SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01202

DR. JERRY PRATT — APPELLANT

VERSUS

GULFPORT-BILOXI REGIONAL AIRPORT AUTHORITY D/B/A GULFPORT-BILOXI INTERNATIONAL AIRPORT AND ATLANTIC SOUTHEAST AIRLINES, INC. — APPELLEES

BRIEF OF APPELLEE

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

(Oral Argument is Not Requested)

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CERTIFICATE OF INTERESTED PERSONS

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

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THIS, the 22 day of January, 2010.

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STATEMENT OF THE ISSUES

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STATEMENT OF THE CASE

On or about April 14, 2006, Dr. Jerry Pratt filed suit against the Gulfport-Biloxi Regional Airport Authority, a political subdivision of the State of Mississippi (hereinafter referred to as GBRAA), for damages arising out of a fall that occurred on October 24, 2004, alleging that the GBRAA failed to maintain an outside uncovered temporary metal stairwell in a reasonable safe condition and failed to warn Dr. Pratt of a dangerous condition. (R. At 13-17). On April 26, 2006, GBRAA filed is Answer, Defenses and Affirmative Defenses. (R. at 18-118). After obtaining leave of court, the Plaintiff filed his Amended Complaint, which added Northwest Airlines as a defendant. (R. at 13-17). On June 13, 2007, GBRAA filed it Answer, Defenses, and Affirmative Defenses to the Amended Complaint. (R. at 133-236).

After discovery and delays resulting from bankruptcy issues related to the addition of Northwest Airlines as a defendant, GBRAA filed a Motion for Summary Judgment on August 18, 2008. (R. at 246-286). GBRAA argued that it was exempt from the waiver of sovereign immunity for failure to warn of the alleged dangerous condition because the alleged danger was open and obvious to one exercising due care for his own safety. (R. at 249). GBRAA also argued that it was exempt from the waiver of sovereign immunity on the grounds that any decisions it made regarding the stairs in question involved a discretionary function of government for which it retains immunity. (R. at 250). Accompanying GBRAA's Motion for Summary Judgment was its Itemization of Material Facts relied upon in support of its motion. (R. at 287-290). On November 10, 2008, the Plaintiff filed his Memorandum in Opposition to GBRAA's Motion for Summary Judgment and his Response to Itemization of Material Facts. (R.

at 291-387). On November 14, 2008, GBRAA filed its Rebuttal Memorandum Brief to Plaintiff's Memorandum Opposition to GBRAA's Motion for Summary Judgment. (R. at 388-394).

The Trial Court granted GBRAA's Motion for Summary Judgment on both grounds argued by GBRAA. (R. at 395-401). The Trial Court found that the dangerous condition alleged by the Plaintiff was open and obvious to one exercising due care. (R. at 397). The Trial Court further found that the alleged acts or omissions of GBRAA were a discretionary function of GBRAA, "guided by the regulatory purpose of providing a safe and secure premises for its patrons," for which GBRAA retains immunity from suit. (R. at 400). Finally, on July 2, 2009, a Final Judgment in accordance with Miss.R.Civ.P. 54(b) was entered from which the Plaintiff perfected the instant appeal. (R. at 408-422).

STATEMENT OF RELEVANT FACTS

The Plaintiff's Amended Complaint alleges that on October 24, 2004, "Dr. Jerry Pratt, was a ticketed invitee attempting to board [Atlantic Southeast Airlines] Flight 4528 operating out of defendant, [GBRAA's] facility, located in Harrison County, Mississippi." (R. at 129). Plaintiff further alleges that as he "approached gate 5, he was directed by employees of one or more of the defendants out of a glass door onto an uncovered temporary metal stairwell." (R. at 129). Plaintiff's pleading further alleges that at the time the Plaintiff was exiting the terminal, "it was raining and as plaintiff took one step on the metal stairs while holding the handrail, he lost his footing and fell down the entire stairwell to the tarmac below." (R. at 129). The Plaintiff's Complaint and Amended Complaint allege that GBRAA was negligent in the following respects:

a. In failing to warn the plaintiff of the slick condition of the stairwell;

b. In failing to provide the plaintiff with a safe means of boarding his flight;

c. In failing to assist the plaintiff in traversing the stairwell at a time when the defendants knew or should have known of its dangerous propensity;

d. In improperly maintaining the stairwell;

e. In improperly applying and maintaining the anti-traction tape on the stairwell;

f. In failing to adhere to federal guidelines, industry practices and/or common sense in the application and maintenance of anti-traction tape;

g. In improperly tightening and replacing connecting bolts so as to present a slip and fall hazzard;

h. In failing to provide adequate safety procedures for the loading of airline passengers in rainy conditions from a temporary ramp;

i. In failing to properly train their employees in protecting airline passengers in rainy conditions;

j. In violating the Revised Statutes of the State of Mississippi, all of which are pled as if copied herein in extenso; and

k. All other acts of negligence which were the cause of the incident sued upon and will be shown through litigation in this matter.

(R. at 130).

The temporary stairs referenced above are depicted in an exhibit to GBRAA's Motion for Summary Judgment (R. at 267) and are more specifically described as Airstairs, manufactured by Stinar Corporation. (R. at 268-270). The Airstairs in question actually belonged to Northwest Airlines. (Deposition of Don Shepley at p. 8-9; R. at 271-272). GBRAA, in essence, borrowed the stairs for Northwest to create a temporary exit from the airport terminal during a construction project. (Deposition of Lloyd Gates at p. 20; R. at 278). GBRAA employees added anti-skid tape to the treads/steps on the Airstairs. (Lloyd Gates Deposition at p. 30; R. at 279). When the Airstairs in question came from the Stinar factory, the treads/steps were not equipped with any anti-skid material. (Don Shepley Deposition at p. 30-31; R. at 274-275). Instead, Stinar's specifications for the Airstairs considered one of the safety features of the treads/steps as, "[a]luminum diamond plate [which] provides a non-skid walking surface." (R. at 269). The anti-skid material installed by GBRAA was added as an additional safety measure. (Don Shepley Deposition at p. 34; R. at 276). Admittedly, the anti-skid material placed on the diamond plate treads/steps of the Airstairs did not cover the entire tread/steps, but rather, the anti-skid material was placed in the middle of each tread/step. (R. at 347-353).

