IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-IA-01207-SCT E

COVINGTON COUNTY SCHOOL DISTRICT — APPELLANT

V.

LUTRICIA MAGEE, INDIVIDUALLY, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF LONNIE C. MAGEE, JR., DECEASED, AND ALL OTHERS WHO ARE ENTITLED TO RECOVER UNDER THE WRONGFUL DEATH STATUTE — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF COVINGTON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

SUBMITTED BY:

GERALD P. COLLIER, M[redacted]
STAMPS & STAMPS
ATTORNEYS AT LAW
POST OFFICE BOX 2916
JACKSON, MISSISSIPPI 39207-2916
269 EAST PEARL STREET
JACKSON, MISSISSIPPI 39201
TELEPHONE: (601) 354-4747

ATTORNEY FOR APPELLEE

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CERTIFICATE OF INTERESTED PARTIES

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

1. Gerald P. Collier, Esquire
   Attorney For Appellee(Lutricia Magee)
   Stamps & Stamps
   Attorneys At Law
   Post Office Box 2916
   Jackson, Mississippi 39207-2916

2. Robert P. Thompson, Esq.
   William B. Stewart, Sr., Esq.
   Attorneys for Appellant (Covington County School District)
   Copeland, Cook, Taylor & Bush, P.A.
   Post Office Box 6020
   Ridgeland, Mississippi 39158

3. Robert D. Gholson, Esq.
   Noel A. Rogers, Esq.
   Attorneys for Defendant, Green Tree Family Medical Clinic, PLLC, Joe Johnston, M.D. and Word Johnston, M.D.
   Burson, Entrekin & Orr, PLLC
   Post Office Box 1289
   Laurel, Mississippi 39441

4. J. Robert Ramsay, Esq.
Attorney for Defendants, Bettye Logan, F.N.P. and Covington County Hospital
Ramsay & Hammond, P.L.L.C.
Post Office Box 16567
Hattiesburg, Mississippi 39404-6567

5. Anita Modak-Truran, Esq.
Chad R. Hutchinson, Esq.
Attorneys for Bettye Logan, F.N.P.
Butler, Snow, O'Mara, Stevens & Cannada, PLLC
Post Office Box 22567
Jackson, Mississippi 39225-2567

6. Jolly M. Matthews, Esq.
Attorney for Defendant, Bettye Logan, F.N.P.
Matthews & Stroud
48 Liberty Place, Suite 2
Hattiesburg, Mississippi 39402

7. Honorable Robert G. Evans
Covington County Circuit Court Judge
Post Office Box 545
Laurel, Mississippi 39153

8. Bettye Logan, F.N.P. - Defendant
6367 Highway 84
Prentiss, Mississippi 39474

9. Covington County Hospital - Defendant
P.O. Box 1149
Collins, Mississippi 39428

10. Green Tree Family Medical Clinic, P.L.L.C. - Defendant
603 Main Street
Mount Olive, Mississippi 39119

SO CERTIFIED this the 6th day of APRIL, 2009.

GERALD P. COLLIER
ATTORNEY FOR THE APPELLEE
MSB NO. 10583

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IV. STATEMENT OF THE ISSUE(S)

(1) Whether the claims of the Plaintiff, Lutricia Magee, Individually and on behalf of the Wrongful Death Beneficiaries of Lonnie C. Magee, Jr. ("the Plaintiff"), against the Covington County School District ("the District"), are based upon the District's exercise of ordinary care in reliance upon, or the execution or performance of or the failure to exercise or perform a statute, ordinance, or regulation?

(2) Whether Covington County School District has a statutory duty to provide a safe environment for its students and to minimize risks to its students and whether this duty applies to decisions and/or conduct related to allowing football practice to be conducted in dangerously hot and humid temperatures?

V. STATEMENT OF THE CASE

A. Nature of the Case

On August 8, 2007, Lonnie C. Magee, Jr., a seventeen year old male, collapsed and died during football practice at Mount Olive Attendance Center. As a result of his death, Plaintiff filed the subject lawsuit, alleging, in part, that the Covington County School District (referred also herein as "Defendant") failed to provide a safe environment for its students and failed to take ordinary care and reasonable steps to minimize risks to students by allowing football practice(s) to be conducted during extremely dangerous, hot and humid August temperatures. Plaintiff seeks damages pursuant to the Mississippi Wrongful Death Statute as codified in Mississippi Code Annotated § 11-7-13 (Rev. 2004).

B. The Course of the Proceedings

On February 25, 2008, Plaintiff filed her First Amended Complaint.[1] (R. 5-12). More specifically, Plaintiff alleges that the Covington County School District was negligent in failing to provide a safe environment for its students and failing to exercise ordinary care and take reasonable steps to minimize risks to students by allowing football practice(s) to be conducted during extremely dangerous, hot and humid August temperatures. (R. 7-9). As a result of Defendant's negligence, Plaintiff's son, Lonnie C. Magee, Jr., collapsed and died while participating in football practice at Mount Olive Attendance Center on August 8, 2007. (R. 9).

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Plaintiff's original Complaint was not made part of the record. The First Amended Complaint contains the same allegations in the original Complaint with the addition of John Doe Defendants.

