IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

No. 2009-CA-01433

LINDA PETTIS, BEVERLY LADNER, DONNIE CUEVAS, JR., AMY CUEVAS, BLAIR SCHUMAN, Individually and by and through her next friend and natural guardian, her mother, AMY CUEVAS, and DAEMON CUEVAS, JR., Individually and by and through his next friend and natural guardian, his father DONNIE CUEVAS, JR. — PLAINTIFFS/APPELLANTS

VS.

MISSISSIPPI TRANSPORTATION COMMISSION — DEFENDANT/APPELLEE

Linda Pettis, et. al v. Mississippi Transportation Commission, Cause No. 04-0356
In the Circuit Court of Hancock County, Mississippi

ORAL ARGUMENT REQUESTED

BRIEF OF THE APPELLEE MISSISSIPPI TRANSPORTATION COMMISSION

Stephen G. Peresich, Esq., MS Bar No. [redacted]
Johanna M. McMullan, Esq., MS Bar No. [redacted]
PAGE, MANNINO, PERESICH,
& McDERMOTT, P.L.L.C.
Post Office Drawer 289
Biloxi, MS 39533
Telephone: (228) 374-2100
Attorneys for the Defendants/Appellees

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VS.

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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.

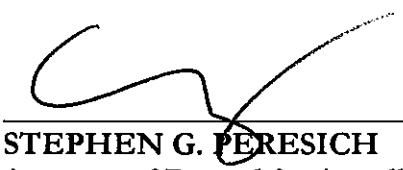
1. **Appellants:** Linda Pettis, Beverly Ladner, Donnie Cuevas, Jr., Amy Cuevas, Blair Schuman, and Dameon Cuevas, Jr.

2. **Counsel for Appellants:** James L. Davis, III, Esq. and Ian A. Brendel, Esq.

3. **Appellee:** Mississippi Transportation Commission

4. **Counsel for Appellee:** Stephen G. Peresich, Esq., Johanna M. McMullan, Esq. of the firm Page, Mannino, Peresich & McDermott, PLLC and Jackye Bertucci, Esq.

5. The Honorable Roger T. Clark, Hancock County Circuit Court Judge.



STEPHEN G. PERESICH
Attorney of Record for Appellees

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STATEMENT ON ORAL ARGUMENT

Defendant/Appellee Mississippi Transportation Commission respectfully requests that oral argument be heard in this matter.

STATEMENT OF ISSUES

I. Whether the trial court properly granted the Mississippi Transportation Commission ("MTC") immunity under the Mississippi Tort Claims Act.

A. Whether the MTC's maintenance of Highway 603 was a discretionary function under the Mississippi Torts Claim Act, Mississippi Code section 11-46-9(1)(d)(Supp. 2002).

B. Whether the risk of hydroplaning when the pavement is wet or there is water pooling on the highway during heavy rain was open and obvious such that the MTC had no duty warn under Mississippi Code section 11-46-9(1)(v)(Supp. 2002).

C. Whether the ordinary care standard applies to Mississippi Code sections 11-46-9(1)(d) and (1)(v)(Supp. 2002).

STATEMENT OF THE CASE

A. Procedural Background

On August 12, 2004, Plaintiffs Linda Pettis, Beverly Ladner, Donnie Cuevas, Jr., Amy Cuevas, Blair Schuman, and Dameon Cuevas, Jr. ("Plaintiffs") filed their Complaint against the Mississippi Department of Transportation ("MDOT") and Hancock County, Mississippi, stemming from a June 24, 2003, car accident. R. 5-7. Plaintiffs were permitted to amend their Complaint to substitute the Mississippi Transportation Commission ("MTC") as the proper party to sue in accordance with Mississippi Code section 65-1-5 (Supp. 2002). The MTC filed its answer and discovery ensued. R. 88-95. Hancock County was later dismissed from the case. R.E. 2; R. 2.

Plaintiffs alleged that the MTC had a duty to maintain Mississippi roads and highways in a safe condition and that Plaintiffs' accident was caused by rutting in the highway. R. 6. Plaintiffs contended that the ruts in the highway created an "unreasonable hazard." R. 6.

On March 26, 2009, the MTC moved for summary judgment based on the immunities granted by the Mississippi Torts Claim Act ("the Act"). R. 126-32. The MTC asserted that Mississippi Code section 11-46-9(1)(d) provided the MTC immunity because its maintenance of Highway 603 was a "discretionary" function. R. 128-129. Next, summary judgment was sought on the basis of Mississippi Code section 11-46-9(1)(p) that gives immunity for highway designs approved by the MTC. R. 129. The MTC sought summary judgment because Mississippi Code section 11-46-9(1)(q) provides immunity to governmental agencies for claims arising solely due to weather conditions. R. 129-130. In addition, the MTC moved for summary judgment on Plaintiffs' claims of the MTC's failure to warn of a dangerous condition. R. 130. Inasmuch as Mississippi Code section 11-46-9(1)(v) exempts claims where the dangerous condition is obvious, the MTC sought summary judgment because condition in question was open to Plaintiff Pettis. R. 130.

After a hearing on the summary judgment motion, the trial court issued its opinion and granted summary judgment to the MTC, dismissing Plaintiffs' claims with prejudice. R.E. 5-7; R. 579-581; Tr. 1-11. The trial court found that the MTC was immune from liability pursuant to the Mississippi Torts Claim Act ("the Act") in Mississippi Code Sections 11-46-9(1)(d) because the MTC's decision to repair or not to make repairs on Highway 603 was "discretionary." R.E. 6; R. 580. Specifically, the trial court held that "the decision to repair or maintain this area was a "discretionary function or duty" not one "'positively imposed by law and its performance required in a time or manner or upon conditions which are specifically designated.'" R.E. 6; R. 580 (citing *Marshall v. Chawla*, 520 So. 2d 1374 (Miss. 1988); *Willingham v. Mississippi Transp. Comm'n*, 944 So. 2d 949 (Miss. Ct. App. 2006)). Regarding the allegation that the rutting in the "roadway combined with the rain created a dangerous condition which the MTC should have corrected or warned about," the trial court held that the risk of hydroplaning on wet pavement was an "open and obvious" condition for which the MTC is granted immunity under section 11-46-9(1)(v). R.E. 5-7; R. 581. Further, the trial court held that "[u]nder any of the Plaintiffs [sic] theories[,] the [MTC] is immune from liability." R.E. 7; R. 581.

