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

JERRY PRATT — APPELLANT

-VERSUS-

GULFPORT-BILOXI REGIONAL AIRPORT AUTHORITY — APPELLEE

REPLY BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

APPEALED FROM:

CIRCUIT COURT OF HARRISON COUNTY
FIRST JUDICIAL DISTRICT
NO. A2401-2006-104

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SUMMARY OF THE ARGUMENT

The Airport is not entitled to sovereign immunity in this case because the danger that caused Plaintiff's injury was not open and obvious to one exercising reasonable care. The slickness of the stairs was hidden by the diamond-studded metal plate that gave the illusion of a "non-skid" walking surface. Even if the danger is found to be obvious and there was no duty to warn, there is still a duty to make a known danger safe. A government entity is not entitled to claim immunity for all claims under the open and obvious defense *when it was that entity's negligence that caused the danger* because of the separate duty to make the premises safe. Finally, the defense that the Airport should enjoy immunity from suit on the basis that applying traction tape in a negligent manner was a discretionary function of government is not supported by the evidence or the law in Mississippi. The applying of tape, even at the operational level, is not an act, *by the very nature of the act itself*, that involves the policy making decision process. It is not like fixing potholes or hiring or firing teachers, the quintessential examples.

The legal and factual issues are two-fold. Issue one addresses whether the condition was obvious and pertains solely to the failure to warn claim. Plaintiff feels that it was not obvious given the way the stairs were constructed and given Dr. Pratt's testimony in his deposition. He expected the same give and take from the stairs that he experienced on the *wet horizontal platform* between the building and the steps. Plaintiff has also pleaded that the measures taken by the Airport to make the stairs safe were inadequate. This would be Plaintiff's alleged "other acts of negligence" that revolve around the Airport putting traction tape on only the middle two-feet of the four-foot wide steps. Should the Court find that there was no duty to warn because the slickness was open and obvious, then Plaintiff feels that there are triable issues nonetheless because of the continuing duty to make the stairs safe.

The Airport writes at length about "Frasier's Octopus" and the octopus's arms: "even if one does not get you another one will." (Br. 9, 10, 14-15, 22, and 32; citing, "76 Miss. L.J. 982-83"). However, this simple and fanciful reference is in itself inadequate to summarize the Court's approach to cases such as this. The underlying assumption is that each defense is "disjunctive" and if the Airport is successful on either defense, Plaintiff cannot bring any claims. That is to say, if the danger is "open and obvious," then there is no duty to warn of the hidden danger or to make the stairs safe if the danger is not hidden. However, the language from the statue clearly says, "a governmental entity shall not be liable *for the failure to warn* of a dangerous condition that is obvious to one exercising due care." Miss. Code Ann. § 11-46-9(1)(v). It does not say that a governmental entity shall not be liable for any cause of action if the dangerous condition is obvious. The statute specifically says when the entity shall be liable and what for.

Even the lower court separated the two, realizing the inadequacy of each of the defenses standing alone. It stated that the danger was open and obvious; and, therefore there was no duty to warn Dr. Pratt of the danger. (R. at 397). As to all other acts of negligence, the trial court found that the acts and omissions of the Airport represent a discretionary function of government for which immunity from suit has not been lifted (R. at 400). The court did not hold that there is no duty to warn because warnings are discretionary functions of government; nor did the court find that there was not a duty to make the stairs safe because the danger was obvious. While this point might seem minor or academic, it is the key to understanding the Airport's Brief and analysis. Much of the analysis of holdings and cases cited overlook important factual issues and confuse the two separate duties to make the premises safe and to warn of hidden dangerous conditions.

Nonetheless, for the lower court to have found that the danger was open and obvious, it is

a given that the Court found there was a danger. Plaintiff believes, however, that the uncontradicted evidence shows that it was not obvious to one exercising due care. The Airport relied in part and the lower court relied solely on the case of *The City of Clinton v. Smith*, 861 So.2d 232 (Miss. 2003) in which summary judgment was affirmed against a plaintiff that slipped on an icy wheelchair ramp. Plaintiff contends that the *City of Clinton* opinion is distinguishable because the ice occurred naturally on an otherwise safe wheelchair ramp. Plus, ice is always very slick. In Dr. Pratt's case the diamond-studded metal plates promoted an illusion of traction. (Photos, R. at 345-54).

