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. APPELLANTS

VERSUS

MISSISSIPPI TRANSPORTATION COMMISSION APPELLEE

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

BRIEF OF APPELLANTS

ORAL ARGUMENT 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 so that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

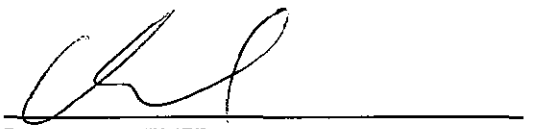
1. **Appellants:** Linda Pettis, Beverly Ladner, Donnie Cuevas, Jr., Amy Cuevas, Blair Schuman and Dameon Cuevas, Jr.

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. of the firm Page, Mannino, Peresich & McKermott, PLLC and Jackye Bertucci, Esq.

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



IAN BRENDEL
Attorney of Record for Appellants

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A. The Trial Court erred by granting summary judgment and finding that Appellee was entitled to "discretionary function" immunity under Miss. Code Ann. § 11-46-9(1)(d) because the Appellee's Road Superintendent was performing a "ministerial" duty.

B. The Trial Court erred by finding that Appellee was immune pursuant to Miss. Code Ann. § 11-46-9(1) because Appellants' submitted evidence that Appellee had actual knowledge of a dangerous condition on Highway 603 where the subject accident occurred.

II. Whether the Trial Court erred by granting summary judgment and finding that the rutting on highway was "a dangerous condition which is obvious to one exercising due care" under Miss. Code Ann. § 11-46-9(1)(v), thus entitling Appellee to immunity thereunder.

STATEMENT OF THE CASE

On August 12, 2004, Linda Pettis, Beverly Ladner, Donnie Cuevas, Jr., Amy Cuevas, Blair Schuman and Dameon Cuevas, Jr. (Appellants') filed a complaint in the Hancock County Circuit Court. [R. 5-7]. Appellants' initially named as Defendants Hancock County, Mississippi and the Mississippi Department of Transportation [R.5].[1] The lawsuit was subsequently defended by the Mississippi Transportation Commission (Appellee), who filed an Answer to Appellants' complaint on January 20, 2005. [R. 88-95]. On March 26, 2009, Appellee moved for summary judgment against the Appellant's. [R. 126-303]. On June 3, 2009, the Appellants' filed their response and supporting memorandum in opposition to Appellee's motion for summary judgment. [R. 326-565]. A hearing was on Appellee's summary judgment motion was heard before Circuit Court (Trial Court) Judge Honorable Roger T. Clark on June 18, 2009. On August 20, 2009, the Trial Court issued an Opinion and entered Judgment granting Appellee's motion for summary judgment, and dismissing Appellant's case with prejudice. [R. 579-581]. The Appellants' timely filed their notice of appeal on September 1, 2009, aggrieved by the Trial Court's Judgment granting Appellee's summary judgment motion. [R.582-583].

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[1]Hancock County, Mississippi was later dismissed as a Defendant. The Plaintiff initially named the Mississippi Department of Transportation as a Defendant. However, the lawsuit was defended under the entity "Mississippi Transportation Commission."

STATEMENT OF RELEVANT FACTS

In June 2003, Linda Pettis and five (5) others got into Linda Pettis' 2001 Dodge Neon to go to Linda Pettis' grandson's baseball game. [R. 533,535]. The five (5) other occupants in the Dodge Neon included: Beverly Ladner, Donnie Cuevas, Jr., Amy Cuevas, Blair Schuman and Dameon Cuevas, Jr. [R. 534]. Linda Pettis was the driver, Beverly Ladner was seated in the front passenger seat. Dameon Cuevas, Jr, Donnie Cuevas, Jr., Blair Schuman and Amy Cuevas were seated in the back passenger seats. [R. 534] The six (6) occupants of the Dodge Neon, Dameon Cuevas, Jr, Donnie Cuevas, Jr., Blair Schuman, Amy Cuevas, Beverly Ladner and Linda Pettis, are the Appellants' in the instant appeal.

Linda Pettis was driving south on Highway 603 in Hancock County, Mississippi en route to her grandson's baseball game. Linda Pettis described the accident as it unfolded:

> "... And I turned on 603, and we were going down the road probably three, four miles. And after I passed the American Legion, you come up on a little hill. And on that hill, probably five or six miles down the road, you could see the rain. It was - - the rain was coming down. You could actually see where it was starting and you couldn't see past the rain. It was real heavy. And I remember my son saying well, Mom, you can slow down now because, you know, you see the rain and we have plenty - - we had two hours. And I slowed down.
>
> There was a truck behind me. And I turned my windshield wipers on before I even got to the rain. And we got into the rain and all of the sudden, it wasn't probably two minutes after we got into the rain. I felt the back jerk. And then it felt as if I was in the air. I had no control over the steering wheel, no control over the brakes ... . And then that was it. I mean, I realized that we had stopped up against the tree, and I remember seeing the crosses. And that was it." [R. 536-537].