In his deposition taken during the course of discovery, the Plaintiff testified as follows:

A. . . . I walked over to the left side of the stairwell, grabbed the left stairwell and took one step and then slipped and lost my footing.

Q. And when you say, you took one step, that was when you took one step down?

A. Off the top of the platform.

Q. Now, after you walked out the door, you said onto the platform, I think, what was the weather like?

A. It was drizzling.

Q. When was the first time that you were aware that it was drizzling?

A. When I opened the door to walk out there.

(R. at 282-283).

Q. So you would have walked across this platform approximately 12 feet before you encountered the first step [the one on which the Plaintiff slipped], if this measurement's correct?

A. I think so.

(R. at 284).

Q. Okay. By the time you made, say, your second step across the platform, were you aware it was raining?

A. I would be guessing, but I think so.

(R. at 284).

Q. Prior to you taking that first step [where he slipped], were you aware it was raining?

A. Yes.

(R. at 285).

Q. And when you opened the door, were you immediately aware that these stairs were not covered?

A. I think so.

Q. And looking at Exhibit 1, not only were the stairs not covered, the platform, as we've described it, that wasn't covered, either, was it?

A. Correct.

Q. So it would be fair to say that prior to you taking the first step, you were aware it was raining, and you were aware that the steps were not covered?

A. Yes.

(R. at 285).

Q. Now, you see in Exhibit 2 there's the - - you called it a rubber strip, the black strip on the step. When you looked down, were you aware that that strip did not come all the way across the step?

A. Yes.

(R. at 286).

Q. But when you stepped down, you realized you weren't actually stepping on the strip, that you were stepping down on that Diamond Plate?

A. I believe so.

(R. at 286).

Q. Now you said that you should have been warned that this step was wet, but you were aware prior to encountering the step that it was raining; correct?

A. When I opened the door and walked outside, I was aware.

Q. Right. Do you think it would have been reasonable to assume that the step would have been wet if it was raining and the steps were uncovered? Reasonable on your part, I should say.

A. Yes.

* * *

Q. You said it would have been reasonable for you to assume that that step would have been wet because it was raining and the steps were uncovered; correct?

A. That's correct.

Q. So any warning that the step was wet would have been warning you of something of which you should reasonably have known prior to the warning; correct, or with or without the warning, I should say?

A. Can you rephrase that?

Q. Okay. You agree with me that it was reasonable to assume that the step was wet because it was raining and they were uncovered?

A. Correct.

Q. So any warning that anybody would have given you that, hey, this step is wet, would have been a warning about something that you either knew or should known was already there?

A. Not necessarily.

Q. Okay. Can you explain that?

A. A warning makes you have additional caution when you do something.

Q. Okay. Anything else, just as far as the explanation?

A. It's like when you go someplace and they mop the floor and they have the sign out there, you can see them mopping the floor, but they still have a sign there so that you take extra caution.

(R. at 286).

SUMMARY OF ARGUMENT

GBRAA is a political subdivision of the State of Mississippi which is subject to the Mississippi Tort Claims Act (MTCA). GBRAA is exempt from liability for the Plaintiff's allegations of negligence under the provisions of Mississippi Code Annotated § 11-46-9. Section 11-46-5 of the MTCA is only a partial waiver of sovereign immunity, and the Legislature expressly exempts political bodies from the waiver of sovereign immunity for acts related to several categories of conduct enumerated in §11-46-9. The conduct of GBRAA, as alleged by the Plaintiff to have been negligent, falls within at least one these exemptions. The Courts have held that the "[g]overnmental immunity exists if any subpart of Mississippi Code Annotated § 11-46-9(1) applies." *Delmont v. Harrison County Sch. Dist.*, 944 So. 2d 131, 133 (¶4) (Miss. Ct. App. 2006) (citing *Fair v. Town of Friars Point*, 930 So. 2d 467, 471 (¶9) (Miss. Ct. App. 2006)). (Emphasis added). This rationale has been referred to as "Fraiser's Octopus," as a result of a law review article written by Jim Frasier, wherein he wrote that the exemptions in Section 11-46-9 "are disjunctive in nature, and thus, 'like an octopus' arms, even if one does not get you another one may.'" *See* Frasier, 76 Miss. L.J. at 982-83 (quoting Frasier 68 Miss. L.J. at 743). As such, if the Defendant can satisfy any one exemption, it is immune from suit, and it is unnecessary to consider any other exemptions.

The Plaintiff alleges that GBRAA negligently failed to warn him of a dangerous condition. Mississippi Code Annotated § 11-46-9(1)(v) provides that a governmental entity subject to the MTCA "shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care . . . ."

The Plaintiff herein admitted the following facts:

- He knew it was raining before he took his first step.
- He knew the steps were uncovered.
- Because it was raining, it was reasonable to assume the steps were wet.
- He knew when he took his first step that he was not stepping on the anti-skid material on the step, but was stepping on the metal step. (R. at 282-286).

These undisputed facts clearly establish that any danger of the wet diamond plate treads/steps as a result of being exposed to rainfall was open and obvious to the Plaintiff, if he was exercising due care. As such, GBRAA is entitled to the immunity afforded it under Section 11-46-9(1)(v).

