A: Yes, I have.

Q: The side where the accident happened?

A: Yes, I have.

Q: Did you observed - - just tell the Court down there where the bridge - - as you're going, tell the Court did you observe any signs pertaining to road open or road closed?

A: Yes, I have.

Q: What did you see?

A: Coming in on the Adams County side, there's the little fork that's right close to the county line. There was a road closed sign there. Coming on down to what I refer to as the Anderson property which is back 1500, 2000 feet from the bridge, there was a road closed sign there, and then as I approached the bridge, there was a bridge out sign at the dirt there.

[Omitted Lines]

Q: All right. And the dirt mounds were about - - stretched across the road about how high?

A: Three and half to four feet high.

Q: Okay. One behind the other?

A: There was one at the bridge and on back on the Adams County side roughly twenty-five or thirty feet.

(*See* R.E. at 2, T.R. at 263, 265.)

Franklin County supervisor Woodrow Wilson testified as to the warnings that were placed before the bridge.

Q: [Omitted Lines] would you please tell the Court what you did to close the road and the bridge.

A: Well, we went and start getting dirt, put dirt berms on the bridge, and then on the Adams County side we had a crack across the road to the bridge. We put a dirt berm across the bridge. We stepped back from the bridge about twenty or thirty feet, and we put another one across behind the crack for safety in case if that would fall off, then we would still have a dirt berm behind it.

Q: And were any signs put up?

A: Yeah.

Q: And what were they?

A: We had bridge out sign right at the first dirt berm, and we had a road closed sign approximately 1500 feet back from the bridge, and we had another road closed sign at the Adams County-Franklin County line.

[Omitted Lines]

Q: [Omitted Lines] Was there a tape put out there?

A: Yeah. Orange ribbon, reflective orange ribbon was put up in front of the first dirt berm.

(*See* R.E. at 3, T.R. at 284, 285.)

Mr. Wilson also testified that he and his road foreman undertook to continually check to make sure the warnings signs and dirt embankments remained in place.

Q: Now, after all of this was erected and the road closed signs, did you ever visit the Well's Creek Bridge on Adams County side?

A: Yeah. Most probably two or three times a month.

Q: All right. Why were you doing that?

A: For the safety of the public.

[Omitted Lines]

Q: How often would you have your foreman go - - actually go on the road on the Adams County side?

A: Both sides. I would tell him to go at least twice a week. Tried to do it on Monday morning and Friday morning.

Q: And when he saw that a sign was either down or had been thrown off to the side or was missing, what would he do?

A: He would replace it.

(*See* R.E. at 3, T.R. at 285, 286.)

This testimony establishes that Franklin County had provided substantial warnings that the bridge was closed. Also, Franklin County exercised care to make sure that the warnings signs were properly replaced after vandalism. (*See* R.E. at 3, T.R. at 285, 286.)

Martin's alleged proof of lack of warnings, on the other hand, was not credible. For instance, Martin's witnesses were inconsistent in their testimony as to the size of the dirt embankments erected by Franklin County. Hetzinger first testified that there were no dirt embankments or mounds at the entrance to the bridge at the time of the accident. (*See* R.E. at 14, T.R. at 22.) However, during questioning by the Court, Hetzinger admitted that there was two feet of dirt all the way across in front of the bridge. (*See* R.E. at 14, T.R. at 49.)

Martin's testimony was likewise contradictory. During direct examination Martin testified that the dirt embankments were maybe two feet tall. (*See* R.E. at 15, T.R. at 56.)

However, during cross-examination Martin admitted that during his deposition he referred to a "hill" at the entrance to the bridge and that he would describe a hill as four to five feet tall. (*See* R.E. at 15, T.R. at 79, 80.) In addition to the contradictory testimony about the size of the dirt embankment, Martin was also unable to provide a reasonable explanation for an approximate 40 minute time gap between the time he allegedly left his deer camp on the ATV and when he directly proceeded to and arrived at the bridge, which was only 1/2 to 3/4 of a mile from the camp.