However, should this Court find that the slickness of the stairs was obvious, the defense is not an absolute bar to recovery for any and all claims since the Airport created the danger. Mississippi law, pre- and post-Mississippi Tort Claims Act, indicates that the duty to make premises safe is required on the basis that, if the danger is open and obvious to would-be travelers, the danger should be even more open and obvious to the one with the ability and duty to make the repairs. This is consistent with a plain reading of the statute.

The law in Mississippi is that not all discretionary functions are immune. The act, here the inadequacy of the measures taken to make the stairs safe, must also be grounded in social, economic or political policy decision making in order to satisfy the second prong of the public policy functions test. Throughout the Airport's Brief the Defendant summarized Plaintiff's argument regarding the public policy functions test by saying that the act could not be discretionary because it was not made at the administrative level. Plaintiff's argument was not that simple. Plaintiff believes that the decision to put two feet of traction tape in the middle of four feet of stairs – even made at the operational level – did not involve the weighing of competing social, political or economic public policies. It was just two maintenance guys, looking

at some slick steps, and saying, well that ought to do it .... it looks good to me. At the time, there was not a limit on how much tape they could use; there is no evidence of not enough time to put the extra tape; and, no one has suggested that there was not enough money or manpower to put down just a couple feet more of tape; and, there are no competing social issues. In fact, the only ones making those suggestions are the attorneys for the Airport without pointing to specific factual evidence in the record in support of the defense. There is no evidence in the record. To allow the Airport to prevail on this point would set a new precedent that all government actions made by any government employees would be subject to immunity.

IV.

ARGUMENT

Dr. Jerry Pratt's personal injury claim should not have been dismissed on summary judgment because there is uncontradicted evidence that the Airport knew that the stairwell that caused Dr. Pratt's fall was slick; the Airport did not warn him of the slick stairs; and the slickness of the metal stairs was unknown to Dr. Pratt due to the illusion of traction created by the "diamond plate ... [*a seemingly*] non-skid walking surface." It should not be held against Dr. Pratt that he thought the diamond-plated steps would provide traction. The Airport would have this Honorable Court believe the same thing: "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." (Appellee's Br. 5)(bracketed changes in the original). The expectation that the apparent "non-skid walking surface" would provide traction was not unreasonable or irrational, ***even to a medical doctor***.

Furthermore, the decision to put down two feet instead of four feet of traction tape does not qualify for the discretionary function defense because it does not satisfy the second prong of the public policy functions test. It did not involve the weighing of social, political or economic public policies at the administrative or the operational level.

A. GENUINE ISSUES OF MATERIAL FACT EXIST SUCH THAT THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO GULFPORT-BILOXI REGIONAL AIRPORT AS A MATTER OF LAW.

1. The "open and obvious" defense is not available to the Airport as an absolute bar to recovery because the Airport was aware of, and by its own negligence, created the danger that caused Dr. Pratt's fall.

Under Mississippi law, a premises owner owes an invitee, such as Dr. Pratt, two separate duties for which violation of one or the other supports a cause of action: "(1) to keep the premises

reasonably safe, and (2) to warn of hidden danger ... The breach of either duty supports a claim of negligence. Each must be separately analyzed." *Mayfield v. The Hairbender*, 903 So.2d 733, 737-738 (Miss. 2005). This did not change with the advent of the Mississippi Tort Claims Act. In fact cases following the MTCA are in accord with the idea of two parallel but separate duties.[1]

The issue in *The Hairbender* case was, "whether a plaintiff may pursue a claim of negligent failure to repair a dangerous condition that is open and obvious." 903 So.2d at 734. The lower court dismissed the plaintiff's case on summary judgement finding that a store owner was not negligent in failing to repair uneven pavement that was open and obvious. *Id.* at 735. The Court, at the lower court level and on appeal, found that the condition was open and obvious but that suit could still be maintained for negligent failure to maintain the premises in a reasonably safe condition. *Id.* at 738-39.

The Hairbender Court reversed in part and affirmed in part the trial court's decision to dismiss the claim on summary judgment and held that the duty to warn and the duty to maintain one's premises is two-fold. *Id.* The defendant in *The Hairbender* argued to the Court that they had to *either* make the premises safe *or* warn of any hidden dangers, as argued by the Airport in Dr. Pratt's case; however, the Court pointed out the danger of such a holding:

> The party in the best position to **eliminate a dangerous condition** should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger.