Donata Gibson was an eyewitness to the Plaintiffs' accident. Donata Gibson was driving and following the 2001 Dodge Neon. Gibson described the accident and the water rushing down from the driveway nearby the location where the accident occurred:

Q: Go ahead and, just if your could, tell us what you saw in connection with this accident.

A: We were both headed south, and just before the accident, there's a bad curve. And when go halfway in that curve, it was just a sheet of water ... the next thing I knew, she just started - - when she hit the water that was coming off that driveway - - she just started spinning out of control and went off the side and hit the pine tree to the left of the highway... . [R.520].

***

Q: Okay. You said some water coming off the driveway to her right. Go head and describe that, as best you can.

A: Yes It was like somebody standing there with a fire hose. That's how hard it was coming off of there because even after she hit it and I came through it, it was still coming up underneath my car - - my truck. [R. 520-521]

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The cross to which Linda Pettis referred was placed there in memoriam for a tragic death that occurred in a similar location on Highway 603. On January 27, 2000, Bridget Travirca, a young twenty-seven (27) year old woman from Waveland, Mississippi, was traveling southbound on Highway 603. Travirca lost control on Highway 603 South, crashed into a large pine tree, and tragically died. [R. 540]

Prior to the Appellants' accident in June 2003, the Hancock County Board of Supervisors notified the Appellee that there were problems with Highway 603 in Hancock County. By way of letter dated October 18, 2000, sent to Wayne Brown, the Appellee's Southern District Highway Commissioner, the Hancock Board of Supervisors notified Appellee that they wished to "voice concerns regarding some road conditions on State Highways, (Hwy. 603, North - Hwy. 43 from Hwy. 603 to Pearl River County line - Small Box Culvert needed on Highway 604)." [R. 523]. Todd Jordan, an Assistant District Engineer for Appellee, responded by way of a letter dated

October 31, 2000. There, Todd Jordan stated that "I understand your concern over the pavement conditions on SR 603 and SR 43. SR 603 and SR 43 are in the schedule to be overlaid within the next three years .... I want to assure you that when funds become available, we will let these projects on a prioritized basis." [R. 525].

Further, Roland Ladner, who lived nearby the location where the Appellants' accident occurred on Highway 603, submitted a complaint to the Appellee on March 10, 2003, regarding the surface of Highway 603. This complaint was made just three (3) months prior to the Appellants' accident, which occurred on June 24, 2003. The complaint/incident report reported that, "This man called again - said last 7 miles of 603 (inter 53) has never been surfaced - on h'wy or curves where he lives - **many wrecks** - wants to meet with someone to check it out ,etc." Under the "Corrective Action Taken" portion of Roland Ladner's complaint/incident report, Todd Jordon wrote "Plan to overlay this summer. Advised Mr. Ladner of this."[R. 527-530] (Emphasis added).

The Appellants' filed their complaint in the Hancock County, Mississippi Circuit Court. [R. 5]. There, the Appellants' alleged that the cause of their accident and resulting injuries and damages were caused by Appellee's failure to properly maintain the area on Highway 603 by allowing ruts to form in the asphalt surface. [R.6]. The Appellants' later sought leave to amend their complaint, alleging that the driveway nearby where the Appellants' accident occurred was improperly maintained by the Appellee, and that such failure caused the accident and their injuries. [R.305].

Appellants' designated John Bates as an expert in the field of accident reconstruction. [R.105-122]. At his trial deposition, John Bates was offered as an expert in the field of civil

engineering specializing in traffic accident reconstruction and evaluation of highway design, highway maintenance and highway construction zones. [R.470]. In Bates' deposition, he gave an opinion that Appellee created a dangerous condition to the Appellants' based on improper highway maintenance of both the asphalt surface and the driveway nearby the scene of the accident on Highway 603. Bates opined that the Appellee improperly maintained the asphalt surface and thus created a dangerous condition to the Appellants' because there were wheel ruts in the asphalt near or at the scene of the accident which were more than three times the acceptable threshold depth. [R. 472-474]. Further, Bates opined that Appellee improperly maintained the driveway near the scene of the accident because the Appellee failed to create a six- inch dip near the highway so that water will be diverted to ditches and not onto the highway. R. 478-479].