On September 1, 2009, Plaintiffs filed their Notice of Appeal. R. 582.

B. Statement of Facts

On June 24, 2003, Linda Pettis, with her five passengers, was driving her 2001 Dodge Neon south on Highway 603 in Hancock County headed to a little league baseball game. R. 6. Pettis testified that she saw a line of rain falling some distance away. App. R.E. A;[1] R. 537. According to Pettis, shortly after reaching the rain, the back of her vehicle jerked, she lost control over the steering and brakes and the vehicle hydroplaned, leaving the roadway and hitting a tree. App. R.E. A; R. 537.

[1]Appellee's Record Excerpts are cited herein as "App. R.E.__." Appellants' Record Excerpts are cited herein as "R.E.__."

Pettis testified that after the accident, she returned to the scene and saw that there was still water standing on the road. App. R.E. A; R. 291. Pettis testified that at the time of the accident it was raining heavily and she was traveling at a rate of 50 mph. App. R.E. A ; R. 289. Pettis stated that immediately prior to the accident she saw the ruts in the highway and water standing in the road. App. R.E. A; R. 291.

Donata Gipson, an eye witness to the accident, testified that she was driving behind Pettis' car before the accident. R. 520. Gipson described entering the curve behind Pettis' car, seeing water coming off a driveway in sheets, and seeing Pettis spin out of control and hit a pine tree. R. 520-21.

Mississippi Highway Patrol Officer Dale DeCamp, Jr. responded to the accident and prepared an accident report. R. 11. He noted that the Pettis vehicle was "traveling Highway 603, struck a puddle of water, lost control, and ran off the road to the left striking a tree." R. 11. Officer DeCamp reported that the vehicle's estimated speed was 50 mph. R. 11.

Prior to the accident on October 18, 2000, the Hancock Board of Supervisors sent a letter to Wayne Brown, the Southern District Highway Commissioner, complaining about the road conditions in their county. App. R.E. B; R. 523. On October 21, 2000, Todd Jordan, the Assistant District Engineer-Maintenance for the Sixth District of the MDOT, responded to the letter stating that Highway 603 was scheduled to be overlaid within the next three (3) years, and that at that time, in 2000, there were not adequate funds to overlay the highway. App. R.E. B; R. 525.

In affidavit testimony, Jordon, a registered, professional engineer with nineteen (19) years of experience, testified that his duties as the Assistant District Engineer-Maintenance included overseeing the maintenance of the public highways within the district. App. R.E. B; R. 271. He testified that "funds are limited for purposes of performing maintenance on existing state highways . . . I, along with the District Engineer, must make judgment calls when work appears to be necessary." App. R.E. B;

App. R.E. B; R. 272. Jordan further testified,

> There must be a balancing of the competing needs for maintenance within the district and judgment calls made as to when and where work will be performed and to what extent, if any, safety upgrades are necessary or desirable considering the amount of funding available for each year and the needs and/or conditions of the various highways within the district.

App. R.E. B; R. 272. According to Jordon, "testing for rutting is performed by MDOT's Research Division every two years, . . . , using lasers." App. R.E. B; R. 272. However, Jordan stated that an average rutting index is calculated for each section of pavement, and then the overall condition of the pavement is rated. R. 272. He testified that "the depth of the rutting on the section of road where the accident occurred was statistically lower than average." App. R.E. B; R. 273. Jordan concluded that in his opinion, the "rutting in the pavement at the location where this accident occurred was not unreasonably dangerous or hazardous." App. R.E. B; R. 273. In his view, the MTC exercised due and reasonable care in the maintenance of that section of highway. App. R.E. B; R. 273.

On March 10, 2003, Roger Ladner, the owner of a driveway adjoining the highway near the accident, submitted a complaint to the Mississippi Department of Transportation regarding the surface on Highway 603. R. 530. In response to the complaint, Todd Jordan advised Mr. Ladner that an overlay of the highway was scheduled for the Summer of 2003. R. 530. In deposition testimony, Mr. Ladner testified the driveway was on the property prior to his family's purchase of the property. R. 301. He further testified that the "State" had prepared the asphalt connection between his property and the highway and the "state department" would periodically add asphalt to the holes on the driveway where it meets Highway 603. R. 300-302. As far as maintaining the driveway, Mr. Ladner testified that he and his brother maintained and graded the driveway and had done so for approximately ten (10) years. R. 302.

MDOT Road Superintendent Carl Ladner testified in this matter that his job included

inspection and maintenance of Highway 603. R. 463. Superintendent Ladner testified that he inspected Highway 603 once a month. R. 463. He also stated that his inspections included the driveways adjoining the highways. R. 464. According to Superintendent Ladner, he and the other MDOT employees would look for any roadway and driveway problems during their inspections. R. 465. He testified that if it were raining during his inspection, he would look for problems created by the rain. *Id.* Superintendent Ladner testified further that if the intersecting driveways are not grated or sloped properly, dangerous situations can be created. R. 465. He deemed such situations "illegal driveways." R. 467.

Plaintiffs offered the opinion of accident re-constructionist John Bates in support of their case. R. 469-517. According to Bates, the highway contained ruts measuring .375 inches at the accident site created a dangerous condition. R. 473. In Bates' opinion, the driveway near the sight of the accident was not built to the specifications outlined by MDOT. R. 119. According to Bates, the driveway was not constructed with a dip of six (6) inches lower than the surface of the highway. Bates testified that in his opinion the driveway was maintained and constructed in a way that created a dangerous condition. R. 478.

SUMMARY OF THE ARGUMENT

The trial court correctly held that the MTC is entitled to immunity under the Mississippi Torts Claim Act, Mississippi Code section 11-46-9(1)(d), because it is well-settled law that maintenance of roads and highways is a discretionary function of the MTC. As such, because the MTC is entitled to immunity under Mississippi Code section 11-46-9(1)(d), it is also immune from Plaintiffs' additional "claims arising from the act or omission complained of." *Willing v. Estate of Benz*, 958 So. 2d 1240, 1255 (Miss. Ct. App. 2007). Thus, the Court's analysis of this case can end here. In any event, the MTC is also immune from suit on Plaintiff's failure to warn claim because the alleged dangerous condition was

an open and obvious condition for which the MTC was not required to warn motorists exercising due care. Miss. Code Ann. § 11-46-9(1)(v) (Supp. 2002). Inasmuch as there are no material facts in dispute as to the events surrounding Plaintiffs' accident and the MTC's actions pertinent to the case, the MTC is entitled to a judgment as a matter of law.