Martin testified that he arrived at his camp between 12:00 a.m. and 1:00 a.m., (*See* R.E. at 15, T.R. at 74), and that the accident happened approximately 2 hours later at 3:00 a.m. (*See* R.E. at 15, T.R. at 75.) Martin testified that he left his deer camp on his ATV around 2:15 a.m., proceeded directly to the bridge, and that he only had to travel 1/2 to 3/4 of a mile to reach the bridge. (*See* R.E. at 15, T.R. at 83.) Martin also admitted that it would have only taken him approximately 2 minutes and 15 seconds to reach the bridge. (*See* R.E. at 15, T.R. at 84.) Yet, Martin testified that the accident happened at 3:00 a.m. (*See* R.E. at 15, T.R. at 83). Martin's only explanation for the time gap from 2:15 a.m. to 3:00 a.m. was that he and his companions stopped and talked about half-way to the bridge (which would mean they only traveled about 1/4 mile and rode for about a minute) in a feeble attempt to try and account for the approximate 40 minute time gap. (*See* R.E. at 15, T.R. at 85.) This testimony is simply not credible. The trial court was instead presented with evidence by Franklin County that during this approximate 40 minute time gap, Martin and his companions were ramping or jumping the dirt embankments at the bridge. (*See* Norris testimony, R.E. at 6, T.R. at 209.)

Martin's father, Glenn Martin, Jr., also testified on Martin's behalf. After learning of the accident, he traveled from Jackson, Mississippi to the deer camp. (*See* R.E. at 16, T.R. at 175.)

Upon arriving at the deer camp and learning that his son was being transported from Natchez to University Hospital in Jackson, he immediately went to visit the bridge where he encountered some dirt approximately three to four inches high in front of the bridge. (*See* R.E. at 16, T.R. at 178.) This testimony is totally contradictory to Hetzinger who ultimately admitted that the dirt embankments were two feet high, or Martin himself who admitted the dirt embankments were four to five feet high.

It is well settled that "The trial judge, sitting in a bench trial as the trier of fact, has the sole authority for determining the credibility of the witnesses." City of Jackson v. Lipsey, 834 So.2d 687, 691 (¶ 14) (Miss. 2003)(*citing* Rice Researchers, Inc. v. Hiter, 512 So.2d 1259, 1265 (Miss. 1987)). As the finder of fact, the trial court was presented with substantial, credible, and reasonable evidence in support of its finding that Franklin County had taken substantial precautionary steps in erecting signs and warnings and placing the dirt barricades at the entrance to the bridge.

B. Franklin County's warnings were adequate

Franklin County erected and maintained substantial warnings to alert the public that the Wells Creek Bridge was closed. Martin's argument on this issue focuses largely on the dirt embankments that had been erected by Franklin County prior to the subject accident. Martin ignores the testimony by Norris that she saw the Bridge Out sign placed directly in front of the first dirt embankment, and testimony by Jones and Wilson who both testified as to the substantial steps undertaken by the county to warn the public that the bridge was out. (*See* Norris testimony, R.E. at 6, T.R. at 203, Jones testimony, R.E. at 2, T.R. at 263, 265, and Wilson testimony at R.E. at 3, T.R. 284, 285.)

Martin argues that the dirt embankments do not conform with the Manual on Uniform

Traffic Control Devices (hereinafter "MUTCD"). Martin correctly notes that under Mississippi law, the MUTCD can only be considered as evidence of negligence, and cannot be used to create a standard of care. *See* Donaldson v. Covington County, 846 So.2d 219, 224 (¶ 15)(Miss. 2003); Chisolm v. Mississippi Dep't of Transp., 942 So.2d 136, 143 (¶ 15)(Miss. 2006)). The trial court was bound by Mississippi law to consider all the evidence presented as to the adequacy of the warnings provided by Franklin County. The court correctly concluded that Franklin County provided adequate warnings.

Martin's own witnesses gave testimony supporting the adequacy of Franklin County's warnings to the public. Martin's witness, Mississippi assistant traffic engineer John Smith, admitted that the Mississippi Department of Transportation uses dirt embankments, similar to the one utilized by Franklin County, to close off a road.

> Q. Okay. Now, let me ask you this, Mr. Smith. Do you know of any governmental entity that puts dirt berms or dirt embankments out on the roadway?
>
> A. MDOT has. It's been - - we have got them all over. You probably got some on MDOT right-of-way in this county as this four-lane system came through.
>
> Q. Why do you put those out there?
>
> A. To close the road off.