The Plaintiff relies on *Mayfield v. The Hairbender*, 903 So. 2d 733 (Miss. 2005) in support of his argument that GBRAA is not entitled to immunity under Subsection (v). However, the dichotomy regarding a duty to warn and a duty to maintain a private premises which is discussed in *Mayfield*, is not applicable in this case which involves a governmental entity subject to the MTCA. The MTCA is clear in Exemption (v) 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."

Notwithstanding the foregoing and "Frasier's Octopus" referenced above, GBRAA also is immune from suit pursuant to Mississippi Code Annotated § 11-46-(1)(d) and (g), as the Plaintiff's allegations of negligence necessarily involve a discretionary function of GBRAA. The Mississippi Supreme Court has adopted a two-part test for determining which governmental acts are entitled to discretionary function immunity. Under this two-part test, a governmental entity is entitled to discretionary

function immunity if the entity's activity involved an element of choice or judgment and also involved social, economic, or political policy. *See Jones v. Miss. Dep't of Transp.*, 744 So. 2d 256, 260 (¶ 10) (Miss. 1999).

Further, in Mississippi, an act is discretionary unless the duty is one "that has been positively imposed by law and its performance required in a time and manner or upon conditions which are specifically designated." *Marshall v. Chawla*, 520 So.2d 1374 (Miss. 1988). Discretionary acts require public servants to use their judgment in deciding what is best for the public good, and further are those acts which require personal deliberation, decision and judgment. *Sykes v. Grantham*, 567 So.2d 200, 210 (Miss. 1990).

GBRAA's decisions regarding construction, maintenance and repair of its premises, and, in general, the provision of adequate governmental services, are clearly discretionary. There is no duty positively imposed by law in this regard; rather, GBRAA must use its best judgment in the construction, maintenance, and repair of its premises, including the Airstairs in question.

The Plaintiff in the case *sub judice* can point to no set of instruction, statutory or otherwise, dictating construction, maintenance and repair of the Airstairs in question by GBRAA[1]. Since such measures are left to the discretion of GBRAA, the adequacy of the measures taken need not be addressed.

Prong two of the discretionary function test, is the next inquiry, requiring the Court to determine whether GBRAA's decision involved a policy decision. GBRAA's

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[1]This point appears to be conceded in the Appellant's Brief, as his primary focus is on prong two of the test.

decision with regard to the actions alleged in the Complaint involved social policy because they were guided by the regulatory purpose of providing a safe and secure premises for its patrons. GBRAA's judgment regarding the steps necessary to maintain the means of access from the airport terminal to the air transportation involved an important social and public policy such as providing airline passengers at this public airport with the safest means of egress from the terminal to the air transportation.

Plaintiff argues that because the decisions regarding application of the anti-skid tape and the Airstairs in general were not made at the administrative level, said decisions do not involve policy. (Appellant's Brief at 26). However, the Mississippi Court of Appeals has found that a decision made on the planning or operational level may involve policy decisions. *Willing v. Estate of Benz*, 958 So. 2d 1240, 1253 (¶ 34) (Miss. Ct. App. 2007). Further, "this limitation is applicable to the day-to-day decisions made by . . . governmental actors." *Id.* Clearly, GBRAA's day-to-day decisions regarding passenger safety when boarding flights involve a policy decision, whether at the planning or operational level. As a result, GBRAA is also immune from suit pursuant to the discretionary function exemption from the waiver of sovereign immunity.

ARGUMENT

1. The Trial Court correctly granted summary judgment to GBRAA, a political subdivision of the State of Mississippi, governed by the Mississippi Tort Claims Act, codified at Miss. Code Ann. § 11-46-1, et seq. because the alleged dangerous condition of which the Plaintiff complains was open and obvious to one exercising due care and/or because the alleged acts or omissions of GBRAA of which the Plaintiff complains involves a discretionary function of GBRAA.

GBRAA is a political subdivision of the State of Mississippi, and therefore, subject to Mississippi Code Annotated § 11-46-1 et seq., the Mississippi Tort Claims Act. (MTCA). *See* Mississippi Code Ann. § 11-46-1(i). Section 11-46-5 of the MTCA is only a partial waiver of sovereign immunity, and the Legislature expressly exempts political bodies from the waiver of sovereign immunity for acts related to several categories of conduct enumerated in §11-46-9. GBRAA is exempt from liability for the allegations herein under the provisions of Miss. Code Ann. § 11-46-9. The conduct of GBRAA, as alleged by the Plaintiff to have been negligent, falls within at least one these exemptions. The Courts have held that the "[g]overnmental immunity exists, if any, subpart of Mississippi Code Annotated § 11-46-9(1) applies." *Delmont v. Harrison County Sch. Dist.*, 944 So. 2d 131, 133 (¶4) (Miss. Ct. App. 2006) (citing *Fair v. Town of Friars Point*, 930 So. 2d 467, 471 (¶9) (Miss. Ct. App. 2006)). (Emphasis added). If the Defendant can satisfy any one exemption, it is immune from suit, and it is unnecessary to consider any other exemptions. In *Pearl River Valley Water Supply Dist. v. Bridges*, 878 So.2d 1013 (Miss. Ct. App. 2004), the Mississippi Court of Appeals ruled that if one of the exemptions listed in §11-46-9(1) applies, then a governmental entity is immune, regardless of whether or not the governmental entity can satisfy any of the other exemptions in Subsection 9. *Bridges*, 878 So. 2d at 1016 (¶ 12). The Court held:

> Section 11-46-9(1) contains exemptions lettered from (a) through (x). They are written in the disjunctive, as the next to last section (w) concludes with an "or," which is then followed by the last immunity provision (x). The immunities vary widely and it would be impossible for all to fit. Applicability of any of these sections creates immunity. *State v. Hinds County Bd. of Supervisors*, 635 So.2d 839, 842 (Miss. 1994). (quotation omitted)[2].