The Hairbender, 903 So.2d at 738-39 (internal quotations and citations removed)(emphasis in the

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[1]The *City of Natchez v. Jackson* decision cites to the *The Hairbender* in holding that a government entity does not have absolute immunity from all claims even when a danger is obvious. 944 So.2d 865, 876. This case is discussed in detail below.

original). As such, if the danger is hidden, then there is a duty to warn *and* make the premises safe. They are separate. But if the danger is not hidden, then there is not duty to warn but only a duty to make the premises safe.

This distinction of separate duties is supported by a plain reading of Miss Code Ann. § 11-46-9(1)(v), which provides immunity for the Airport as to claims that meet the following requirements:

> Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care.

The statute does not say that a governmental entity shall not be liable for the failure *to make the premises safe* if the condition is obvious. The Plaintiff easily meets the requirements of the above language. First, the trial court impliedly found that the condition was dangerous in finding that it was obvious. Second, it is undisputed that the Airport is a governmental entity owned by the Cities of Gulfport and Biloxi. As for the third requirement, evidence in support of this part of the claim was uncontested at the trial court level. The Airport caused the dangerous condition in modifying the temporary stairs to make them a permanent attachment to the building. The Airport had notice of the slickness of the stairs through inspection and use and the Work Order to put traction tape on the stairs to fix the problem. (R. at 318.) The Airport had time to protect or warn against the danger but neglected to do so.

In modifying the temporary Stinar stairs to be a permanent fixture to the building, the Airport also added plywood for safety of children, an extra step to make it fit the building, and traction tape due to the slickness of the metallic surface. Ultimately, not enough tape was added

to make it safe for its passengers. It would be no different if there was not enough plywood added and a child fell or of they did not add an extra step between the building and the horizontal platform. The measures taken to correct the hidden danger were inadequate.

Defendant alleges that there is no evidence of anyone ever falling on those steps (Appellee's Br. 22, FN 4). But Mr. Christman, the former operations supervisor at the airport at the time of the October 24, 2004 fall, and the individual who created the work order for the traction tape to be placed on the stairs, said that the decision to add the traction tape would only have been made if someone had fallen previously on those stairs or if he inspected it and deemed it unsafe. (R. at 362.) Either way, the Airport would have been on notice.

The biggest point of contention is the fourth required showing that addresses the issue of whether the condition was hidden or open and obvious. The maintenance man Lloyd Gates, an 18-year employee of the Airport's maintenance department, said it best when he said that those stairs were, "slick."As noted by Gates:

> [By Mr. Altman:]
>
> Q. Did you believe that without the traction tape on them that these stairs were slippery?
> A. Yes. *It's a diamond deal there, but it's – that's still metal, it's still slick.*
> ...
> Q. And you would agree that when those air stairs got wet that especially without the traction tape, they would be slippery?
> A. Yes.
> Q. So, it was at least your goal to put down the traction tape to make a spot where people could step on without slipping down?
> A. Exactly.

(Gates Dep. 37:21-38:15; R. at 375-76)(emphasis added). The Airport was aware that the diamond plate created an illusion of traction due to what appeared to be a "safety feature" in the diamond studded plate. This plate covered the horizontal platform and the steps. The sentiment expressed by the employees of the Airport is un-rebutted in the Appellee's Brief. Not one

sentence is dedicated to addressing what Lloyd Gates or Jared Christman had to say.

The Airport's Brief also ignores the findings of expert witness, Dr. Michael Forbes, the mechanical engineer. Dr. Forbes found the coefficient of friction of the "diamond plate" to be less than half than that of the traction tape when wet and half of the traction tape *when dry.*

The lower court and the Airport's Brief relied upon and likened Dr. Pratt's case to the case of *The City of Clinton v. Smith*, 861 So.2d 323 (Miss. 2003). Such are not the facts of Dr. Pratt's case. Dr. Pratt was paying attention unlike Smith. The stairwell before him was the same stairwell as the one behind him. There was no hidden coefficient of friction. Most importantly, the stairwell was not covered in snow and ice. The City of Clinton's wheelchair ramp was not adorned with the diamond-studded non-skid walking. There was no difference in the coefficients of friction halfway down the ramp. The Airport did have a duty to warn Dr. Pratt of the slickness of the metal on the steps because it was not obvious. And whether it was obvious or not, the Airport had a duty to make the stairs safe.