ARGUMENT

I. MISSISSIPPI TRANSPORTATION COMMISSION IS ENTITLED TO IMMUNITY PURSUANT TO THE MISSISSIPPI TORTS CLAIM ACT, MISSISSIPPI CODE SECTIONS 11-46-9(1)(d) AND (1)(v).

A. Standard of Review

On orders granting summary judgment, this Court conducts a *de novo* review. *PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 49 (Miss. 2005) (citation omitted). Well settled is the rule that summary judgment is properly granted when there are no genuine issues of material fact in dispute. Miss. R. Civ. P. 56(c). The moving party has the burden of demonstrating that no genuine issue of material fact exists within the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Miss. R. Civ. P. 56(c).

The presence of fact issues in the record does not *per se* entitle a party to avoid summary judgment. The Court must be convinced that the factual issue is a material one, one that matters in an outcome determinative sense. *Shaw v. Burchfield*, 481 So. 2d 247, 252 (Miss. 1985). A party opposing summary judgment may not create issue of fact by arguments and assertions in briefs or legal memoranda. *Magee v. Transcontinental Gas Pipe Line Corp.*, 551 So. 2d 182, 186 (Miss. 1989).

To defeat the motion for summary judgment in this case, Plaintiffs must submit specific facts to show that there is a genuine issue for trial. Miss. R. Civ. Pro. 56(e). Plaintiffs must establish that there are genuine issues of material fact in dispute as to whether the MTC's actions were discretionary under Mississippi Code section 11-46-9(1)(d)(Supp. 2002). If Plaintiffs are unable to set forth sufficient

material facts in dispute that MTC's were ministerial, rather than discretionary, then summary judgment must be granted to the MTC because when a state agency is granted immunity as to one sub-section of 11-46-9, it is entitled to immunity for any additional "claims arising from the act or omission complained of." *Willing*, 958 So. 2d at 1255.

However, should the Court find sufficient material facts exist as to the question of whether the MTC's actions were ministerial or discretionary, summary judgment in favor of the MTC is still proper. AS to Plaintiffs' failure to warn claim, the Plaintiffs must come forward with sufficient material facts in dispute as to whether the risk of hydroplaning on wet pavement was not an obvious condition under Mississippi Code section 11-46-9(1)(v) (Supp. 2002) such that the MTC had a duty to warn. If Plaintiffs fail to set forth sufficient material facts as to whether the risk of hydroplaning on wet pavement was not an obvious condition to one exercising due care, then the MTC is entitled to immunity and summary judgment because when, as stated, the MTC is granted immunity as to one sub-section of 11-46-9, it is entitled to immunity for any additional claims arising from the acts or omissions for which Plaintiffs complain. *Willing*, 958 So. 2d at 1255.

B. The Mississippi Transportation Commission's Highway Maintenance Decisions Are Discretionary Functions under Mississippi Code Section 11-46-9(1)(d).

The trial court was correct in finding that the MTC is immune from suit pursuant to the terms of the Mississippi Torts Claim Act. The Act provides, in pertinent part, that:

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> . . . .
>
> (d) Based upon the ***exercise or performance or the failure to exercise or perform a discretionary function or duty*** on the part of a governmental entity or employee thereof, whether or not the discretion be abused . . . .
>
> Miss. Code Ann. § 11-46-9(1)(d) (Supp. 2002).

The trial court held that "[c]ase law is clear that roadway and shoulder maintenance and repair

are discretionary functions of government which necessarily involve social, economic, or political policy and thus MTC is immune from liability. *Knight v. Mississippi Transp. Comm'n* 10 So. 3d 920, 962 (Miss. 2009). *See also Barr v. Hancock County, Mississippi*, 950 So. 2d 254 (Miss. [Ct.] App. 2007)." R.E. 6; R. 580. The trial court was correct because the MTC's actions in its maintenance of Highway 603 are a discretionary function pursuant under section 11-46-9(1)(d) and the MTC is, therefore, granted immunity from suit for actions based on the failure to maintain Mississippi highways.

Plaintiffs' assert that the MTC's actions in the maintenance of Highway 603 were not discretionary duties, but rather were ministerial functions that are not subject to protection under the Act. Two questions are used by the courts to determine whether government conduct is discretionary: (1) whether the activity involved an element of choice or judgment; and if so, (2) whether the choice or judgment in supervision "involves social, economic or political policy alternatives." *Dancy v. East Mississippi State Hosp.*, 944 So. 2d 10, 16 (Miss. 2006). If the governmental activity or function requires an element of choice or judgment, the activity is deemed discretionary. *Id.* at 16. Furthermore, a duty is discretionary if it requires a governmental official to use his own judgment and discretion to carry out the duty. *Id.* at 16. Ministerial activities are those that are not discretionary and are imposed by law and the performance of ministerial activities are not dependent on the employee's judgment. *Mississippi Dept. of Human Servs. v. S.W.*, 974 So. 2d 253, 258 (Miss. Ct. App. 2007); *Barrett v. Miller*, 599 So. 2d 559, 567 (Miss. 1992). Conduct is ministerial "if the obligation is imposed by law leav[es] no room for judgment." *Doe v. State ex rel. Miss. Dept. of Corr.*, 859 So. 2d 350, 356 (Miss. 2003) (citing *Leflore County v. Givens*, 754 So. 2d 1223, 1226 (Miss. 2000)). Once a court has determined that a governmental activity requires discretion or judgment and is discretionary, the court looks to whether the activity is the subject of public policy so as to afford the governmental agency sovereign immunity under the Act. *Pritchard v. Von Houten*, 960 So. 2d 568, 581 (Miss. Ct. App. 2007).

This issue of whether highway road maintenance is discretionary or ministerial is well-settled in Mississippi. "[R]oad maintenance and repair have long been held to be a discretionary function of government." *Barr*, 950 So. 2d 2 at 258; *Brewer v. Burdette*, 768 So. 2d 920, 923 (Miss. 2000); *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So. 2d 1234, 1239 (Miss. 1999); *Mohundro v. Alcorn County*, 675 So. 2d 848, 854 (Miss. 1996) (summarizing a series of cases in which road maintenance and repair are held to be discretionary functions). The decision to repair or maintain Highway 603 was discretionary because it was not one "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, 1375 (Miss. 1988) (overruled in part on other grounds); *Willingham v. Mississippi Transp. Comm'n*, 944 So. 2d 949, 952 (Miss. Ct. App. 2006).