(*See* R.E. at 17, T.R. at 117.)

Martin argues that his liability expert, George Hammitt, testified that the dirt embankments did not provide sufficient warnings. However, Mr. Hammitt admitted that the placement of a Bridge Out sign would have provided sufficient warning.

> Q: I'm on page - - guys, I am on page 38. I want you to start reading a statement you made because - - you know - - when I asked questions at your deposition, you gave long answers like you're giving today, but read this

answer right here to the Court at your deposition. Starting with " I just."

A: "I just - - it's a publication. I pulled it down from the internet. Also that showed how much signs would cost. I have that in here. They're usually somewhere between $40 and $80 for **a sign to be put up saying things like bridge out or dangerous bridge or something like that would given adequate warning or prewarning.**" (Emphasis added.)

(*See* R.E. at 9, T.R. at 162, 163.)

Martin also contends that if warnings signs were placed on Garden City Road, that such warnings were temporary and were commonly known to be stolen or removed. Assuming, *arguendo*, that no warning signs were present at the time of the subject accident, which Franklin County disputes, the trial court was still within its right to find for Franklin County under Mississippi law. Franklin County, through its supervisor Woodrow Wilson, gave undisputed testimony that he personally checked to make sure that the warnings signs were in place prior to the entrance to Well's Creek Bridge, and that his road foreman also conducted regular checks.

Q: Now, after all of this was erected and the road closed signs, did you ever visit the Well's Creek Bridge on Adams County side?

A: Yeah. Most probably two or three times a month.

Q: All right. Why were you doing that?

A: For the safety of the public.

[Omitted Lines]

Q: How often would you have your foreman go - - actually go on the road on the Adams County side?

A: Both sides. I would tell him to go at least twice a week. Tried to do it on Monday morning and Friday morning.

Q: And when he saw that a sign was either down or had been thrown off to the side or was missing, what would he do?

A: He would replace it.

(*See* R.E. at 3, T.R. at 285, 286.)

Miss. Code § 11-46-9(1)(w) states in relevant part 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:
>
> (w) Arising out of the absence, condition, malfunction or removal by third parties or any sign, signal, warning device...unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice.

The Mississippi Supreme Court has held that "...§ 11-46-9(1)(w) does not require a governmental entity to actively patrol areas containing warnings signs to see if a third party has removed the signs. The statute exempts the governmental entity from liability for the removal of warning signs "*unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice*." (Emphasis added.) Mitchell v. City of Greenville, Mississippi, 846 So.2d 1028, 1031 (¶ 13)(Miss.2003). Even if Franklin County was on notice that the warnings signs at the bridge had been removed in the past, Franklin County checked on the placement of the signs at least twice per week to ensure that the signs were replaced. (*See* R.E. at 3, T.R. at 285, 286.) Martin's argument would require that Franklin County actively monitor the warnings signs to ensure that they were in place every minute of the day, and would amount to a standard of absolute or strict liability not permitted by statute. This standard is not required under Mississippi law. Therefore, even assuming that the warnings placed by Franklin County had been removed by some third party at the time of the subject accident, Franklin County would still be entitled to judgment based upon § 11-46-9(1)(w).

III. THE TRIAL COURT PROPERLY REFUSED TO IMPOSE SANCTIONS

The trial court correctly decided not to levy sanctions upon Attorney Lane Reed. Martin's

complaint on this point is about a witness (Mississippi state assistant traffic engineer John Smith) who ultimately testified at the trial, and the documents he authenticated were admitted into evidence. The Trial Judge conducted a full hearing of the matter on the record, and questioned Mr. Reed as to his actions, which were unknown to Franklin County's trial counsel, relative to Mr. Smith. Mr. Reed explained that he contacted the Attorney General's office to determine whether or not a trial subpoena had been served upon John Smith because Mr. Reed found no return of service in the Court file by the morning of trial. Mr. Reed stated that it was his understanding that the assistant Attorney General informed Smith that because he was not under subpoena, he could do whatever he wished to do.

BY THE COURT: What was your purpose in calling the Attorney General?