Either way, the *Smith* case is also distinguishable because it does not involve the adequacy of steps taken to remedy a dangerous condition, or negligent maintenance and repair issues. It is only a "duty to warn" case. The open and obvious defense is limited in application only to the duty to warn and is not available to a government entity as to other acts of negligence when the risk in question was caused by the negligence of the government entity and not by acts of nature:

> While both parties concede that "open and obvious" is not a complete bar to recovery in this case, we recognize that it is a complete bar in a Tort Claims Act case for the failure to warn of a dangerous condition. *City of Jackson*, 903 So.2d at 64(¶ 11). *It is not a bar to recovery when the issue is the government's negligent maintenance or repair which led to the dangerous condition. Id.* This case likewise presented questions of affirmative acts of negligence by the city as well as negligent maintenance and repair.

City of Natchez v. Jackson, 941 So.2d 865, 876 (Miss. App. 2006) (emphasis added). The

Airport says this is a case, "limited to analyzing a claim against a municipality for defects in a sidewalk." (Appellee Br. 19)(emphasis in the original). Plaintiff believes this is a misstatement of the law. And since Plaintiff relies heavily on this *Jackson* case, the facts should be re-visited. It is an MTCA case and involved the claim of a woman who was injured when her heel got caught in a coal grate on a city sidewalk. The grate had been filled with concrete *after* the city, "determined that the holes in the coal grate created a dangerous condition to pedestrians." *Jackson*, 941 So.2d at 865. This Court pointed out a different factual distinction that was overlooked by Airport in its Brief:

> The city argues that holes and cracks in sidewalks are not dangerous conditions for which municipalities may be held liable. Indeed we have refused to impose liability for naturally occurring defects in sidewalks. However, *the supreme court has distinguished between defects caused by nature and those caused by the government. Where 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.*

Id. at 869 (emphasis added). It would appear from the plain reading of this excerpt it appears that this rule is for more than just "sidewalk" cases. The Airport has confused this issue in arguing that the holding is limited only to sidewalks. The language above does not support such a distinction.

In support of its assertion that the *Jackson* Court's rationale is limited only to those case involving sidewalks, the Airport cites *Lancaster v. City of Clarksdale*, 339 So.2d 1359 (Miss. 1976) in support of this proposition. Yet, the Airport does not give the facts of *Lancaster*, which on closer inspection demonstrate that it is not a sidewalk case:

> Beth Lancaster, a 12-year-old minor, by next friend, sued the city of Clarksdale, Mississippi, in the Circuit Court of Coahoma County for damages sustained when she walked into a traffic control box protruding about 30 to 36 inches over the public sidewalk at a height of about 58 1/2 inches. The jury returned a verdict of $12,500.

Lancaster v. City of Clarksdale, 339 So.2d 1359, 1360 (Miss. 1976). The jury returned a verdict

for the Plaintiff for $12,500.00. *Id.* The trial court granted a judgment notwithstanding the verdict to which little Beth Lancaster appealed. The Supreme Court of Mississippi reversed and rendered and reinstated the verdict: "It was a question for the jury as to whether this traffic control box was reasonably placed, or whether the City was negligent in locating it at the height that it did." *Id.* at 1361. We see the case had nothing to do with a sidewalk and that the placement and manner in which the traffic box was made was a triable issue. So, it is the same with Dr. Pratt whose case is about the placement and manner in which traction tape was placed (or not placed) on the Stinar stairs.

Next the Airport states that this Court in the *Jackson* case – that involved the negligent repair of the coal grate – misinterpreted one of the cases that it cites in support of its holding and therefore that holding should be limited to its facts: "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." (Appellee Br. 19). The Airport then cites and presents excerpts from *City of Jackson v. Internal Engine Parts* and a case cited by *City of Jackson* (i.e., *City of Newton v. Lofton*, 840 So.2d 833 (Miss. Ct. App. 2003)) to loosely suggest that the open and obvious defense is a complete bar to all claims, even those involving negligent maintenance, repair and other act of negligence as involved in this case. But those cases, and the excerpts used by Defendant, support the notion that starts with the *Hairbender* case, that the duty to warn and duty to make safe are parallel and separate duties. There was no duty to warn in those cases but the claims were allowed.

Unlike sidewalks gradually damaged by the effects of nature, the temporary stairs were modified due to the Airport's actions, not tree roots and eroding soil. Dr. Pratt's claim is based

on the hidden slickness of the "non-skid" walking surface *and* negligent maintenance that followed the work order to add tape to the stairs. Plaintiff believes there was a duty warn of the danger because the slickness was hidden by the "safety feature." Plaintiff believes the testimony and evidence shows that the measures taken to correct the perceived and known danger were not adequate. The tape should have been added from wall to wall on the steps, as it was on the horizontal platform before the stairs. Both were adorned with the diamond studded material.