On March 20, 2008, the Defendant filed its Answer, denying Plaintiff's claims of negligence and asserting as an affirmative defense the exemptions from liability afforded to a governmental entity under the Mississippi Tort Claims Act. (R. 31-40). Thereafter, Defendant filed its Motion for Summary Judgment on the ground that the school district is entitled to immunity for any negligent acts committed pursuant to Miss. Code Ann. § 11-46-9(1)(d) (Rev. 2002 and Supp. 2008). (R.13-43). Plaintiff filed its Opposition to Defendant's Motion for Summary Judgment. (R. 46-128). Defendant filed its rebuttal. (R. 129-146). The Defendant's Motion for Summary Judgment was set for hearing on June 20, 2008. (R. 44-45).

C. Disposition in the Court Below

At the hearing on Defendant's Motion for Summary Judgment, the trial court heard argument from counsel for the Plaintiff and Defendant as to whether Defendant was entitled to immunity pursuant to Miss. Code Ann. § 11-46-9(1)(d) (Rev. 2002 and Supp. 2008). The trial court denied Defendant's Motion for Summary Judgment on immunity grounds and found that a statutory duty existed, but granted the Defendant's Motion for Summary Judgment as to the Plaintiff's *res ipsa loquitur* claim. The trial court entered its Order Denying in Part and Granting in Part Defendant's Motion for Summary Judgment on June 25, 2008. (R. 147).

On July 3, 2008, Plaintiff filed her Second Amended Complaint. (R.149-164). In that particular complaint, the substantive claims against Defendant remained the same. However, Plaintiff named as additional Defendants certain medical providers. Plaintiff brought suit against these medical providers for their negligence in connection with the Sports Participation Physical Examination performed on Lonnie C. Magee, Jr. on August 7, 2007, and their decision to clear him to play football based off that physical examination. (R. 153-154). The Plaintiff's causes of action against the medical defendants are not part of this appeal.

Thereafter, Defendant filed its Petition for Permission to Appeal Interlocutory Order and for Stay of Trial Court Proceedings with this Court. In its August 27, 2008 Order, the Court granted Defendant's Petition and stayed the trial court proceedings as to only the school district and its employees. (R. 165-166).

D. Statement of the Facts Relevant to the Issue Presented for Review

On August 8, 2007, Lonnie C. Magee, Jr., a seventeen year old male, collapsed during football practice at Mount Olive Attendance Center. (R. 7, 47). Emergency medical personnel arrived on the scene and found Lonnie C. Magee, Jr. lying on the ground with no pulse and unresponsive. (R. 47). CPR was administered by emergency medical personnel in an attempt to save Lonnie C. Magee, Jr.'s life. (R. 47). Lonnie C. Magee, Jr. was transported to the Covington County Hospital emergency room in full cardiac arrest. (R. 47). Emergency room doctors, nurses and other personnel were unsuccessful in their attempt to resuscitate Lonnie C. Magee, Jr. (R. 47). Heat stroke was the cause of Lonnie C. Magee, Jr.'s death.(R. 47).

On the day the Lonnie C. Magee, Jr. collapsed and died, the temperature was dangerously hot and humid. (R. 47). Defendant, Covington County School District, was aware of the dangerously hot and humid temperatures, yet the school district still allowed football practice to be conducted in this dangerous heat. (R. 47). As a result of Lonnie C. Magee, Jr.'s death, Plaintiff filed the subject lawsuit. More specifically, the subject lawsuit alleges that the Covington County School District failed to provide a safe environment for its students and failed to exercise ordinary care and take reasonable steps to minimize risks to students by allowing football practice(s) to be conducted during extremely dangerous, hot and humid August temperatures. (R. 47). Furthermore, Plaintiff alleges in the subject lawsuit that Covington County School District failed to provide properly trained oversight personnel and/or professionals who were able to properly identify and/or make the determination

when student athletes reached the limits of their endurance at football practice during the extremely hot summer days of August thereby failing to exercise ordinary care in performing its statutory duty to provide a safe environment for its students and to minimize risks to students.(R. 7-8). Plaintiff also alleges that Defendant failed to exercise ordinary care in performing its statutory duty to provide a safe environment for its students and to minimize risks to students, by allowing: (1) Defendant's officials to conduct football practices in dangerously hot temperatures without performing sufficient observations and/or evaluations for heatstrokes, heat exhaustion, and/or any other heat-related conditions; (2) lacking the capabilities (including equipment(portable external heart defibulator[2])) to even perform these duties; and/or failing to take any necessary precautions and safeguards to guard against the aforementioned conditions. (R. 7-8). Contrary to Defendant's assertion, the temperature on August 8, 2007, and the cause of Lonnie C. Magee, Jr.'s death are absolutely relevant for purposes of this appeal because those two pieces of information are essential and vital in aiding the Court in deciding the issue of whether the school district and its employees have violated its statutory duty to provide a safe environment for its students.

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One of Plaintiff's experts is expected to testify, in part, that failure to provide or have available an adequate emergency response kit which includes a portable defibulator (external heart defibulator) and qualified personnel, at football practice on August 8, 2007, who are able to properly administer emergency treatment and use the equipment in the emergency response kit (including the portable difibulator), created an unsafe environment and foreseeable risks and this is a contributing cause of the death of Lonnie Magee, Jr.