Several cases have addressed situations involving a vehicle "hydroplaning" on a Mississippi highway. *See Knight*, 10 So. 3d at 969; *Lee v. Mississippi Dept. of Transp.*, 2009 Miss. App. LEXIS 604 (Miss. Ct. App., Sept. 15, 2009); *Willingham*, 944 So. 2d at 953. In all of these cases, the courts held that highway maintenance was a discretionary function. Plaintiffs ignore all of these cases in their primary brief for the well-settled principal that highway maintenance constitutes a discretionary function on the part of the MTC and MDOT.

In *Knight*, a driver and his wife died after colliding into a bridge. *Knight*, 10 So. 3d at 964. Plaintiffs claimed that the MTC had negligently maintained the highway and had failed to warn of dangerous conditions on the road, thus causing the deaths of the driver and his wife. *Id.* The Court of Appeals examined section 11-46-9(1)(d) of the Mississippi Tort Claims Act and held that even where a governmental entity abuses its discretion "'when performing a discretionary function or duty, it is immune from liability.'" *Id.* at 965 (quoting *Dozier v. Hinds County*, 354 F. Supp. 2d 707, 713-14 (S.D. Miss. 2005)).

In *Knight*, the Court's decision turned on whether the MTC's conduct required it to exercise its own policy-based judgment or whether the MTC employees were "bound to perform their duties in accordance with mandatory directives imposed by law." *Id.* at 969. In resolving this issue, the Court looked to Mississippi Code sections 65-1-61 and 65-61-65 regarding pavement and maintenance of Mississippi highways. *Id.* Mississippi Code section 65-1-61 provides, in part, that:

> It shall be the duty of the Transportation Commission to have the Transportation Department construct, reconstruct and maintain, at the cost and expense of the state, all highways under its jurisdiction up to such standards and specifications and with such surfacing material *as the Transportation Commission may determine,* such paving to be done for each project *as rapidly as funds are made available* therefor and, *as nearly as practicable,* immediately upon the completion of all work performed pursuant to grade, drainage and bridge contracts for the project.

Miss. Code Ann. § 65-1-61 (emphasis added). The Court held that in this statute, the phrase "'as the [MTC] may determine' indicates that the MTC's employees must use their own 'judgment or discretion' in maintaining highways in MTC's jurisdiction according to its own standards. . . ." *Knight*, 10 So. 2d at 969 (citation omitted),

> As to highway maintenance, Mississippi Code section 65-1-65 states:
>
> It shall be the duty of the State Highway Commission to have the State Highway Department *maintain all highways* which have been or which may be hereafter taken over by the State Highway Department for maintenance in such a way as to afford convenient, comfortable, and economic use thereof by the public at all times. *To this end it shall be the duty of the director, subject to the rules, regulations and orders of the commission as spread on its minutes,* to organize an adequate and continuous patrol for the maintenance, repair, and inspection of all of the state-maintained state highway system, so that said highways may be kept under proper maintenance and repair at all times.

Miss. Code Ann. § 65-1-65 (Supp. 2002) (emphasis added). Regarding section 65-1-65, the *Knight* Court held that

> [the] MTC's director is under a duty, subject to the rules and regulations of the MTC, to properly maintain and repair highways under the MTC's jurisdiction. *See Mohundro v. Alcorn County*, 675 So. 2d 848, 853-54 (Miss, 1996) (stating that 'road maintenance and repair are discretionary rather than ministerial functions').

Knight, 10 So. 3d at 970.

The Court also examined Mississippi Code section 63-3-303 (Rev. 2004)[2] governing the placement of traffic-control devices and noted its holding in *Willingham*, in which it held that the meaning of section 63-3-303 was to create a statutory duty that must be carried out in a discretionary manner. *Knight*, 10 So. 3d at 970. The Court in *Knight* held that these statutes did not impose any "specific directives 'as to the time, manner, and conditions for carrying out' the MTC's duties in maintaining highways or posting traffic-control or warning devices." *Id.* As a result, the Court determined that such duties were not ministerial. *Id.* Instead, the Court found that "all three statutes require the MTC use its judgment and discretion in carrying out the duties prescribed therein." *Id.* Finally, the Court in *Knight* decided that the duties to maintain highways and place traffic-control devices required the MTC to "consider the policy considerations of doing so." *Id.* (citing *Dancy*, 944 So. 2d at 18 (stating that "it must be presumed that [an] agent's acts are grounded in policy when exercising . . . discretion.")).

Most recently, in *Lee*, the Court of Appeals reaffirmed *Knight* and rejected the argument that MDOT was liable for its failure to repair rut and/or accident occurring on the state highway. *Lee*, 2009 Miss. App. LEXIS at *17-18. In *Lee*, a heavy rain had caused water to pool on the highway. *Id.* The driver's car hydroplaned on the pooled water causing her vehicle to cross the center line and collide with oncoming traffic. *Id.* Plaintiffs claimed that rutting in the highway caused rainwater to pool and

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[2]Mississippi Code section 63-3-303 provides:

> The commissioner of public safety and the state highway commission shall place and maintain such traffic-control devices conforming to its manual and specifications, upon all state and county highways as it shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic.
> No local authority shall place or maintain any traffic-control device upon any highway under the jurisdiction of the commissioner of public safety and the state highway commission except by the latter's permission.

caused the accident. *Id.* After the trial court granted the MDOT summary judgment, plaintiffs appealed arguing that MDOT had notice of the pooling water on the highway when it rained and therefore MDOT waived its immunity under the Act. *Id.* at *5. After noting that it was undisputed that the area of the highway where the accident occurred was "rutted out" and likely contributed to the pooling water, the Court of Appeals relied on *Knight* and held that the exercise and performance of MDOT's maintenance of the state's highways were a discretionary function subject to immunity under the Act. The Court of Appeals recognized that

> the 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.

Id. at *10 (emphasis in original).