In support of its argument that the Stinar stairs were obviously dangerous to one exercising due care, the Airport cites to *Willinghan v. Miss. Transp. Comm'n*, 944 So.2d 949 (Miss. Ct. App. 2006)(Appellee Br. 17). The case involved a hydroplaning vehicle and subsequent injury. This case is not at all similar for obvious reasons, to name a few: Dr. Pratt was not driving; he did not hydroplane (his foot actually made contact with the surface as opposed to skimming across a pool of water); the road was not covered with an aluminum plated non-skid walking surface; and, there was no traction tape in the middle of the road. Also, there was no expert testimony that the road on which Mr. Willingham hydroplaned on was also slick when dry. In the case at hand, Dr. Forbes said that the stairs when dry had half the traction of the traction tape.

The Airport's employees have testified that the reason for the application of the traction tape was the slipping danger that they sought to correct. Yet, the measures taken were simply inadequate. In this regard, the Airport failed.

2. The Airport is not immune from liability as a matter of law under the "discretionary function" defense because the negligent acts that created the dangerous condition did not involve social, economic or political policy as required under the discretionary function test.

The court granted summary judgement "with regards to the remaining negligence claims" against the Airport on the grounds that the Airport was entitled to "discretionary function

immunity." (Order 4; R at 398). The Airport's defense is that the application of the traction tape was a "discretionary function." The airport cites two sections of the MTCA in support of this immunity claim, Miss. Code AnnSec. 11-46-9(1)(d) and (g).

In order to be afforded immunity under this language, a governmental entity must show that the activity involved not only an element of choice and that the choice involved the weighing of social, economic or political policy making. *Jones v. Mississippi Department of Transportation*, 744 So.2d 256, 260 (Miss. 1999)(overruled on other grounds). This is the "public policy function test" (PPF) and serves the purpose of preventing second-guessing of the legislative and administrative decisions. *Chapman v. City of Quitman*, 954 So.2d 468 (Miss. App. 2007)(internal citations and quotations omitted).

The Airport's brief fails to substantially address Plaintiff's analysis of *Pritchard v. Von Houten*, 960 So.2d 568 (Miss. App. 2007). Its facts are very important to Dr. Pratt's case. Ms. Regan Pritchard was a college student who received a 3d degree burn to her ankle at a demonstration involving the pouring of hot iron, when Professor Von Houten neglected to put dry sand on the ground. She filed a claim under the Mississippi Tort Claims Act alleging various acts and omissions that resulted in her burning. The trial judge ruled that there was discretionary function immunity finding that the putting down of dry sand involved and element of choice and a sound public policy as it related to the student's education. This Court overturned the trial court and held that although the decision may have been "discretionary" and involved a hint of public policy, and not enough to satisfy the second prong of the public policy functions test. *Pritchard*, 960 So.2d at 582 -583. It was argued in Apellant's Brief that the Airport's argument would reduce all governmental actions to requiring immunity from liability which was the legislature's intent. There is no response to this argument by the Airport. As in the *Pritchard* case, the

Airport's argument effectively eviscerates the public policy prong of the discretionary functions test, as any and all actions of any and all state actors would be tied to some remote agency that regulates or empowers the state actor in question.

Strangely, the Airport cites *Suddith v. Univ. of S. Miss.*, 977 So.2d 1158 (Miss. Ct. App. 2007), to support that the placement of traction tape it protected by the discretionary functions test. Once again, a look at the facts of the case is insightful. *Suddith* involve a 42 U.S.C. § 1983 civil rights breach of contract claim brought by Professor John Suddith after he was not given tenure in light of his previously having an affair with a student. *Id.* The lower court granted the Defendants summary judgment and the Supreme Court found the lower court "was without reversible error." *Id.* at 1164. This case is clearly distinguishable on its facts for obvious reasons. The issue of rather to hire of fire or limit a teacher to non-tenure is nothing like how much sand to put down, how much traction tape to apply or the driving of a car.

There is no evidence of record – at the operation or administrative level – of record that there was a lack of tape or inadequate funds to address this public need, or, more to the point, that any administrative or public body or decision-making body of any sorts met and deliberated over how to address competing public policy objectives.

Dr. Pratt's Brief pointed to the perfect example of when the public policy function test should apply: when dealing with highways and sidewalks, which more times than not sit in a state of disrepair due to a lack of public resources and damage caused by nature. *Lee v. Mississippi Dept. of Transp.*, No. 2008-CA-00605-COA ¶ 8, 2009 WL 2929827, 2 (Miss. App. Sept. 16, 2009). The Court in *Lee* explained: "We recognize that MDOT has a limited number of funds to disperse in the maintenance and upkeep of the State's highways. Therefore, MDOT *must* use its discretion and judgment when determining the order in which roads will be resurfaced or repaired.