VI. SUMMARY OF THE ARGUMENT

This Honorable Court must decide whether Covington County School District exercised ordinary care, in reliance upon, or in the execution or performance of, or in the failure to execute or perform its statutory duty to provide a safe environment for its students. It is Plaintiff's contention that Defendant failed to perform its statutory duty to provide a safe environment for its students when the school district decided to conduct football practice during extremely dangerous hot and humid temperature. Therefore, Covington County School District should not be granted immunity for its actions and/or omissions under the Mississippi Tort Claims Act.

Plaintiff argues that a school district's statutory duty to provide a safe environment "has been positively imposed by law;" therefore, it is a ministerial duty. The decision of whether to conduct football practice during a time when the heat index was at least 113° Fahrenheit should not be viewed any differently as: (1) the decision to close a school in instances were a tornado or hurricane is threatening the area where the school is located; (2) the decision to not allow buses to transport students to and from school when there is ice on the road because of safety issues; or (3) the decision to close a school when a bomb threat calls into question the safety of the school. It is true that school personnel must exercise some amount of discretion in making such decisions, but that still does not change the fact that decisions of this nature have a basis in the statutorily imposed obligation to provide a safe school environment for students, which is a ministerial dictate

In the case at bar, a statutory duty has been conclusively established. This Honorable Court has opined in *Pigford v. Jackson Public School District*, 910 So. 2d 575 (Miss. 2005) (citing *L.W.*, 754 So.2d 1136 (Miss. 1999)), that the administration of public schools constitutes the execution of a statutory duty. Furthermore, Defendant has readily admitted that it has a statutory duty to provide a safe environment for its students via certain responses to Plaintiff's Requests for Admission.

This Honorable Court has concluded that public schools have the responsibility to use ordinary care and take reasonable steps to minimize risks to students thereby providing a safe school environment." *Pearl Public School District v. Groner*, 784 So. 2d 911, 915 (Miss. 2001) (citing *L.W. v. McComb Separate Municipal School District*, 754 So. 2d 1136, 1141) (Miss. 1999)). However, Defendant argues that it or any school district has a statutory duty to provide a safe environment to its students *only* in instances involving school discipline and/or disorderly conduct by students at school. Its argument, if accepted, virtually eliminates any duty of school district to provided a safe environment and minimize the risks to students in situations involving health (including spread of disease), severe weather conditions, structural (building) hazards, etc. Here, Defendant had a statutory duty to provide a safe environment for its students and to minimize the risks to its students by not allowing football practice to be conducted during a time when the heat index was at least 113° Fahrenheit.

Plaintiff's allegations of negligence are different than those argued in *Prince v. Louisville Mun. School Dist.*, 741 So. 2d 207(Miss. 1999) and *Harris v. McCray*, 867 So. 2d 188, 192 (Miss. 2004). In *Prince* and *Harris* the focus was on whether the actions and/or inactions of the coaches in supervising their football practices are discretionary in nature and therefore afforded immunity under the Tort Claims Act without any focus on whether coaches failed to exercise ordinary care in the reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance, or regulation. In the case *sub judice*, Plaintiff's focus is on the failure of the school district to exercise ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance, or regulation. The crux of Plaintiff's claims against the Defendant lies in deciding the issue of whether the school district and its employees violated its statutory duty to provide a safe environment for its students. Plaintiff is attacking the decision of the

school district to place students in an unsafe environment by electing to conduct football practice during a time when the heat index was at least 113° Fahrenheit.

Even if the acts and/or omissions of Covington County School District may have been discretionary, they still did not involve social, economic, or political policy. In *Stewart ex rel. Womack v. City of Jackson*, 804 So. 2d 1041, 1048 (Miss. 2002), the Mississippi Supreme Court stated that it "must distinguish between real policy decisions implicating governmental functions and simple acts of negligence which injures innocent citizens." The decision to conduct football practice during a time when the heat index was at least 113° Fahrenheit does not involve real policy decisions. Therefore, the actions and/or omissions of Defendant should not be afforded immunity under the Mississippi Tort Claims Act.

Accordingly, this Honorable Court should affirm the trial court's denial of Defendant's Motion for Summary Judgment and affirm the trial court's ruling/order denying, in part, Defendant's Motion for Summary Judgment.

VII. ARGUMENT

A. Standard of Review

"In reviewing a trial court's ruling on a motion for summary judgment, the [Mississippi Supreme Court] conducts a de novo review and examines all the evidentiary matters before it, including admissions in pleadings, answers to interrogatories, depositions, and affidavits." *Presley v. City of Senatobia*, 997 So. 2d 235, 237 (¶ 4) (Miss. 2008) (citing *Green v. Allendale Planting Co.*, 954 So. 2d 1032, 1037 (¶ 8) (Miss. 2007)). The Supreme Court has stated that "[t]he evidence must be viewed in the light most favorable to the party against whom the motion has been made." *Id.* (citing *City of Jackson v. Sutton*, 797 So. 2d 977, 979 (¶ 7) (Miss. 2001)).

B. The Mississippi Tort Claims Act

Plaintiff agrees with Defendant's statement that Covington County School District is a "governmental entity" and a "political subdivision" of the state. However, Plaintiff disputes and does not agree with that statement that Covington County School District, in the case *sub judice,* is subject to the limitations of liability and exemptions from liability available under the Mississippi Tort Claims Act, as set forth in *Miss. Code Ann. § 11-46-1, et seq.* Mississippi Code Annotated § 11-46-9(1)(b) provides that the school district and its employees are exempt from liability while performing or failing to perform such statutory duties so long as ordinary care is exercised. It specifically provides, in part, as follows:

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance, or regulation, whether or not the statute, ordinance or regulation be valid. . . .