In *Willingham,* plaintiffs sued the MTC for injuries and death resulting from a two-vehicle collision on a state highway. *Willingham*, 944 So. 2d at 949. Plaintiffs alleged that the highway surface where the accident occurred was rutted which Plaintiffs alleged caused water to build up in the cracks and contributed to the hydroplaning of the vehicle that collided with plaintiffs' decedents. *Id.* at 953. It was undisputed that the highway was rutted, that, prior to the accident, the MTC had made arrangements to have the highway surface repaired and that there were no warning signs in place to warn drivers that hydroplaning was a danger during heavy rainfall. *Id.* at 950. On these facts the Court of Appeal affirmed summary judgment, stating that MTC has discretion in repairing roads:

> [the MTC's] District Engineer . . . testified extensively regarding the fact that the MTC does not have enough funds to repair all the roads under its controls that are in need of repair. Therefore, . . . [the] roads must be assigned a priority and repaired according to that prioritization. Although a computer program is used to help prioritize which roads are most in need of repair, . . . the MTC has the discretion to alter the priority of a road if it deems necessary.

Willingham, 944 So. 2d at 950.

In the present case, Plaintiffs argue that Superintendent Ladner's testimony that "he had to"

or was required to inspect and oversee the maintenance of all the roads in his district reflects a ministerial duty instead of a discretionary duty. Plaintiffs are wrong and there is no evidence that Superintendent Ladner did not inspect Highway 603. While Ladner's testimony may reflect that it was a ministerial function of the MTC to inspect the highways, there is no evidentiary support in the record that the inspections did not occur. Thus, the MTC fulfilled any ministerial duties it may have had in the inspection of Highway 603. Though Superintendent Ladner's job required him to inspect the roadways, according to the undisputed testimony of Todd Jordon, the decisions whether to make repairs based upon his inspections involved judgment and discernment of the MTC, as to which repairs would be made first based on the funding available to make the repairs. App. R.E. B; R. 272. Additionally, the MTC had scheduled Highway 603 to be resurfaced in the Summer of 2003 when funds became available. R. 530. In 2000, Assistant District Engineer Jordan stated that Highway 603 was set to be overlaid in the next three years. R. 525. He also stated that at that time, there were insufficient funds available for the project and that other projects were of higher priority. *Id.* Jordan testified that the decision whether or not to repair Highway 603 in Hancock County, Mississippi where the accident occurred was "discretionary" pursuant to Mississippi Code section 11-46-9(1)(d) (Supp. 2002). App. R.E. B; R. 270-73. He stated he had to make *judgment calls* about highway maintenance on Highway 603. App. R.E. B; R. 272. Jordan's testimony is not disputed. Because the decisions of maintenance and repair of Highway 603 are not specifically controlled by statute, but rather involve the judgment and discernment of MTC employees, the MTC's decisions to the repair and maintenance of Highway 603 were discretionary and not ministerial.

Plaintiffs never address in their primary brief the longstanding decisions holding that highway maintenance by the MTC or the MDOT are discretionary functions of those agencies. *Barr*, 950 So. 2d at 258; *Brewer*, 768 So. 2d at 923; *Lang*, 764 So. 2d at 1239; *Mohundro*, 675 So. 2d at 854. Even more,

Plaintiffs never address the *Knight*, *Lee* and *Willingham* decisions, all of which involve highway rutting, a hydroplaning vehicle, and a negligent, highway maintenance claim against the MTC or MDOT. As indicated above, these decisions all held that highway maintenance was a discretionary function of the MTC or the MDOT and that summary judgment had been properly entered. The facts in the present case cannot be distinguished from the *Knight*, *Lee* and *Willingham* decisions. Like *Knight*, *Lee* and *Willingham*, immunity is properly granted to the MTC for its maintenance of Highway 603 pursuant to the Mississippi Torts Claim Act.

Plaintiffs rely on *Ladner v. Stone County*, 938 So. 2d 270, 275 (Miss. 2006), for the proposition that "finding the [the MTC] is entitled to immunity under Miss. Code Ann. 11-49-9(1) [sic] is contrary to the Mississippi Supreme Court's interpretation of discretionary function immunity." Appellant's Brief at 24. In *Stone County*, a county bridge collapsed. *Stone County*, 938 So. 2d at 272. As plaintiff attempted to drive across the bridge, she did not see that the bridge had collapsed and crashed into the opposite side of the bridge. *Id.* Plaintiff contended that Stone County knew the bridge was defective and dangerous and failed to correct the problem or warn her of the dangerous condition. *Id.* At trial, plaintiff entered into evidence the steps needed to protect her against this dangerous condition and that the steps were feasible for Stone County as to money and time. *Id.* at 275. The county road manager testified that he had not inspected the bridge despite the numerous reports from the engineer that the bridge was in ever worsening condition and in need of repair. *Stone County*, 938 So. 2d at 272. A former county board member testified that the county road manager had a duty to inspect, repair and maintain the roads. *Id.* at 273. Further, there was evidence that just a few months before plaintiff's accident, the county was told that failure of the bridge was imminent. *Id.* Yet, the evidence showed that the County did not close the bridge or repair the bridge. *Id.* at 273.

Following the bench trial, the trial court held that the County was protected by the

discretionary function immunity of the Act. *Id.* On appeal, the Court of Appeals reversed, holding that the County was not immune from its duty to properly maintain and repair the bridge. *Id.* at 275. In so holding, the Court recognized the evidence of the steps the County could have taken to protect the plaintiff and that the steps were feasible to the County. *Id.* The County had been on notice for five years that the bridge was in need of repair and that the County had adequate time to repair the bridge before the collapse. *Id.* In addition, the Court acknowledged the evidence that the County had more than enough funds to repair the bridge without jeopardizing other road projects. *Id.*

On the facts alone, the *Stone County* case is distinguishable from the present case. First, there is no evidence that Highway 603 was not inspected. In fact, the evidence adduced on this point establishes that Road Supervisor Carl Ladner and the men working with him inspected Highway 603 on a monthly basis. App. R.E. C; R. 463. There was no failure to inspect Highway 603. In addition, Jordan testified that he was required to determine which roadway projects would be performed first and that Highway 603 was scheduled to resurfaced in the Summer of 2003. App. R.E. B; R. 272; 525. The evidence in the *Stone County* case was that the County took no action to repair the bridge.