Lee, No. 2008-CA-00605-COA at ¶ 9, 2009 WL 2929827 at 2 (*emphasis in the original*). The Airport did not and cannot liken its case to those cases involving public policy decisions because the facts are too dissimilar. It cannot claim that it has to deal with the issues that MDOT is confronted with: serious funding issues and a lack of resources to confront the effect of nature and decay. The Airport was not forced to choose between using what little traction tape they had.

The Airport has scantily girded their argument with quixotic and anecdotal evidence in an attempt to show that this prong is satisfied:

> 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 .... 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.

(Appellee's Br. 11-12). The same could have been said when Professor Von Houten did not put down dry sand to protect Regan Pritchard from a known potential harm:

> [Professor Von Houten's] decision with regard to the actions alleged in the Complaint involved [educational] policy because they were guided by the regulatory purpose of providing a [well-rounded education] for its patrons .... an important social and public policy such as providing [students] at this public [university] with the safest means of [learning].

(Appellee's Br. 11-12). The Court however did not whole-heartedly embrace such a rationale:

> It is difficult for this Court to fathom how Von Houten's failure to put down dry sand involved a policy judgment of a social, political, or economic nature. The failure to put down dry sand did not necessitate a selection between alternative policy objectives, and, like driving an automobile in the course and scope of employment, could not have been based upon any government regulatory purpose. Therefore, the act is not susceptible to policy analysis.

Pritchard v. Von Houten, 960 So.2d 568, 583 (Miss. App. 2007). Or put it in the context of Dr.

Pratt's case:

> It is difficult for this Court to fathom how [GBRAA's] failure to put down [enough traction tape] involved a policy judgment of a social, political, or economic nature. The failure to put down [enough traction tape] did not necessitate a selection between alternative policy objectives, and, like driving an automobile in the course and scope of employment, could not have been based upon any government regulatory purpose. Therefore, the act is not susceptible to policy analysis.

Pritchard v. Von Houten, 960 So.2d 568, 583 (Miss. App. 2007)(with changes to make it appropriate for the case at hand).

It is obvious that such a decision does not require a selection between alternative policy objectives and is not susceptible to policy analysis such as those involved with affording funds to fix sidewalks and roads. The maintenance men admitted that they had enough tape and that there was nothing stopping them from putting tape all the way across. The lower court's decision in this case reduces every government action to immunity. Such, was not the intended effect by the legislature. Therefore, the Airport should not be granted immunity in this case.

V.
CONCLUSION

Dr. Pratt slipped and fell because he trusted that the diamond-studded plate would provide the traction that he had on the platform that existed before the steps and between the building. This platform also had diamond studded plate but the traction tape was wall to wall and intermittently laid. The steps of the stairwell did not have the tape on the stairs where one could hold the rail and walk down the steps. The slickness was hidden from him because the steps appeared to be a non-skid surface.

The employees of the Airport that were deposed in this case all confirmed that the steps were not safe. They said the stairs were slick. However, the adequacy of the measures taken to make the stairs safe were not sufficient. The failure to place tape from wall to wall on the stairs resulted in Dr. Pratt's fall. Unlike the plaintiff in *The City of Clinton v. Smith* Dr. Pratt was exercising "ordinary care."

The employees of the airport, the maintenance men and the operations supervisor all stated that the stairs, on closer inspection, were slick. Jared Christman thought someone else had fallen or that he personally inspected them and thought that the uncovered portion was not safe. It is the failure to warn Dr. Pratt of this hidden slickness and the omitting of tape from the outside two feet of the steps that caused his injuries.

Furthermore, Airport's claim of "discretionary function" is not applicable to the facts of this case in that the decision in question does not meet the requirements of a "discretionary function" under our law since the public policy prong is not satisfied. For the foregoing reasons, Plaintiff, Dr. Jerry Pratt, would ask this Honorable Court reverse the ruling of the lower court and remand the case accordingly.

RESPECTFULLY SUBMITTED, on this 5th day of February, 2010.

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CERTIFICATE OF SERVICE

I, Kenneth M. Altman, attorney for Plaintiff, hereby certify that I have this day mailed via United States mail, postage fully prepaid, a true and correct copy of the above and foregoing Notice of Appeal to:

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