See Miss. Code § 11-46-9(1)(b).

There is no question that the Covington County School District had a statutory duty to provide a safe environment for its students and to minimize risks to its students. The fact is readily admitted by the Defendant, although the school district argues that the duty is discretionary. Having established a duty on part of the Defendant, the primary question is whether Covington County School District exercised ordinary care, in reliance upon, or in the execution or performance of, or in the failure to execute or perform its statutory duty to provide a safe environment for its students and to minimize risks to its students by allowing football practice to be conducted in dangerously hot and humid temperatures. It is Plaintiff's contention, as set forth more fully herein, that ordinary care was not exercised in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation. Therefore, Covington County School District should not be granted immunity for its actions and/or omissions under the Mississippi Tort Claims Act.

C. Ministerial Versus Discretionary Conduct

Plaintiff agrees with Defendant's assessment that whether the conduct of Covington County School District was ministerial or discretionary is outcome determinative as to the issue presented to the Court for review. Counsel for Covington County School District would have this Court to believe that the actions of the school district in deciding to conduct football practices in extremely dangerous hot and humid temperatures were clearly discretionary and, therefore, the school district is afforded absolute immunity under the Mississippi Tort Claims Act. That simply is a fallacy. To illustrate Plaintiff's contention, it is necessary to first define a discretionary and ministerial duty. "A duty is discretionary if it requires the official to use her own judgment and discretion in the performance thereof." *L.W. v. McComb Separate Municipal School District*, 754 So. 2d 1136, 1141 (¶ 21) (Miss. 1999))(citations omitted). "In contrast, an act is ministerial if the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon

conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." *Id.* (quoting *Davis v. Little*, 362 So. 2d 642, 644 (Miss. 1978)).

Applying the definition of a ministerial duty to the facts of this case, a plausible argument could be made that the actions of Covington County School District were ministerial in nature. It is an uncontroverted fact that from statutory law our Supreme Court has fashioned a statutory duty for public schools to provide a safe environment for students by utilizing ordinary care and taking reasonable steps to minimize risks to students. That duty is one which has been positively imposed by law. The decision of whether to conduct football practice during a time when the heat index was at least 113° Fahrenheit should not be viewed any differently as: the decision to close a school in instances were a tornado or hurricane is threatening the area where the school is located; the decision to not allow buses to transport students to and from school when there is ice on the road because of safety issues; or the decision to close a school when a bomb threat calls into question the safety of the school. It is true that school personnel must exercise some amount of discretion in making such decisions, but that still does not change the fact that decisions of this nature have a basis in the statutorily imposed obligation to provide a safe school environment for students, which is a ministerial dictate. Obviously, the superintendent of Covington County School District could have and should have utilized ordinary care and taken reasonable steps to provide a safe school environment for his students and minimize foreseeable risks of harm to them before the death of Lonnie C. Magee, Jr. This fact is evident by the memo wherein the superintendent mandated that there be no outside activity (practice or games) between the hours of 3:00 p.m. to 7:00 p.m. for football due to the heat. (R. 115).

In reference to discretionary, there has been some confusion as to what type of governmental conduct should be afforded immunity under the Mississippi Tort Claims Act. "In discerning whether a function is afforded immunity under the discretionary exception, it must first be determined whether the activity involved an element of choice or judgment." *Jones v. Miss. Dept. of Transp.*, 744 So. 2d 256, 260 (¶ 10) (Miss. 1999) (citation omitted). "If so, it must then be determined whether the choice involved social, economic or political policy." *Id.* Not all acts are protected under the exception, even though they involve the exercise of some form of discretion. The United States Supreme Court has held that "only those functions which by nature are policy decisions, whether made at the operational or planning level, are protected. *Id.* (citing *U.S. v. Gaubert*, 499 U.S. 315, 322 (1991)).

D. A STATUTORY DUTY HAS BEEN ESTABLISHED

This Honorable Court has opined in *Pigford v. Jackson Public School District*, 910 So. 2d 575 (Miss. 2005) (citing *L.W.*, 754 So.2d 1136 (Miss. 1999)), that the administration of public schools constitutes the execution of a statutory duty. *Id.* It must be noted that for compulsory school age children in Mississippi, enrollment and attendance in school is mandated by statute. Given these mandates, our Supreme Court has stated that "[s]ince the state requires all children to be enrolled in school, it only seems logical that the state should then require school personnel to use ordinary care in administering our public schools." *L.W.*, 754 So. 2d at 1142. Miss. Code Ann. § 37-9-14, provides, in part, as follows:

> (1) It shall be the duty of the superintendent of schools to administer the schools within his district and to implement the decisions of the school board.

Id. Plaintiff has alleged, in her First Amended Complaint, that Defendant has violated its duty imposed pursuant to Mississippi Code Annotated § 37-9-14, by failing to provide a safe school

environment and failing to minimize risks to its students. (R. 8). In *Pigford,* the Supreme Court opined that the administration of public schools constitutes the execution of a statutory duty and school personnel are required to use ordinary care in administering public schools and ordinary and reasonable steps must be taken to minimize risks to students. *Pigford*, 910 So. 2d. at 575, 578, 580 (Miss. 2005).