The subject driveway intersected Highway 603 at or near the location where the Appellants' vehicle began hydroplaning. Bates testified that the driveway had a "steep grade" at "seven percent." [R. 476].Carl Ladner, who was the Mississippi Department of Transportation's Road Superintendent in Hancock County at the time of the Appellants' accident, testified in his deposition that one of his duties was to inspect "bad driveways" and "look" for the "bad driveways," to wit:

Q: Did you have to inspect all of the roads?

A: Yes, sir, I did.

Q: And how often did you have inspect the roads?

A: Once a month.

Q: As far as Highway 603, how often did you inspect Highway 603?

A: Once a month.

Q: Go ahead and give details to exactly - - what would you do when you would inspect the highway?

A: It was a drive through and mostly sight, by sight, if you see a low shoulder, a bad driveway, a ditch stopped up, litter, dead trees, potholes, such and that.

Q: Go ahead. You said "a bad driveway"; explain that, what you mean.

A: Well, if it's a bad dip of, you know, like entering a highway, if it's a bad dropoff or if it's sand washing out in the road or rocks washing out in the road that too high and needs to be cut down, such as that. R. 463].

***

Q: And anything else about driveways that y'all were inspecting to see if there was any problems?

A: It's mostly drainage and, like I say, low shoulders at a driveway or high shoulders at a driveway or maybe you might notice a hole in the driveway. And if that occurs, normally your pipe's bad and you got to change it out and over it, such as that.

Q: Y'all were also there to inspect to - - I hate to say, to kind of look for the unexpectable and try to prevent problems from arising?

A: Exactly. Not only myself, even our employees because they might see something that I don't see and come back and tell me.

Q: Okay. And as far as water running into the road and everything, if a car was to hit from water coming from one side during a rainstorm, could that be something that could create a danger or a dangerous situation?

A: Oh, most seriously. Yeah, definitely. [R. 464-465].

***

Q: Okay, How about if there was a driveway intersecting the road that was elevated, could that create a problem?

MS. BERTUCCI:

Object to the form. Go ahead.

MR. DAVIS:

Q: Go ahead.

A: If it's not grated right or sloped right to where the water can get off before it gets to the road.

Q: Okay.

A: But they're not supposed to be like that. **They're supposed to six inches lower over the pipe than the highway.**

Q: All right. Go ahead and explain that. Six inches lower over the pipe, I'm confused.

A: Well, it stops your water from getting to the highway. If it's just coming straight down into the highway. **If it's just coming straight down into the highway, that's an illegal driveway.**

Q: Okay. **And were y'all supposed to go look for these illegal driveways?**

A: **Oh, yeah. Oh, yeah...** . [R. 466-467] (Emphasis added).

***

Appellee filed a motion for summary judgment, alleging, *inter alia,* that Appellee was entitled to summary judgment on grounds that: (1) Appellants' failed to meet the notice requirements set forth in Miss. Code Ann. § 11-46-11(2); (2) Appellee was entitled summary judgment pursuant to Miss. Code Ann. § 11-46-9(1)(d) because Appellee's maintenance of Highway 603 where the Appellant's accident occurred was "discretionary," thereby providing immunity to the Appellee; (3) Appellee was entitled summary judgment pursuant to Miss. Code Ann. § 11-46-9(1)(p) because the design in Highway 603 had been approved by the Appellee, thereby providing immunity to Appellee; (4) Appellee was entitled to summary judgment pursuant to Miss. Code Ann. § 11-46-9(1)(q) because Appellant's injuries arose solely from the

weather conditions; (5) Appellee was entitled to summary judgment pursuant to Miss. Code Ann. § 11-46-9(1)(v) because the dangerous condition on Highway 603 was obvious, thereby entitling Appellee to immunity. [R. 126-132]. Appellants' filed a response opposing Appellee's summary judgment motion [R. 326-327] and accompanying memorandum [R. 328-367].

After a hearing in the Hancock County Circuit Court on Appellee's motion for summary judgment on June 18, 2009, the Trial Court granted Appellee's motion for summary judgment and entering judgment pursuant to Miss. R. Civ. P. 56 on August 20, 2009. [R. 579-581] The Trial Court found that Appellants' substantially complied with the notice requirements pursuant to Miss. Code Ann. § 11-46-11(2).[R. 580]. However, the Trial Court found that Appellee was immune from liability pursuant to Miss. Code Ann. § 11-46-9(1)(d) because the Appellee's decision to repair or not make repairs on Highway 603 was "discretionary." [R.580]. Further, the Trial Court found that the Appellee was immune from liability pursuant to Miss. Code Ann. § 11-46-9(1)(v) because the risk of hydroplaning on wet pavement is an "open and obvious" danger. [R. 581]. Aggrieved from the Trial Court's granting of Appellee's motion for summary judgment, Appellants' timely appealed the Trial Court's judgment.