Id. (Emphasis added).

The *Bridges* Court further held that "the statute **is written in the disjunctive** which indicates that [the] subsections . . . should not be read together but should be read as alternatives separate and apart from one another." *Id.* (Emphasis added). The *Bridges* Court's held that it would be impossible for all of the immunities of Section 11-46-9(1) to fit, and therefore, the applicability of any one (1) of these sections creates immunity, which is the only logical interpretation of the many exemptions listed in Section 11-46-9(1). *Id.* The *Bridges* Court further held that: "We cannot interpret the Supreme Court's opinion as having turned the possible inapplicability of the immunity provision [in one of the exemptions] into an affirmative source for liability." *Id.* at 1019 (¶ 30).

More recently, in *Knight v. Miss. Dep't. of Transp.*, 10 So. 3d 962 (Miss. Ct. App. 2009), the Mississippi Court of Appeals, again citing to a Mississippi Supreme Court decision, has held:

> Jim Frasier created the term "Frasier's Octopus" in his 1999 law review article entitled, "A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of immunity, Non-jury Trial, and Limitation of Liability," 68 Miss. L.J. 703 (1999). In Frasier's 2007 article on the same subject matter,

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[2]It is important to note that the Court of Appeals cited a Mississippi Supreme Court decision for this proposition.

> Frasier states that the exemptions [in Section 11-46-9] "are disjunctive in nature, and thus, 'like an octupus's arms, even if one does not get you, another one may.'" (Frasier, 76 Miss. L.J. at 982-83 (quoting Frasier, 68 Miss. L.J. at 743)).
>
> We find that the concept behind "Frasier's Octopus" applies in this case. Because we have found summary judgment appropriate as to section 11-46-9(1)(d), we need not engage in any analysis regarding the Appellants' claim as to section 11-46-9(1)(v). In other words, "[as] established by precedent of both this Court and the supreme court, where any of the immunities enumerated in section 11-49-9(1) apply, the government is completely immune from the claims arising from the act or omission complained of." *Willing*, 958 So. 2d at 1255. *See State v. Hinds County Ed. of Supervisors*, 635 So. 2d 839, 842 (Miss. 1994) (stating that "[w]hen the State is sued to determine whether a state statute or action is unconstitutional, the State cannot be held liable for damages if the conduct falls within one of the exceptions found in [Mississippi] Code [Annotated] [S]ection 11-46-9"). For the above reasons, the Appellants' argument that section 11-46-9(1)(v) saves their case is without merit.

Knight, 10 So. 3d at 971 (¶ 32-33).

As stated, the Plaintiff alleges that GBRAA negligently failed to warn him of a dangerous condition. Mississippi Code Annotated § 11-46-9(1)(v) provides as follows in this regard:

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> (v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive and adequate opportunity to protect or warn against; provided, however, that a governmental entity **shall not be liable for the failure to warn of a dangerous condition that is obvious to one exercising due care . . .**

(Emphasis added).

Although in *Tharp v. Bunge Corp.*, 641 So.2d 20, 25 (Miss. 1994), the

Mississippi Supreme Court has abolished the open and obvious defense as a complete defense available to private property owners/occupants, the Mississippi Legislature has seen fit to codify the open and obvious defense as it relates to governmental entities, as is set forth in Subsection (v) above. It is clear that the intent of the Legislature was to provide governmental entities with immunity from suit when the claim is based upon an alleged dangerous condition which was open and obvious to one exercising due care. In *Mississippi Dep't. of Transp. v. Trosclair*, 851 So.2d 408 (Miss. Ct. App. 2003) in a dissenting opinion, presiding Justice Southwick stated as follows regarding the open and obvious defense codified in the MTCA:

> The related but non-statutory "open and obvious" defense applicable to private parties is a component of comparative negligence. It is not a complete bar to recovery unless the plaintiff's failure to notice an obvious defect is the sole proximate cause of injury. *Tharp v. Bunge Corp.*, 641 So.2d 20, 25 (Miss. 1994). The approach of the governmental immunity statute is rather different than usual negligence rules. The Legislature declared that sovereign immunity would bar liability in tort except as waived in the Act. Miss. Code Ann. §§ 11-46-3 and 11-46-5 (Rev. 2002). The statutory defense that there is no obligation to warn of an obviously dangerous condition is an absolute bar to recovery based on a failure to warn. *See* Jim Fraiser, "A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act", 68 Miss. L.J. 703, 829-830 (1999).

Trosclair, 851 So.2d at 420 (¶ 41) (Southwick, P.J., dissenting).

In 2003, the Mississippi Supreme Court addressed a very similar factual scenario to that facing the Court in the case *sub judice.* More specifically, in *The City of Clinton v. Smith*, 861 So. 2d 232 (Miss. 2003), the plaintiff was exiting a municipal court building in Clinton after the City had been struck by a severe ice storm. *Smith*, 861 So. 2d at 324 (¶ 3). The plaintiff observed ice and snow on the steps when he entered the building; however, he saw no warnings or flags regarding the ice and snow

accumulation. *Id.* When the plaintiff exited the building via a wheelchair ramp, he slipped and fell which resulted in an injury. *Id.* In finding that the City of Clinton was immune from suit pursuant to Subsection (v), the Mississippi Supreme Court noted that "at trial and in his deposition, Smith admitted that the steps and ramp were covered with enough snow and ice for any human eye to see and he wasn't paying attention as he left the building holding his money and receipt." *Id.* at p. 327(¶ 17)[3]. The Court further found that by the plaintiff's own testimony, he admitted that the ice and snow on the ramp was obvious for anyone to see. *Id.* at ¶ 19. As such, based upon these admissions, the facts presented a situation of an open and obvious condition which is required for immunity pursuant to Subsection (v). *Id.*