Furthermore, Defendant has readily admitted that it has a statutory duty, as evidenced by the following Request for Admission:

> **REQUEST FOR ADMISSION NO. 12**: Admit that defendant, Covington County School District, has a statutory duty to provide a safe environment for its students.
>
> **RESPONSE**: Admitted.

(R. 48). Defendant attempts to clarify the above stated admission by bringing the Court's attention to a response given to an admission in Plaintiff's Second Set of Request for Admissions. (R. 144-146). More specifically, Request for Admission No. 17 states as follows:

> **REQUEST FOR ADMISSION NO. 17**: Please admit that the Covington County School District has a statutory duty to use ordinary care in administering public schools and to take ordinary and reasonable steps to minimize risks for its students.
>
> **RESPONSE**: Responding to Request No. 17, ***Defendant admits*** only that from Miss. Code Ann. § 37-9-69, the Courts of this state have fashioned a ***ministerial duty to maintain a safe environment for the students*** that has been applied by the Courts in a limited context....

(R. 145-146) (emphasis added). Mississippi Rule of Civil Procedure 36 is meant to provide, and should provide, an authoritative manner of procedure, and it is to be enforced even if harsh consequences may result. *DeBlanc v. Stancil*, 814 So. 2d 769, 801 (Miss. 2002). Even though the Court enjoys discretion in pretrial matters, a decision to permit a party to withdraw and amend admissions should only be rendered in *extraordinary circumstances*. *Educational Placement Serv.*

v. Wilson, 487 So. 2d 1316, 1318 (Miss. 1986) (emphasis added). Courts may not give or withhold at pleasure, and Mississippi Rule of Civil Procedure 36 should be enforced according to its terms without gratuity. *Id. M*atters are deemed admitted even if the facts are outcome determinative. *Towner v. Moore*, 604 So. 2d 1093, 1099 (Miss. 1992). The statutory duty of the Covington County School District to provide a safe environment for its students has been established in this case via the subject request for admission. Moreover, not only did the Defendant admit that it had a statutory duty, but it also admitted that the duty to provide a safe environment for students is ministerial in nature.

E. <u>There is a Statutory Duty that Applies to the Facts of this Case</u>

It must be noted that "[b]oth state and federal law supports [the Mississippi Supreme Court's] conclusion that public schools have the responsibility to use ordinary care and take reasonable steps to minimize risks to students thereby providing a safe school environment." *Pearl Public School District v. Groner*, 784 So. 2d 911, 915 (Miss. 2001) (citing *L.W. v. McComb Separate Municipal School District*, 754 So. 2d 1136, 1141) (Miss. 1999)). Defendant argues that the duty to provide a safe environment for students *only* applies in instances involving school discipline and/or disorderly conduct by students at school. Defendant would like for this Honorable Court to believe that statement as being a fact, yet the school district fails to cite any case wherein the Mississippi Supreme Court has limited the statutory duty to provide a safe environment for students to that context only. Covington County School District flatly states that given the unique factual circumstances of this case, our Courts should not construe it in the same manner as they have other cases dealing with negligence on part of a school district in providing a safe environment for students. That statement is tantamount to saying that it would be absurd for our Courts to even consider a case as this one under the same legal analysis and applicable law although it deals with claims of negligence on part

of a school district that led to injuries, and eventual death, of a student.

Covington County School District's position is that it or any school district does not have a statutory duty to provide a safe environment to its students unless it involves the conduct of its students. Its argument, if accepted, virtually eliminates any duty of school district to provided a safe environment and minimize the risks to students in situations involving health (including spread of disease), severe weather conditions, structural (building) hazards, etc. In its brief to the Court, Defendant admits that "the duty to provide a safe environment could conceivably apply to other areas of school safety," but goes on to state that the duty does not render a school district an absolute guarantor of the students' safety. While a school district may not be able to provide a safe environment for its students in every situation, there are certain situations in which it is obvious that a school district has a duty to take action to prevent its students from being placed in harm's way. For example, one would not readily question whether a school district has a duty to cancel or postpone a sporting event and/or practice during a lightning storm because of the threat of bodily harm and/or death that such conditions pose to student athletes. Is this example any different than a school district failing to provide a safe environment for its students and failing to minimize the risks to its students by allowing football practice to be conducted during a time when the heat index was at least 113° Fahrenheit? (R. 69). Plaintiff would argue that they are one in the same.

F. Miss. Code Ann. § 37-9-69 and Miss. Code Ann. § 37-9-14 Give Rise to a Statutory Duty that Applies to the Facts of this Case

As stated above, Mississippi Code Annotated § 37-9-14 imposes a duty on the superintendent of schools to administer the schools within his district. *Id.* As established above, the administration of public schools constitutes the execution of a statutory duty. In *Pigford*, the Supreme Court opined that the administration of public schools constitutes the execution of a statutory duty and school

personnel are required to use ordinary care in administering public schools and ordinary and reasonable steps must be taken to minimize risks to students. *Pigford*, 910 So. 2d. 575, 578, 580 (Miss. 2005). As established above, Mississippi Code Annotated § 11-46-9-(1)(b) requires that Defendant exercise ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform a statute, ordinance or regulation. The issue of ordinary care is a fact question that should be decided in the trial court. *Pearl Public School District*, 784 So. 2d at 915 (Miss.2001). Defendant's argument that the Court has never applied Mississippi Code Annotated § 37-9-14 in the context of Mississippi Code Annotated § 11-46-9(1)(b) for the purpose of analyzing whether a governmental entity exercised ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, is groundless. This argument is simply not plausible. If the statute creates a statutory duty on behalf of the Defendant, then the Defendant must exercise ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform the statutory duty. The fact that the application of the facts to the law is of first impression, does not mean that the Court abandons the law and refuses to apply a new factual scenario to the law.