SUMMARY OF THE ARGUMENT

The Trial Court's Judgment granting Appellee's Motion for Summary Judgment is due to be reversed. The Trial Court erred by finding that Appellee was entitled to immunity under Miss. Code Ann. § 11-46-9(1)(d) (Supp. 2002) for two reasons. First, the Road Superintendent for the Appellee at the time of Appellant's accident testified in his deposition that he "had to" inspect and maintain Highway 603 in Hancock County, Mississippi for "illegal driveways" and "maintenance" demonstrates that Carl Ladner was performing a ministerial, and not a

discretionary. Second, the Trial Court erred by finding Appellee was entitled to immunity under Miss. Code Ann. § 11-46-9(1)(d) (Supp. 2002) because Appellee had actual notice of the dangerous conditions on Highway 603, and no evidence was submitted that Appellee took any steps to mitigate the dangerous conditions on Highway 603 where Appellants' accident occurred. Finally, the Trial Court erred by finding that Appellee was entitled to immunity, and thus summary judgment, under Miss. Code Ann. § 11-46-9(1)(v), because there was no evidence that Linda Pettis, the driver, could have known, nor could it be "open and obvious" to Linda Pettis the dangerous depths of the tire ruts were approximately three (3) tenths of an inch too deep.

STANDARD OF REVIEW

Pursuant to Rule 56 of the Mississippi Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56©. The Court views the evidence in the light most favorable to the non-moving party. *Univ. of Miss. Med. Ctr.v. Easterling,* 928 So.2d 815, 817 (Miss.2006). "The moving party bears the burden on demonstrating that there is no genuine issue of material fact." *Id.* This Court applies a *de novo* standard of review to a trial court's grant of summary judgment. *Willingham v. Miss. Transp. Comm'n,* 944 So.2d 949, 951 (¶7) (Miss.Ct. App.2006).

ARGUMENT

I. Whether the Trial Court erred by granting summary judgment and finding that Appellee was entitled to "discretionary function" immunity under Miss. Code Ann. § 11-46-9(1)(d)

A. The Trial Court erred by granting summary judgment and finding that

Appellee was entitled to "discretionary function" immunity under Miss. Code Ann. § 11-46-9(1)(d) because the Appellee's Road Superintendent was performing a "ministerial" duty.

The Mississippi Tort Claims Act (MTCA) provides the exclusive civil tort remedy against a government entity. *Howard v. City of Biloxi,* 943 So.2d 751, 754 (Miss.Ct.App.2006). The Trial Court found that Appellee was immune from liability pursuant to Miss. Code Ann. § 11-46-9(1)(d) (Supp. 2002). Miss. Code Ann. § 11-46-9 (Supp. 2002), provides in pertinent part, that:

> (1) A government entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> ...
>
> (d) Based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a government entity or employee thereof, whether or not the discretion be abused.

Miss. Code Ann. § 11-46-9(1)(d).

The Trial Court found, in rendering judgment for the Appellee, 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 (Appellee) is immunity from liability." [R.580].

The Trial Court erred in finding that Appellee was immune from liability pursuant to Miss. Code Ann. § 11-46-9(1)(d) (Supp. 2002) because Appellee's Road Superintendent was performing a ministerial function by maintaining Highway 603 and the driveway that intersects Highway 603 at or near the location of Plaintiffs' accident. The Mississippi Supreme Court has addressed whether an act is discretionary pursuant to Miss. Code Ann. § 11-46-9(1)(d), to wit:

"In determining whether government conduct is discretionary the Court must answer two

(2) questions: (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. E. Miss. State Hosp.*, 944 So.2d 10, 16 (Miss.2006).

Regarding the first question, whether the activity involved an element or choice or judgment, the Court must first determine whether the function is discretionary or ministerial. *Id.* at 16. A duty is discretionary if it requires an official to use her own judgment and discretion in order to carry out the duty. *Id.* at 16. On the other hand, a duty is ministerial and not discretionary if it is imposed by law and its performance is not dependent on the employee's judgment. *Miss Dep't of Human Servs. v. S.W.*, 974 So.2d 253, 258 (Miss.Ct.App.2007); *see, e.g.*, *Barrett v. Miller,* 599 So.2d 559, 567 (Miss.1992).

As to the second question, if the act at issue does require discretion or judgment, then for sovereign immunity to be triggered under the discretionary exemption, the act must also have been subject to some form of public policy analysis. *Pritchard v. Von Houten,* 960 So.2d 568, 581 (Miss.Ct.App.2007).