Also providing guidance herein is the case of *Willingham v. Miss. Transp. Comm'n.*, 944 So. 2d 949 (Miss. Ct. App. 2006). In *Willingham*, on a rainy night the vehicle in question hydroplaned during heavy rainfall. *Willingham*, 944 So. 2d at 950 (¶ 3). The Court held that the Mississippi Transportation Commission (MTC) was immune pursuant to Subsection (v) because the danger of hydroplaning during the heavy rainfall was open and obvious. *Id.* 953 (¶ 15). More specifically, the Court held as follows:

> In this case, the danger at issue was open and obvious to one exercising ordinary care. It is elementary, common knowledge that driving is more dangerous and should be approached more carefully during bad weather, such as the weather at the time of the accident in question. Although the pavement at question in this case was rutted and may have heightened the risk of hydroplaning, the risk of hydroplaning during rainfall is an open and obvious danger, such that the MTC is shielded under the MTCA.

Id. at ¶ 16.

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[3]These are very similar admissions as those made by the Plaintiff herein in his deposition.

The Plaintiff herein admitted the following facts:

- He knew it was raining before he took his first step;
- He knew the steps were uncovered;
- Because it was raining, it was reasonable to assume the steps were wet; and
- He knew when he took his first step that he was not stepping on the anti-skid material on the step. (R. at 282-286).

These undisputed facts clearly establish that the alleged danger of wet diamond plate treads/steps as a result of being exposed to rainfall was open and obvious to the Plaintiff. As such, GBRAA is entitled to the immunity afforded it in Mississippi Code Annotated §11-46-9(1)(v).

The Plaintiff completely ignores the fact that when the Airstairs came from the factory, there was no "anti-skid" tape on the stairs. (Rec. at 274-275) and that one of the listed safety features of the Airstairs when they left the factory was "[a]luminum diamond plate provides a nonskid walking surface." (R. at 269). Rather, Plaintiff argues that GBRAA created a dangerous condition by adding anti-skid tape to the Airstairs, such that GBRAA as a governmental entity, cannot avail itself of the open and obvious defense, codified in Exemption (v) of the MTCA; however, this argument has no merit. The decision relied upon by the Plaintiff for this proposition, *City of Natchez v. Jackson*, 941 So. 2d 865 (Miss. Ct. App. 2006), is distinguishable. In *Jackson*, the plaintiff was injured when she caught her heel in an old coal grate in a sidewalk. *Jackson*, 941 So. 2d at 868 (¶2-3). The Plaintiff correctly points out that in *Jackson*, the Court of Appeals stated "[w]here the defect is caused by the City, we are much

more prone to hold it is a triable issue as to whether the City was negligent . . . ." (Appellant's Br. at 21). However, what the Plaintiff fails to point out is that the *Jackson* decision is a case limited to analyzing a claim against a municipality for defects in a sidewalk. If one examines the cases relied upon by the Court in the *Jackson* decision, it is immediately clear that they involve defects in sidewalks and, therefore, the *Jackson* decision should be limited to its unique facts. In fact, in *Lancaster v. City of Clarksdale*, 339 So. 2d 1359, 1360 (Miss. 1976), cited in the *Jackson* case, the Mississippi Supreme Court specifically stated: "This Court has distinguished between defects in sidewalks created by nature or adverse weather conditions and defects or obstructions created by the municipality itself. We have been much more prone to hold that it is a jury question where the municipality has created the defect or obstruction." *Lancaster*, 339 So. 2d at 1360. *Burton v. City of Philadelphia*, 595 So. 2d 1279 (Miss. 1991) and *City of Ruleville v. Grittman*, 250 Miss. 842, 845-46, 168 So. 2d 527, 529 (Miss. 1964), also cited in the *Jackson* decision contain virtually identical language. Furthermore, these cases relied upon in *Jackson* are pre-MTCA cases. So again, the Court's holding in *Jackson* should be limited to *Jackson's* unique facts. Finally, in reaching its holding, the *Jackson* Court misinterpreted the holding of *City of Jackson v. Internal Engine Parts*, 903 So. 2d 60 (Miss. 2005), when it stated that: "[T]he 'open and obvious' defense is not a bar to recovery when the issue is the government's negligent maintenance and repair which led to the dangerous condition." *Jackson*, 941 So. 2d at 876 (¶ 33) (citing *City of Jackson*, (903 So. 2d at 64 (¶ 11)). In *City of Jackson v. Internal Engine Parts*, the plaintiff brought suit against the City for property damages resulting from flooding. *City of Jackson*, 903 So. 2d at 62 (¶ 2). What the Court

actually said in *City of Jackson* was:

> The case before the Court today is not a failure to warn case. The issue here is not whether the City was negligent for failing to warn of a dangerous condition, but rather, whether the City was negligent for failing to inspect and maintain the drainage ditch and consequently allowing a dangerous condition to continue to exist.

Id. at 64 (¶ 11).

Limiting *Jackson* to its facts is also supported by the case of *City of Newton v. Lofton,* 840 So.2d 833 (Miss. Ct. App. 2003). The relevant facts of *Lofton* are as follows:

> Lofton and her party parked their vehicle in a parking lot to the rear of the gymnasium and began to walk a path across a grassy area near the gymnasium. In order to get to the gymnasium Lofton had to negotiate her way through a construction site, where the City was attempting to improve visibility for drivers. Lofton in attempting to step up the curb, which was recently constructed, apparently tripped and fell, breaking her ankle.