Mississippi Code Annotated § 37-9-69 imposes a duty on the superintendent, principal and teachers in the public schools of this state enforce the statutes, rules and regulations prescribed for the operations of school. *Id.* In light of this statutory duty, Covington County School District must exercise ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform the statutory duty. At minimum, there exists genuine issues of material fact as to whether Covington County School District exercised ordinary care in enforcing the statutes, rules and regulations prescribed for the operations of public schools. In light of the fact that the issue of ordinary care is a fact question, and discovery is incomplete, summary judgment is not proper.

G. Cases Cited by Appellant are Distinguishable from this Case

In its brief, Defendant details specific facts and the Court's rationale in several cases wherein student athletes suffered heat strokes while practicing football, and the Court held that the coaches and school district were entitled to immunity under Mississippi Code Annotated § 11-46-9(1)(d). In two particular cases of importance, *Prince v. Louisville Mun. School Dist.*, 741 So. 2d 207(Miss. 1999) and *Harris v. McCray*, 867 So. 2d 188, 192 (Miss. 2004), this Honorable Court based its holdings on the facts and arguments before it. We must note that in either case there were no arguments made which addressed a statutory duty and the application of Mississippi Code Annotated § 11-46-9-(1)(b), which requires that the school district exercise ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform a statute, ordinance or regulation.

This Court opined specifically in *Harris*, 867 So. 2d at 192 (¶ 15) (Miss. 2004) that "[t]here is nothing in the record to imply that Coach McCray's actions as a football coach on August 21, 1995, violated any statute, ordinance, or regulation." *Id.* That statement by the Court seems to intimate that its ruling may have been different if there was an argument made and evidence to support the argument that the actions of the coach violated a statute, ordinance, or regulation. In *Prince*, 741 So. 2d at 212 (¶ 20) (Miss. 1999), the Court stated that:

> There was no evidence presented in the lower court to show that either Bowman or Chambliss did anything beyond exercising ordinary discretion in supervising the Nanih Waiya football practice on August 29, 1991. Prince produced no facts that evidenced any disregard for his health or any other outrageous action on the part of Brown or Chambliss that might have warranted a departure from our previous holdings.

Here, the Court would be hard pressed to make such definitive findings as it did in *Harris* and *Prince* because the record before it has not been sufficiently developed. Many facts are in dispute and thus consideration of summary judgment is inappropriate. There are many unanswered questions

revolving around what transpired at Mount Olive Attendance Center on the day the Lonnie C. Magee, Jr. collapsed and died. There are unanswered questions about what the coaching staff did before practice, during practice, and at the time that Plaintiff's son collapsed on the football field. There are also unanswered questions surrounding the thought process and rational of the Defendant in deciding to conduct football practice in such dangerously hot and humid temperatures.

In short, there are a myriad of unanswered questions and facts in dispute that when revealed could very well show that not only did Defendant failed to perform its statutory duty to provide a safe environment for its students in order to minimize the risk of harm to the students, but also failed to perform other statutes, ordinances or regulations as well. Additional discovery, as well as depositions of the school superintendent, principal, athletic director, coaching staff, members of the varsity football team, teachers, etc., is needed to flesh out crucial discoverable facts. This Court has held that a circuit court erroneously granted a school district summary judgment because of unresolved factual questions present in the case and because of the principle that ordinary care is a question of fact. *See Henderson v. Simpson County Public School Dist.*, 847 So. 2d 856, 858 (Miss. 2003).

Defendant has misconstrued the basis of Plaintiff's argument or the law at issue, which has largely contributed to Defendant's statements that certain statutory and/or case law does not apply to the facts and circumstances of the present case and that "Plaintiff's attempt to distinguish her claims from [*Harris* and *Prince*] is a distinction without a difference." Therefore, Plaintiff would like to resolve some of the confusion and clearly state the basis for her argument and its distinction from the two aforementioned cases to the Court. In *Prince* and *Harris* the allegations of negligence focused on the actions and/or inactions of the coaches during football practice without considering whether the coaches exercised ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance, or regulation. The crux of Plaintiff's