Plaintiffs in the present case also argue that if the Court were to find the MTC immune from liability under Mississippi Code section 11-46-9(1)(d), such a finding would give the MTC absolute immunity for highway maintenance, "because Appellee could ignore warnings of dangerous conditions and rely on the discretionary function immunity provision[s]. . . ." Plaintiffs' argument here conflates the claims for highway maintenance and the failure to warn of a dangerous condition. The evidence here is that the MTC did not ignore the reports from those concerned about the condition of Highway 603. Rather, the MTC made plans to repair and resurface the highway as soon as the funds were available to do so. The MTC made a judgment call that the condition of the highway was not such that it needed immediate repair as compared with other roadway maintenance needs. As for warning of

dangerous conditions, under Mississippi Code section 11-46-9(1)(v), the MTC is immune from suit for conditions which are open and obvious to drivers exercising due care. (*See* Section II. D for further analysis on this issue).

Finally, because the MTC's maintenance of Highway 603 is a discretionary function for which the MTC is entitled to immunity under section 11-46-9(1)(d) further analysis is not required because where any of the immunities enumerated in section 11-46-9 providing immunity to a government agency apply, the agency is completely immune from the "claims arising from the act or omissions complained of." *Knight*, 10 So. 3d at 971.

C. The Mississippi Transportation Commission Is Immune from Liability for the Claim that It Breached its Duty to Maintain the Intersecting Driveway Because Highway Shoulder Maintenance Is a Discretionary Function under Mississippi Code Section 11-46-9(1)(d).[3]

Plaintiffs argue on appeal that the MTC breached its duty which was to maintain the intersecting driveway where the incident occurred, and Plaintiffs' offer their expert's testimony to

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[2]The subject of the maintenance of the intersecting driveway was not alleged in Plaintiffs' Complaint or their Amended Complaint. R. 6, 85-86. Plaintiffs' allegations contained in their Complaint state that

> the cause of the accident was that the vehicle the Plaintiffs were in hydroplaned because of ruts formed in the tire tracks in the south bound lane in the asphalt surfacing. . .That this condition constituted an unreasonable hazard, which was the proximate cause of the Plaintiffs [sic] accident and all their injuries.

R. 6. Plaintiffs filed a motion for leave to file a third amended complaint on May 11, 2009, after the MTC had filed its motion for summary judgment. R.E. 3; R. 2 (Docket reflecting filing of Motion to Amend Complaint). Plaintiffs' sought to add numerous allegations based on the testimony of Plaintiffs' expert. The MTC filed its opposition to the motion to file a third amended complaint and the motion was heard by the trial court at the hearing on the MTC's motion for summary judgment. Tr. 8-11. The trial court acknowledged in its Judgment that Plaintiffs proposed amended complaint included the allegation that the MTC was negligent in maintaining the intersecting driveway near the scene of the accident. R.E. 6; R. 580. However, the trial court did not specifically rule on the motion for leave file a third amended complaint. Moreover, Plaintiffs have not raised the issue of the failure of the trial court to rule on the motion to file the third amended complaint.

As to the highway rutting and any alleged duty to warn, the trial court held that the danger was open and obvious such that the MTC had no duty to warn. The trial court held that "under any of Plaintiffs [sic] theories, the [MTC] is immune from liability." R.E. 7; R. 581. The trial court never specifically addressed Plaintiffs' additional claim regarding the maintenance of the intersecting driveway. Consequently, this issue is was not properly preserved for appellate review and/or has been waived by Plaintiffs.

substantiate their claim. Plaintiffs' expert, Bates, testified that the driveway did not have the required "dip" to allow rainwater to runoff before entering the highway. R. 478. According to Bates, the manner in which the driveway was constructed and maintained created a dangerous condition. *Id.*

Mr. Roger Ladner, the owner of the driveway leading to Highway 603 testified that he and his brother had been "grating" the driveway for more than ten (10) years. R. 302. Mr. Ladner further testified that the "State" would fill in the areas along the driveway that met with the highway from time to time. R. 302.

Plaintiffs point again to the testimony of the Road Superintendent, Carl Ladner and claim that his testimony that (1) a driveway without a six-inch dip is an "illegal driveway," (2) and that Ladner's job duties required him to look for "illegal driveways" is sufficient to show that the MTC failed to "take steps to repair the driveway where feasible." Appellant's Brief at 19. Plaintiffs then curiously reason that the MTC's failure to repair the driveway "where feasible" prohibits application of the "discretionary function exception." *Id.* Plaintiffs' analysis here lacks any merit.

First, as established above, the case law is clear that roadway maintenance and repair are discretionary functions of the MTC. *See Knight*, 10 So. 3d 962. The fact that MTC employees inspect the roadways and intersecting driveways does not change the discretionary nature of the highway repair and maintenance. Plaintiffs have cited no cases that distinguish driveway and shoulder repair and maintenance to highway repair and maintenance. Superintendent Ladner's testimony is that the MTC is responsible for the roadway from the centerline to the corresponding right-of-way. R. 464. Again, Superintendent Ladner's testimony is that he looked for problems with the highway shoulders and driveways. R. 464-65. In addition, Superintendent Ladner never testified that he did not inspect the area of Highway 603 in question. Plaintiffs have presented no evidence that the driveway in question was not inspected. Consequently, the MTC's ministerial functions of inspecting the roadways,

including areas up to the right of way were satisfied. Inasmuch as the MTC's duty to repair and maintain the shoulder and driveway areas in question constitutes a discretionary function, the MTC is immune from liability under the Act.

D. Pursuant to Mississippi Code Section 11-46-9(1)(v), the Mississippi Transportation Commission Had No Duty to Warn of a Condition That Was Open and Obvious to One Exercising Due Care.

Mississippi law provides governmental immunities to state agencies for the failure to warn of dangerous conditions where such conditions are open and obvious to one exercising due care. Miss. Code Ann. § 11-46-9(1)(v) (Supp. 2002). Specifically, Mississippi Code section 11-46-9(1)(v) 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:
>
> . . . .
>
> (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 which is obvious to one exercising due care.***

Miss. Code Ann. § 11-46-9(1)(v) (Supp. 2002) (emphasis added). Pursuant to the terms of this statute, a government agency is extended immunity *regardless of whether it had actual or constructive notice* of a dangerous condition *if* the condition is "open to one exercising due care." *Id.* Because the risk of hydroplaning when the pavement is wet is an open and obvious condition, the MTC is granted immunity from suit under the Act and is not liable to Plaintiffs.

The alleged "dangerous condition" in this case was the risk of hydroplaning on a particular section of Highway 603 when it was raining and that area was wet or there was a pooling of water due to the rain. The alleged "dangerous condition," however, was open and obvious to a person exercising ordinary care when driving a vehicle through this section of Highway 603. It is common knowledge that driving a vehicle is more dangerous and should be approached more carefully during bad weather.