Newton, 840 So.2d at ¶ 2.

Witnesses to the accident testified to the absence of any warning signs and to the fact that the construction on the curb was not completed, and in the event it was completed, it was not satisfactory. *Id.* at ¶ 8. The trial court, in finding that the City was not entitled to the immunity afforded it in Subsection (v), "determined that the condition was not 'open and obvious', which is required for immunity to apply." *Id.* This Mississippi Court of Appeals affirmed the trial court's ruling. *Id.* The import of this decision is not the Court's holding but its rationale. Contrary to Plaintiff's argument that the open and obvious defense is not available to a governmental entity if it created the alleged condition, in *Lofton*, as set forth above, the City's construction efforts lead to the alleged dangerous condition, and the Court simply said that the condition was not open

and obvious. The Court never said that the open and obvious defense was not available to the City.

In summary, what facts support the "open and obvious" defense in this case?

1. The Plaintiff was fully aware that it was raining when he exited the door to the terminal to descend the stairs in question. (R. at 282-284);

2. The Plaintiff was fully aware that the stairs were not covered before he began his descent. (R. at 285);

3. The Plaintiff admitted that because it was raining and because the stairs were not covered, it would have been reasonable for him to assume that the steps were wet. (R. at 286);

4. The Plaintiff was fully aware that the anti-skid tape did not come all the way across the steps of the stairs. (R. at 286); and

5. When the Plaintiff took his first step which resulted in his slip and fall accident, he was fully aware that he was not stepping onto the anti-skid material, but was stepping directly onto the rain-soaked diamond plate surface of the step in question. (R. at 286).

This Defendant is left pondering this question: What was there left to warn the Plaintiff about? The Plaintiff was fully cognizant of every condition that confronted him when he exited the door of the terminal. Why? . . . Because the conditions were obvious to him. Therefore, pursuant to Subsection (v), GBRAA is immune from suit herein because it cannot "be liable for a failure to warn of a dangerous condition that is obvious to one exercising due care." The Plaintiff's contention that he should have been warned of the difference in traction between the diamond plate treads/steps and

the anti-skid tape verges on absurdity. Did GBRAA really need to warn a medical doctor that there was a difference in the traction between the wet metal diamond plate and the anti-skid material? No, because the difference is obvious. The Plaintiff is asking this Court to abandon common sense. However, common sense dictates that any danger presenting itself to Dr. Pratt was obvious to one exercising due care[4].

The Plaintiff also relies on *Mayfield v. The Hairbender*, 903 So. 2d 733 (Miss. 2005) in support of his argument that GBRAA is not entitled to immunity under Subsection (v). However, the dichotomy regarding a duty to warn and a duty to maintain a private premises discussed in *Mayfield* is simply not applicable in this case which involves a governmental entity subject to the MTCA. The MTCA is clear in Exemption (v) that "a governmental entity shall not be liable for the failure to warn of a dangerous condition that is obvious to one exercising due care."

C. DISCRETIONARY FUNCTION IMMUNITY

Notwithstanding the foregoing and "Frasier's Ocopus," GBRAA is also immune from suit as the Plaintiff's allegations of negligence necessarily involve a discretionary function of GBRAA. The applicable provisions of the MTCA in this regard is Mississippi Code Annotated §11-46-9(1)(d) and (g), which provides:

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties **shall not be liable** for **any** claim:
>
> > (d) Based upon the exercise or performance or the failure to exercise or perform a **discretionary** function or duty on the part of a governmental entity or

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[4]Of note is the fact that there is no evidence in the record of any other passenger slipping on the stairs in question.

employee thereof, **whether or not the discretion be abused** ...

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

(Emphasis added).

In 1999, the Mississippi Supreme Court adopted a two-part test for determining which governmental acts are entitled to discretionary function immunity. *Jones v. Miss. Dep't. of Transp.*, 744 So. 2d 256, 260 (¶ 10) (Miss. 1999). This test is used by the federal courts in analyzing claims under the Federal Tort Claims Act. *See U.S. v. Gaubert*, 499 U.S. 215, 322 (1991). Under this two-part test, a governmental entity is entitled to discretionary function immunity if the entity's activity involved an element of choice or judgment and also involved social, economic, or political policy. *See Jones*, 744 So. 2d at 260 (¶ 10). The *Jones* Court stated that under the discretionary function exemption, "only those functions which by nature are policy decisions, whether made at the operational or planning level, are protected." *Id.* (*citing Gaubert*, 499 U.S. at 322). While this two-part test was not consistently applied by Mississippi courts after its adoption, in *Pritchard v.Van Houten, et al,* 960 So. 2d 568 (Miss. Ct. App. 2007), the Mississippi Court of Appeals held "Mississippi's most recent precedent on this issue has recognized the two-part test; therefore, this Court has no doubt that it is to adhere to the two-part public policy function test in determining the application of discretionary function immunity." *Pritchard,* 960 So. 2d 568, 581 (¶ 35).

In determining whether GBRAA's actions herein meet the first prong of the

discretionary function exception test, it is useful to rely on the interpretation the United States Supreme Court has given this prong. In *Gaubert*, the Court stated that a court must first inquire whether a challenged action was discretionary or was instead controlled by statutes or regulations. *Gaubert,* 494 U.S. at 328. More specifically, in this regard, the Mississippi Supreme Court, in *Coplin v. Francis*, 631 So.2d 752 (Miss. 1994), addressed the distinction between discretionary and ministerial duties:

> We have frequently articulated the distinction between discretionary and ministerial duties, distinguishing between those actions which inherently require the exercise of individual judgment and those which are positively imposed by law. The classic definition of ministerial function is found in *Poyner v. Gilmore*, 171 Miss. 859, 158 So.2d So. 922 (1935), where it was stated that:
>
> [t]he most important criterion, perhaps, is that [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 . . . judgment or discretion, the act and discharge thereof is ministerial. *Poyner*, 171 Miss. at 856, 158 So. at 923.