claims against the Defendant lies in deciding the issue of whether the school district and its employees violated its statutory duty to provide a safe environment for its students. Plaintiff acknowledges that this Court has previously held that the actions and decisions of coaches in conducting and supervising their practices are discretionary in nature and therefore afforded immunity under the Tort Claims Act in the absence of a finding that coaches failed to exercise ordinary care in the reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance, or regulation. In the case *sub judice*, Plaintiff is attacking the failure of the school district to exercise ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance, or regulation. Plaintiff is attacking the decision to place students in an unsafe environment by electing to conduct football practice during a time when the heat index was at least 113° Fahrenheit. The decision of when, where, how, and why to conduct practice is trumped by the overriding statutory duty of a school district and its employees to provide a safe environment for its students and to minimize risks to its students. There is a huge difference in a decision as to what drills players need, how long drills should last, and how to discipline players as compared to when practice should be canceled or postponed due to dangerous weather conditions because with the former a coach may run the risk of losing control and discipline of his/her team, but with the latter, a student may get seriously injured or in the case of Lonnie Magee, Jr., lose his life. Furthermore, the latter brings into play the statutory duty to provide a safe environment for students and to minimize risks to students. Covington County School District had a statutory duty to use ordinary care and take reasonable steps to minimize risks to students, thereby providing a safe school environment. Defendant breached that statutory duty when it allowed football practice to be conducted in an environment that was unsafe for its student athletes. Therein lies the fundamental difference between Plaintiff's allegations of negligence and the allegations of negligence in the *Prince*

and *Harris* cases.

H. The Application of MHSAA Handbook Give Rise to a Duty that Applies to the Facts of this Case.

Defendant erroneously argued that there is no duty, statutory or otherwise, that has been positively imposed on the Defendant to have in place a policy and/or procedure to account for the heat and when practice could take place. To the contrary, the Mississippi High School Activities Association, Inc.'s Handbook requires and regulates the clothing that high school football players must wear during the first five (5) days of August football practice. Paragraph (a) on the section titled "Rules Governing Football" states in part, as follows:

> [D]uring the first five (5) days of August football practice, players shall not wear football pads of any kind, football togs, or football jerseys. Helmets, face guards, mouth pieces, and shoes may be worn.
> . . .

(R. 80).

The handbook also states in Article X, in part, that:

> The superintendent, principal, coach or other representative of the school in charge shall be responsible officers of the school. They shall be responsible for the conduct of those connected with their school, both at home and on trips, as representatives of the school and community. . .
>
> The school administration has a responsibility to educate student athletes, coaches, and other appropriate persons on state association legislation that could affect them. Further, the member should monitor its compliance with state association legislation.

(R. 79).

Obviously, this creates a genuine issue of material fact as to whether the subject handbook is a statute, regulation and/or ordinance. The affidavit of Ennis Proctor, Executive Director of Mississippi High School Activities Association, made an exhibit to Defendant's Motion for Summary Judgment, is misleading in that it does not address the regulations that are established in the subject

handbook. (R. 42-43). Furthermore, the above regulations concerning clothing and/or gear that a football player can wear during the first five (5) days of August football practice contradicts Proctor's affidavit where he stated that Mississippi High School Activities Association has no policy or regulatory scheme in effect stating what outdoor activities are allowed, the time of same and the clothes to be worn, as based on the heat index. This handbook activates Miss. Code Ann. §11-46-9-(1)(b) and it is an issue of fact as to whether the Defendant exercise ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform any of the applicable regulations within the subject handbook.

I. The Qualifications of the Personnel at Practice on August 8, 2007, are Relevant to the Defendant's Statutory Duty.

In her First Amended Complaint, Plaintiff alleges that Defendant failed to "provide properly trained oversight personnel and/or professionals who were able to properly identify and/or make the determination when student athletes reached the limits of their endurance at football practice during the extremely hot summer days of August." (R. 7). Plaintiff also alleged that during the course and scope of the football practice there was no observations made to determine signs of potential heatstroke, heat exhaustion, and/or any other heat-related problems. (R. 7). Contrary to Defendant's assertions otherwise, these claims made by Plaintiff are not aimed at attacking the school district's hiring and supervision of its employees. Rather, these claims focus on the Defendant's actions of not further providing a safe environment for its students. Once the decision was made to place student athletes in a dangerous environment by electing to conduct football practice when the heat index was at least 113° Fahrenheit, it only seems logical that there should have been school personnel present who were properly trained to identify and respond to any heat-related problems experienced by a student athlete. There should have been employees of the school district who positively knew what

affirmative steps to take to alleviate and minimize the risks of danger and harm to the student athletes placed in an already dangerous environment. In short, the lack of proper equipment (portable defibulator) and qualified personnel who were properly trained in addressing heat-related illness and/or injuries made an already unsafe environment even more unsafe for the students.

J. Defendant's Actions and/or Omissions Do Not Involve Social, Economic, or Political Policy.

Even if this Court was to find that the actions and/or omissions of Covington County School District were discretionary, the Defendant is still not entitled to immunity under the Mississippi Tort Claims Act because those discretionary acts and/or omissions did not involve social, economic or political policy. In *Stewart ex rel. Womack v. City of Jackson*, 804 So. 2d 1041, 1048 (Miss. 2002), the Mississippi Supreme Court stated that it "must distinguish between real policy decisions implicating governmental functions and simple acts of negligence which injures innocent citizens." In that case the issue was whether the City of Jackson and its employees were immune from liability under Mississippi Code Annotated § 11-46-9 for damages sustained by Stewart when she fell and eventually suffered a stroke after exiting a shuttle van provided by the City of Jackson and then attempted to cross the street. *Id.* at 1045-46. Stewart claimed that her injuries were caused by the City employees' failure to assist her across the street. *Id.* In determining whether the acts and/or omissions were immune from liability, the Supreme Court stated that the "case does not involve real policy decisions implicating governmental functions; rather, it involves allegations of simple acts of negligence." *Id.* at 1048. Therefore, the Court held that even though the acts or omissions of the City of Jackson and its employees were discretionary, they were not of the type of discretionary acts or omissions contemplated as granting immunity by the Mississippi Tort Claims Act. *Id.* Thus, they were discretionary acts or omissions that were not afforded immunity.