Willingham, 944 So. 2d at 953. The court in *Willingham*, addressing a similar hydroplaning situation, held:

> 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 for hydroplaning, the risk of hydroplaning during rainfall is an open and obvious danger, such that the MTC is shielded under the MTCA.

Id. at 953.

The court again held in *Lee* that pooling water on a highway is an open and obvious danger for which immunity is granted. *Lee*, 2009 Miss. App. LEXIS 604 at *19. In *Lee*, on the claims that the MDOT was required to warn of a dangerous condition, the court noted that the plaintiffs presented numerous affidavits with different accounts of the intensity of the rain at the time of the accident. *Id.* However, the court chose to place the most emphasis on the driver's statement that "it had rained heavily a short time before the accident, but it had "changed to a light rain" before the accident." *Id.* at *13-15. The driver also stated that she "*saw the water on the road from the rain* and was driving about [fifty to fifty-five] miles per hour . . . " *Id.* at *14 (emphasis in original). On these facts, the court held that regardless of whether the MDOT had notice of a dangerous condition, the condition was open and obvious to one exercising due care and the MDOT's immunity was not waived by failing to warn of a dangerous condition. *Id.* at *19.

Like the facts in *Lee*, Pettis stated that immediately prior to the accident she saw the ruts in the highway and water standing in the road. R. 291. As such, to Pettis, the pooling water on Highway 603 was open and obvious and she was under a duty to operate her vehicle giving due care to the conditions of the highway. The holdings in *Willingham* and *Lee* are indistinguishable from the present case and compel the same result, that is, that summary judgment be affirmed on the basis that the MTC is granted immunity under the Act.

Plaintiffs assert that because the MTC had notice of the dangerous condition, the MTC is not entitled to immunity or summary judgment under Mississippi Code section 11-46-9(1)(v). Here, Plaintiffs ignore the final terms of the statute that clearly states: "*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. Miss. Code Ann. § 11-46-9(1)(v) Supp. 2002). According to a plain reading of the statute, if the dangerous condition is one that is "obvious to one exercising due care," then whether or not the MTC had notice of the dangerous condition is immaterial. *Lee*, 2009 Miss. App. LEXIS 604 at *19.

E. The Ordinary Care Standard Is Inapplicable to Mississippi Code Sections 11-46-9(1)(b) and (v).

Plaintiffs contend that because the MTC had actual notice of the dangerous condition, then the MTC's use of ordinary care in warning of the dangerous condition is a question for the finder of fact. Appellant's Brief at 19, citing *Mississippi Dept. of Transp. v. Cargile*, 847 So. 2d 258, 268 (Miss. 2003) and *Jones v. Mississippi Dept. of Transp.*, 744 So. 2d 256, 260 (Miss. 1999). Again, Plaintiffs ignore the very terms of section 11-46-9(1)(v) that a governmental agency is not required to warn of a dangerous condition if that condition is open to one exercising due care. Nonetheless, Plaintiffs rely on *Cargile*, asserting that the MTC had actual notice of a dangerous condition and had the opportunity to warn but did not do so. Plaintiffs argue:

> [a]t the very least, this Court will have to overrule the proposition set forth in *Mississippi Dept. of Transp. v. Cargile*, 847 So. 2d 258, 268 citing *Brewer v. Burdette*, 786 So. 2d 920, 923 (Miss. 2000), that provides when a government actor has been placed on either actual or constructive notice of a dangerous condition, the government actor's use of ordinary care is a question for the finder of fact.

Appellant's Brief at 23. This "proposition," however, has already been rejected by the Mississippi Supreme Court and the Mississippi Court of Appeals on multiple occasions and Plaintiffs never come to grips with recent case law on this issue. "Because of the plain language of [section 11-46-(1)(d)],

reading a duty of ordinary care *into* the statute came under substantial criticism." *Dozier*, 354 F. Supp. 2d at 713-14 (citing Robert F. Walker, *Comment, Mississippi Tort Claims Act: Is Discretionary Immunity Useless?*, 71 Miss. L.J. 695 (Winter 2002) (emphasis added).

In *Cargile*, the driver claimed that he hydroplaned on pooled water on the highway resulting in a collision with injuries. *Id.* at 260. Following a bench trial, the trial court found the plaintiff and MDOT each fifty percent at fault. *Id.* On appeal, the MDOT asserted that the trial court erred in failing to grant it immunity under the Mississippi Torts Claim Act. *Id.* at 266. The Court stated that "immunity for discretionary duties is granted only when ordinary care is used" and that question of whether ordinary care has been used is a question for the finder of fact. *Id.* at 268 (citing *Brewer*, 768 So. 2d at 923 (Miss. 2000); *L.W. v. McComb Separate School District*, 754 So. 2d 1136, 1142 (Miss. 1999)).

The Mississippi Supreme Court, however, has since rejected *Cargile* for the proposition that Mississippi Code section 11-46-9(1)(d) imposes a duty of ordinary care. *See Collins v. Tallahatchie County*, 876 So. 2d 284, 289 (Miss. 2004). In *Collins*, the Supreme Court expressly held that section 11-46-9(1)(d) *does not* impose a duty of ordinary care. *Id.* at 291. In doing so, the Supreme Court recognized the "apparent misunderstanding" in *Brewer* on the "erroneous proposition that one must use ordinary care in performing a discretionary function to retain immunity." *Id.*

> Unfortunately, *Brewer* cited *L.W. v. McComb Separate School District*, 754 So. 2d 1136 (Miss. 1999), for the proposition that an ordinary care standard applies to discretionary function immunity. . . . In *Brewer*, this Court misapplied the wording in *L.W.* by incorrectly applying the ordinary care standard to discretionary duties. . . . Miss. Code Ann. § 11-46-9(1)(d) exempts governmental entities from liability of a discretionary function or duty "whether or not the discretion be abused." Therefore, ordinary care standard is not applicable to Miss. Code. Ann. § 11-46-9(1)(d).

Id. at 289 (footnote omitted). The Supreme Court also held that section 11–46-(1)(b) *does* contain the ordinary care standard. *Collins*, 876 So. 2d at 289; *see also Harris v. McCray*, 867 So. 2d 188, 189 (Miss. 2003). Section 11-46-9(1)(b) of the Act states that governmental immunity applies to governmental

actions:

> 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.