Coplin, 631 So.2d at 754.

By way of example, in *Mohundro v. Alcorn Co.,* 675 So.2d 848 (Miss. 1996), the plaintiff filed suit alleging that the supervisors as a board and individually were liable for the plaintiff's injury due to negligent maintenance of a bridge. *Mohundro*, 675 So. 2d at 850-51. The evidence showed that the individual supervisor in charge of bridge maintenance knew of the dangerous condition and was admittedly worried it would cause harm to the public. *Id.* However, he made no effort to warn the public of the dangerous condition. *Id.*

In its ruling, the Mississippi Supreme Court noted that due to a statute (Miss.

Code Ann. § 19-3-41)[5] granting supervisors full discretionary jurisdiction over county roads, the general rule is that County Boards of Supervisors are immune from liability for injuries resulting from the negligent maintenance of public roads. *Id.* at 853. *See also Coplin v. Francis*, *supra*; *State v. Lewis*, 498 So. 2d 321, 322 (Miss. 1986). Even though *Mohundro* was decided prior to the effective date of the partial waiver of sovereign immunity, under §11-46-5,[6] the Legislature has kept the law in these cases alive under 11-46-9(d) by exempting political subdivisions and their employees from liability for any acts which are discretionary in nature[7] .

By way of analogy, the Mississippi Supreme Court has made it clear that "[r]oad maintenance and repair are discretionary rather than ministerial functions. . . ." *Brewer v. Burdette*, 768 So.2d 920, 923 (Miss. 2000) (quoting *Mohundro, supra*).

With regard to prong two of the test, which asks whether a governmental decision implicates social, economic or political public policy, the *Pritchard* court stated:

> ...The proper inquiry is whether the decision "implicates the exercise of the policy judgment of social, economic or political nature." *Dotts v. Pat Harrison Waterway Dist.,* 933 So. 2d 322, 326 (Miss. 2006). The focus is on the nature of the acts taken and their susceptibility to policy analysis; the Court does not examine the actual subjective thought process of the government decision maker. *Id.* In *Dotts*, the decisions of the Pat Harrison Waterway District concerning the enclosure of a swimming area, the placement of signage, and the provision of safety equipment and

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[5]In the case *sub judice*, there is no similar statute.

[6]The partial waiver applies to tortious conduct of the political subdivisions occurring on or after October 1, 1993. Even though *Mohundro* was decided in 1996 prior to the effective date of the MTCA, the suit arose out of an accident occurring in 1990.

[7]In *L.W. v. McComb Mun. Separate Sch. Dist.*, 754 So.2d 1136 (¶21) (Miss. 1999), the Mississippi Supreme Court held that "since statutory and common law immunity require a determination of discretion, prior case law can be used to define discretionary conduct." *L.W.*, 754 So.2d at ¶ 21.

> lifeguards were grounded in public policy because of the cost and practicality of those decisions could be weighed against the value to the public. *Id.*

Pritchard, 960 So. 2d at 583 (¶ 38).

The United States Supreme Court has held that certain actions, such as driving an automobile, require the use of discretion but are not entitled to discretionary function immunity because they are not based on any regulatory purpose the government authority is seeking to accomplish. *Gaubert*, 499 U.S. at 325. In *Pritchard*, the Mississippi Court of Appeals held that a professor's failure to put down dry sand prior to an iron pour demonstration did not involve a policy judgment of a social, political or economic nature and did not necessitate a selection between alternative policy objectives. *Pritchard*, 960 So. 2d at 583 (¶ 40). The *Pritchard* Court stated "like driving an automobile in the course and scope of employment, [the professor's decision] could not have been based upon any government regulatory purpose and was not susceptible to policy analysis." Conversely, in *Suddith v. Univ. of S. Miss., et al*, 977 So. 2d 1158 (Miss. Ct. App. 2007), the Mississippi Court of Appeals found that the discretionary function immunity exception applied to a university's decision to hire a teacher for a one-year term despite an allegation of impropriety. *Suddith*, 977 So. 2d at 1179 (¶ 49). The *Suddith* Court stated "[we] further find that Drs. Lucas' and Huffman's judgment regarding the hiring of a faculty member involved important social and public policy, such as providing the students of Mississippi at this public university with the best faculty members possible." *Id.*

GBRAA's decision with regard to the actions alleged in the Complaint involved social policy because they were guided by the regulatory purpose of providing a safe

and secure premises for its patrons. Unlike driving an automobile or failing to lay down dry sand before an iron pour demonstration, GBRAA's decisions herein are also susceptible to policy analysis because the cost and practicality of those decisions can be weighed against the value to the public. Because each of Plaintiff's claims is based upon conduct of GBRAA that was entirely discretionary in nature and implicated public policy, Plaintiff's claims should be dismissed as a matter of law.

In fact, the case of *Dotts v. Pat Harrison Waterway Dist., 933 So. 2d 322* (Miss. Ct. App. 2006), relied upon by the Plaintiff, supports the fact that the discretionary function of GBRAA at issue involved a public policy decision. In *Dotts*, the governmental actor's decisions at issue involved "the enclosure of the swimming area, the signage at the pond, and the provision concerning life guards and lifesaving equipment." *Id.* at 327 (¶ 16). The Court of Appeals affirmed the trial court's finding that the defendant's decisions involved policy decisions, which came about "[a]fter weighing the costs and practicality of these provisions against the value to the public to have such provisions." *Id.*[8]

GBRAA is grounded with the responsibility of running a public airport which boards hundreds, if not thousands, of passengers a day. The manner in which GBRAA maintains it premises as it relates to boarding airline passengers clearly is susceptible to a policy analysis. If the Pat Harrison Waterway District's decisions regarding a swimming area involved social, economic or political policy, how can it be argued that

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[8]It is very important to note that in *Pritchard* discussed above, where the Court found that the professor's decisions did not involve a policy of the University, the Court cited *Dotts.*

GBRAA's decisions relative to boarding passengers on airline flights do not involve the same policy decisions?