This same reasoning applied to the present facts leads to the same conclusion. Even if the acts and/or omissions of Covington County School District may have been discretionary, they still did not involve social, economic, or political policy. Counsel for Covington County School District makes a feeble attempt to correlate the acts and/or omissions of the school district to public policy by stating that a decision to hold practices later in the evening would interfere with a student athlete's academics and sleep, as well as result in additional supervisory and transportation costs for the school district. Defendant's baseless claims would be more plausible if August 8, 2007, had not been the first day of school, therefore causing minimal, if any, interference with academics. Moreover, most student athletes are accustomed to dealing with varying practice times that may have a direct impact on their academics and sleep. Furthermore, Defendant has produced no evidence to even remotely suggest that Covington County School District provides transportation for student athletes after school hours. It is an unquestioned fact that students who engage in after school extracurricular activities, including football, are expected to provide their own transportation to their homes and to practices and other functions when school is not in session. Therefore, the students could have simply went home and had their parents bring them back to school for a later practice time when the temperature was much cooler. This would not involve any additional costs to the school for supervision or transportation. The Superintendent of Covington County School District apparently did not share the same concerns as espoused by Defendant's counsel because he mandated that there be no outside activity (practice or games) between the hours of 3:00 p.m. to 7:00 p.m. for all student athletes due to the heat immediately following the death of Lonnie C. Magee, Jr. (R. 115).

Simply put, applying the standards enumerated by this Honorable Court clearly leads to the conclusion that the acts and/or omissions of Petitioner do not involve real policy decisions. Accordingly, the decision to conduct football practice during a time when the heat index was at least

113° Fahrenheit should not be afforded immunity under the Mississippi Tort Claims Act and is clearly a simple act of negligence.

CONCLUSION

Does the Defendant have a statutory duty to provide a safe environment for its students and to minimize risks to its students? Does this duty apply to the Defendant's decision to put its football players (student athletes) at risk by conducting football practice at a time when the heat index was at least 113° Fahrenheit? These are some of the questions that the Court must ask itself. Defendant would like to have this Court believe that answering the question in the affirmative would lead to the opening of the "flood gates of litigation every time a high school athlete is injured in sports participation or practice. In fact, such a ruling may have the very opposite effect. There may very well be a decrease in cases of this nature because school districts and their employees would be put on notice that they can no longer make choices and decisions which place its students in an unsafe environment, then hide behind discretionary acts immunity once their choices and decisions lead harm, injuries, and even death of a student. Parents in Mississippi are compelled by law to send their school age children to school; therefore, school districts and their employees should be compelled to create a safe environment for students and be held accountable for their actions when they fail to do so.

Therefore, Plaintiff respectfully requests that this Honorable Court affirm the trial court's denial of Defendant's Motion for Summary Judgment and not render a judgment of dismissal in favor of the Defendant.

Respectfully submitted,

LUTRICIA MAGEE

BY: Gerald P. Collier

GERALD P. COLLIER
ATTORNEY FOR PLAINTIFF
[redacted]

OF COUNSEL:

STAMPS & STAMPS
ATTORNEYS AT LAW
POST OFFICE BOX 2916
JACKSON, MISSISSIPPI 39207-2916
269 EAST PEARL STREET
JACKSON, MISSISSIPPI 39201
TELEPHONE: (601) 354-4747

CERTIFICATE OF SERVICE

I, Gerald P. Collier, Attorney for the Appellee, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Honorable Robert G. Evans
Covington County Circuit Court Judge
Post Office Box 545
Raleigh, Mississippi 39153

Robert P. Thompson, Esq.
William B. Stewart, Esq.
Copeland, Cook, Taylor & Bush
Post Office Box 6020
Ridgeland, Mississippi 39158
***Counsel for Appellant*, Covington County School District**

J. Robert Ramsay, Esq.
Ramsay & Hammond, P.L.L.C.
Post Office Box 16567
Hattiesburg, Mississippi 39404-6567
Counsel for Bettye Logan, F.N.P. through Covington County Hospital

Robert D. Gholson, Esq.
Noel A. Rogers, Esq.
Gholson, Burson, Entrekin & Orr
Post Office Box 1289
Laurel, Mississippi 39441
Counsel for Dr. Word, Joe Johnston and Green Tree Family Medical Clinic

Anita Modak-Truran, Esq.
Chad R. Hutchinson, Esq.
Butler, Snow, O'Mara, Stevens, Cannada, PLLC
Post Office Box 2267
Jackson, Mississippi 39225
Counsel for Bettye Logan, F.N.P. through Fireman's Fund

Jolly M. Matthews, Esq.
Matthews & Stroud
48 Liberty Place, Suite 2
Hattiesburg, Mississippi 39402
Counsel for Bettye Logan, F.N.P. through Fireman's Fund

This, the 6th day of May, 2009.

ATTORNEY FOR APPELLEE