Miss. Code Ann. § 11-46-9(1)(b) (Supp. 2002) (emphasis added). This sub-section expressly provides for the application of the ordinary care standard while both sub-sections (1)(d) and (1)(v) which are involved in this case do not.

Subsequent cases have reinforced the fact that *Brewer* and *L.W.* are no longer precedent for the view that ordinary care is applicable to the Act unless explicitly stated. *See Dancy*, 944 So. 2d 10 (Miss. 2006); *Willingham*, 944 So. 2d at 952; *Barrentine v. Mississippi Dept. of Transp.*, 913 So. 2d 391,393-94 (Miss. Ct. App. 2005); *Dozier*, 354 F. Supp. 2d at 715. Even further, the provisions of the Mississippi Code section 11-46-9(1)(a-y) are to be strictly construed "in accordance with its express wording." *Knight*, 10 So. 3d at 968. Thus, any application of an ordinary care standard to sub-sections (1)(d) and (1)(v) would violate the plain terms of the statutes. As such, Plaintiffs' view that an ordinary care standard applies to sub-sections (1)(d) or (1)(v) is patently erroneous.

II. THE PRINCIPLE OF "FRAISER'S OCTOPUS" APPLIES IN THIS CASE.

Mississippi attorney Jim Fraiser created the term "Fraiser's Octopus" in his 1999 law review article titled, "*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 a 2007 article on the same subject, Fraiser advances that the exemptions in Mississippi Code 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.'" *Article: Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim Exemptions to Immunity Issues: Substantial/ Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions*, 76 Miss. L.J. 973, 983 (2007) (quoting Fraiser, 68 Miss. L.J. at 743). The

Mississippi Supreme Court has held that "the State cannot be held liable for damages if the conduct falls within one of the exceptions found in Mississippi Code section 11-46-9." *State v. Hinds County Bd. of Supervisors*, 635 So.2d 839, 842 (Miss. 1994). The Mississippi Court of Appeals recently applied this principle in both the *Knight* and *Lee* cases. *Knight*, 10 So. 3d at 971; *Lee*, 2009 Miss. App. LEXIS 604, * 17-18. In *Knight*, the Court stated: "where any of the immunities enumerated in section 11-46-9(1) apply, the government is completely immune from the claims arising from the act or omission complained of." *Knight*, 10 So. 3d at 971. Because more than one sub-section of section 11-46-9 is involved in the present case, "Fraiser's Octopus" applies here.

If this Court finds that summary judgment appropriate as to Mississippi Code Section 11-46-9(1)(d), the Court is not required to engage in additional analysis regarding Plaintiffs' claim as to section 11-46-9(1)(v) because "where any of the immunities enumerated in section 11-46-9(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 also Knight*, 10 So. 3d at 971. Conversely, if this Court concludes that summary judgment was properly based on Mississippi Code section 11-46-9(1)(v), then the Court is not required to also address the issues raised pertaining to the immunities in Mississippi Code section 11-46-9(1)(d). *Willing*, 958 So. 2d at 1255; *see also Knight*, 10 So. 3d at 971.

CONCLUSION

Summary judgment was properly entered against Plaintiffs. The trial court correctly determined that maintenance of roads and highways was a discretionary function under Mississippi Code section 11-46-9(1)(d) (Supp. 2002). Defendant Mississippi Transportation Commission was engaged in the discretionary function of maintaining and repairing the roads and highways of the State of Mississippi. The MTC inspected Highway 603 and its actions in maintaining and repairing Highway 603 were subject to the judgment of MTC employees. Because the Mississippi Torts Claims Act provides

immunity for a government entity and its employees when performing a discretionary function or duty, the MTC is entitled to the immunities afforded by Mississippi Code section 11-46-9(1)(d) (Supp. 2002).

Additionally, summary judgment was properly entered by the trial court because the wet pavement and standing water was a "dangerous condition which is obvious to one exercising due care" under Mississippi Code section 11-46-9(1)(v), entitling the MTC to immunity. The MTC cannot be held liable for failure to warn of a dangerous condition that is open and obvious to one exercising due care. Whether the MTC had notice of the dangerous condition is not relevant to the determination of whether the condition was open and obvious because the statute explicitly states that a governmental entity will not be liable for obvious conditions to one exercising due care. Miss. Code Ann. § 11-46-9(1)(v)(Supp. 2002). Consequently, the MTC did not have a duty to warn of the risk of hydroplaning, because such a risk was obvious to Pettis who testified that she saw the water on the highway before she attempted to drive through it. R. 291. Accordingly, the Mississippi Transportation Commission is immune from liability pursuant to the Mississippi Torts Claim Act. Miss. Code Ann. § 11-46-9(1)(v) (Supp. 2002).

Finally, if this Court finds that the MTC is entitled to immunity under either sub-section (1)(d) or (1)(v) of Mississippi Code section 11-46-9(1), then the MTC is completely immune from the claims arising from the acts or omissions about which the Plaintiffs complain.

Respectfully submitted,

MISSISSIPPI TRANSPORTATION COMMISSION

BY: PAGE, MANNINO, PERESICH, McDERMOTT, P.L.L.C.

BY: _____
STEPHEN G. PERESICH MS Bar No. [redacted]
JOHANNA M. MCMULLAN, MS Bar No. [redacted]

PAGE, MANNINO, PERESICH,
& McDERMOTT, P.L.L.C.
Attorneys at Law
Post Office Drawer 289
Biloxi, MS 39533
(228) 374-2100
(228) 432-5539

CERTIFICATE OF SERVICE

I, JOHANNA M. MCMULLAN, of the law firm of Page, Mannino, Peresich & McDermott, P.L.L.C., do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing **Appellee's Brief filed by Defendant Mississippi Transportation Commission,** to:

Counsel for Plaintiffs/Appellants
James L. Davis, III, Esquire
Ian A. Brendel, Esquire
P. O. Box 1839,
Gulfport, MS 39502

Trial Court Judge
Honorable Roger T. Clark
Circuit Court Judge
P.O. Box 1461
Gulfport, Mississippi 39502

This, the 5th day of March, 2010.

JOHANNA M. MCMULLAN

PAGE, MANNINO, PERESICH
& McDERMOTT, P.L.L.C.
460 Briarwood Dr., Suite 415
Post Office Box 16450
Jackson, MS 39236-6450
Telephone: (601) 896.0114
Facsimile: (601) 896.0145