The issue before the Court is much broader than the Plaintiff would have the Court believe. In this regard, *Suddith v. Univ. of S. Miss.* cited above and also cited by the Plaintiff, is illustrative of the fact that the big picture is what is at issue. To reiterate that set forth above, the *Suddith* Court stated "[w]e further find that Drs. Lucas and Hoffman's judgment regarding the hiring of a faculty member [despite allegation of impropriety against the professor], involved important social and public policy, such as providing students of Mississippi at this public university with the best faculty members possible." *Suddith v. Univ. of S. Miss.*, 977 So. 2d 1158, 1179 (¶ 49) (Miss. Ct. App. 2007). In this same vein, GBRAA's judgment regarding the steps necessary to maintain the means of access to air transportation from its terminal while it was under construction involved an important social and public policy: providing airline passengers at this public airport with the safest means of egress from the terminal to their air transportation[9].

Finally, Plaintiff argues that because the decisions regarding application of the anti-skid tape and the Airstairs in general were not made at the administrative level, said decisions do not involve policy. (Appellant's Brief at 26). However, the Mississippi Court of Appeals has found that a decision made on the planning or operational level may involve policy decisions. *Willing v. Estate of Benz*, 958 So. 2d 1240, 1253 (¶ 34) (Miss. Ct. App. 2007). *See also, Gaubert*, 499 U.S. at 322. Further, "this limitation is

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[9]Even if the Defendant abused its discretion, it is still immune under Subsection (d).

applicable to the day-to-day decisions made by . . . governmental actors." *Willing,* 958 So. 2d at 1253 (¶ 34). Clearly, the day-to-day GBRAA's decisions involving passenger safety when boarding flights involve a policy decision, whether at the planning or operational level. As a result, GBRAA is immune from suit pursuant to the discretionary function exemption from the waiver of sovereign immunity.

STANDARD OF REVIEW

This Court employs a deo novo standard of review when reviewing a trial court's grant of summary judgment. *Duckworth v. Warren*, 10 So. 3d 433, 436 (Miss. 2009) (citing *One South, Inc. v. Hollowell*, 963 So. 2d 1156, 1160 (Miss. 2007)). Under Rule 56 of the Mississippi Rules Civil Procedure, summary judgment shall be entered "if the pleading, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party has the burden of persuading the trial court there is no genuine issue of material fact, and that based on those facts the movant is entitled to judgment as a matter of law. *Downs v. Choo*, 656 So.2d 84, 85 (Miss. 1995) (citing *Daniels v. GNB, Inc.*, 629 So.2d 595, 600 (Miss. 1993)). If the non-movant would be unable to prove any facts to support his claim, summary judgment is proper. *Choo*, 656 So.2d at 85.

The movant has the task of persuading the Court, first that there is "no genuine issue of material fact and, second that on the basis of the facts established he is entitled to judgment as a matter of law." *Fruchter v. Lynch Oil, Co.*, 522 So.2d 195, 198 (Miss. 1988). The movant's burden of production in support of summary judgment is no more than what he would carry at trial of the matter. (citations omitted) *Id.* It is the non-movant's responsibility to produce significant and probative evidence in opposition to the motion for summary judgment; such evidence must also satisfy the burden of proof that the non movant would bear at trial. *Id.* If in opposition to summary judgment a party fails to present evidence sufficient to establish an element of a claim as to which the party will bear the burden of proof at trial, then all other facts are immaterial and the

moving party is entitled to a judgment as a matter of law. *Crain v. Cleveland Lodge*, 641 So.2d 1186, 1188 (Miss. 1994); *Grisham v. John Q. Long V.F.W. Post, No. 4057*, 519 So.2d 413, 416 (Miss. 1988). "The party opposing the motion must by affidavit or otherwise set forth specific facts showing that there are indeed genuine issues for trial." (citations omitted). *Palmer v Biloxi Reg. Medical Ctr.*, 564 So.2d 1346, 1355 (Miss. 1990).

CONCLUSION

The undisputed facts establish that the dangerous condition alleged by the Plaintiff was open and obvious to one exercising due care. Therefore, pursuant to Mississippi Code Annotated § 11-46-11(9)(v), GBRAA retains its immunity. The authorities cited by the Plaintiff do not abrogate the immunity afforded GBRAA under Subsection (v). Further, not withstanding the rationale of "Frasier's Octopus," GBRAA's acts or omissions which the Plaintiff alleges caused him harm involve a discretionary function of GBRAA which necessarily implicates social or public policy decisions. The Trial Court's granting of summary judgment to GBRAA should, therefore, be affirmed.

RESPECTFULLY SUBMITTED, this the 22 of January, 2010.

GULFPORT-BILOXI REGIONAL AIRPORT AUTHORITY d/b/a GULFPORT-BILOXI INTERNATIONAL AIRPORT

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CERTIFICATE

Pursuant to M.R.A.P. 25(a), I hereby certify that on this date, January 22, 2010, I deposited in the United States Mail, first class postage prepaid, the original and three copies of the foregoing Brief of Appellee addressed to:

Betty W. Sephton, Clerk
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Court of Appeals of the State of Mississippi
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I further certify that I have deposited in the United States Mail, first class postage prepaid, one copy of the Brief of the Appellee to the following:

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