BY MR. REED: I talked to Mr. Coleman who is with the Attorney General's office - -

BY THE COURT: What was your purpose in calling the Attorney General?

BY MR. REED: To determine whether or not a subpoena had been served on John J. Smith.

BY THE COURT: Being that if you thought he wasn't under subpoena you were going to tell him to leave?

BY MR. REED: I told him that he was - - I didn't tell him anything. Let me back up. Mr. Coleman advised him. His counsel advised him - -

BY THE COURT: No, no, no. Wait, let's just start - - when we got here this morning, did you know who John Smith was.

BY MR. REED: No, sir.

[Omitted Lines]

BY THE COURT: Well, how did Mr. Smith come to leave here when he was here for court his morning.

BY MR. REED: It's my understanding, Judge, that his counsel told him he was not under subpoena and to do whatever he wished to do.

(*See* R.E. at 18, T.R. at 68 to 70).

The trial subpoena in question was issued by the Plaintiff on December 7, 2007, only four days prior to the start of the trial. (*See* R.E. at 19, C.P. at 471.) Mr. Smith was ultimately questioned by the Court on this matter.

BY THE COURT: Why did you leave?

BY MR. SMITH: The legal counsel, Assistant Attorney General for the Department of Transportation told me that he would prefer that I not be here, and I think he said that had they been given time, talking about MDOT, they would have opposed me being here.

(*See* R.E. at 17, T.R. at 104.)

The trial judge conducted a full hearing on this matter which ultimately encompasses approximately 11 pages of the trial court record. The Supreme Court reviews a trial court's decision to grant or deny sanctions under an abuse of discretion standard. Tinnon v. Martin, 716 So.2d 604, 611 (Miss. 1998);(*citing* White v. White, 509 So.2d 205, 207 (Miss. 1987)). Mississippi law makes clear that a trial judge is vested with great latitude when determining whether or not to levy sanctions. *See* Miss. R. Civ. P. 37(e); *(see also* Cooper Tire & Rubber Co. v. McGill, 890 So.2d 859, 867 (¶28)(Miss. 2004), (Rule 37 (e) gives great flexibility to the trial courts in the form of a general grant of power which enables it to deal summarily with discovery abuses);(Amiker v. Drugs for Less, Inc., 796 So.2d 942, 948 (Miss. 2000)). There is no evidence that the trial court abused his discretion in refusing to levy sanctions upon Attorney Lane Reed, especially in light of the fact that Martin's witness, John Smith, was allowed to testify and the documents Mr. Smith authenticated were admitted into evidence.

Martin was afforded a full opportunity to present his argument for sanctions at the trial court level. The Trial Judge heard from the parties, and heard from Mr. Smith. Based upon all of circumstances, the Trial Judge decided that sanctions were not warranted. Martin has failed to show how the trial court's decision was an abuse of discretion, and Martin's point of argument on this issue is without merit.

VI. CONCLUSION

The trial court, sitting as the finder of fact, was presented with substantial, credible, and reasonable evidence that Martin's actions were the sole proximate cause of this accident. Franklin County presented evidence as to the substantial warnings it erected to warn the public that the Well's Creek Bridge was closed, that the warnings were present and in place at the time of the accident, that Martin knew the bridge was closed, that Martin and Allen were legally intoxicated, and that Martin chose to ignore the warnings posted by Franklin County. The trial court was warranted in finding for Franklin County, and the trial court's decision should be affirmed.

WHEREFORE, PREMISES CONSIDERED, Franklin County, Mississippi respectfully requests that this Honorable Court affirm the decision of the Circuit Court of Franklin County, Mississippi.

Respectfully submitted,

FRANKLIN COUNTY, MISSISSIPPI

By: _____

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VII: CERTIFICATE OF SERVICE

I, Jeremy T. Hutto, one of the attorneys of record for Franklin County, Mississippi, hereby certify that I have this day caused to be mailed, via US Mail, postage fully prepaid, a copy of the above and forgoing instrument to:

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Honorable Trial Judge

Honorable Forrest A. Johnson
Circuit Court Judge
Post Office Box 1372
Natchez, Mississippi 39121

THIS the 29th day of July, 2009.

JEREMY T. HUTTO