The Appellee was performing a ministerial function by maintaining Highway 603 and the driveway that intersects Highway 603 at or near the location of Appellants' accident. Carl Ladner was the Road Superintendent over Harrison, Hancock and Pearl River Counties in June 2003, when the Appellants' accident occurred. [R.462] As part of Carl Ladner's job duties, he **had to** do all the maintenance to all the roads, answer to all the complaints and take care of them. [R. 462-463] (Emphasis added). Carl Ladner described his duties in his deposition, to wit:

Q: **Did you have to inspect all of the roads?**

A: **Yes, sir, I did.**

Q: And how often did you have inspect the roads?

A: Once a month.

Q: As far as Highway 603, how often did you inspect Highway 603?

A: Once a month.

Q: Go ahead and give details to exactly - - what would you do when you would inspect the highway?

A: It was a drive through and mostly sight, by sight, if you see a low shoulder, a bad driveway, a ditch stopped up, litter, dead trees, potholes, such and that.

Q: Go ahead. You said "a bad driveway"; explain that, what you mean.

A: Well, if it's a bad dip of, you know, like entering a highway, if it's a bad dropoff or if it's sand washing out in the road or rocks washing out in the road that too high and needs to be cut down, such as that. [R.463] (Emphasis added).

***

Q: And anything else about driveways that y'all were inspecting to see if there was any problems?

A: It's mostly drainage and, like I say, low shoulders at a driveway or high shoulders at a driveway or maybe you might notice a hole in the driveway. And if that occurs, normally your pipe's bad and you got to change it out and over it, such as that.

Q: Y'all were also there to inspect to - - I hate to say, to kind of look for the unexpectable and try to prevent problems from arising?

A: Exactly. Not only myself, even our employees because they might see something

that I don't see and come back and tell me.

Q: Okay. And as far as water running into the road and everything, if a car was to hit from water coming from one side during a rainstorm, could that be something that could create a danger or a dangerous situation?

A: Oh, most seriously. Yeah, definitely. [R.464-465].

***

Q: Okay. How about if there was a driveway intersecting the road that was elevated, could that create a problem?

MS. BERTUCCI:

Object to the form. Go ahead.

MR. DAVIS:

Q: Go ahead.

A: If it's not grated right of sloped right to where the water can get off before it gets to the road.

Q: Okay.

A: But they're not supposed to be like that. They're supposed to be six inches lower over the pipe than the highway.

Q: All right. Go ahead and explain that. Six inches lower over the pipe, I'm confused.

A: Well, it stops your water from getting to the highway. If it's just coming straight down into the highway, that's an illegal driveway.

Q: Okay. And were y'all supposed to go look for these illegal driveways?

A: Oh, yeah. Oh, yeah. Well, it states it in their permit how they got to have it. We

write them a permit. [R. 466-467].

***

Carl Ladner's testimony that he "had to" inspect and maintain Highway 603 in Hancock County Mississippi for "illegal driveways" and "maintenance" demonstrates that Carl Ladner was performing a ministerial, and not a discretionary, duty. Further, Carl Ladner's duties were not dependent on his judgment, because according to his testimony, he "had to" inspect Highway 603 in Hancock County, Mississippi monthly. As such, Carl Ladner's duties to inspect Highway 603 were ministerial.

The Appellee sought to show, through an affidavit submitted by Todd Jordan, that the decision on whether to repair Highway 603 in Hancock County, Mississippi where the subject accident occurred was "discretionary" pursuant to Miss. Code Ann. § 11-46-9(1)(d) (Supp. 2002). [R. 270-273]. There, Todd Jordan stated that he had to make "judgment calls" about highway maintenance on Highway 603. [R. 272].[2] Carl Lander, the Road Superintendent for Appellee over Highway 603 in Hancock County, Mississippi, at the time of Appellants' accident in June 2003, testified in his deposition that he "had to" inspect Highway 603 for "maintenance" and "illegal driveways." [R. 462-463]. As such, the Trial Court erred by finding that the Appellee's decision to maintain Highway 603 were "discretionary" under Miss. Code Ann. § 11-46-9(1)(d) (Supp. 2002).

Carl Ladner testified, as the Mississippi Department of Transportation's Road Superintendent in Hancock County, that one of his duties was to inspect "bad driveways." R.

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[2]It is interesting to note that Jordan does not give a statement about the condition of Highway 603 at the time of Appellant's accident in June 2003.

463]. Further, Carl Ladner testified that about "bad driveways, to wit:

Q: Okay, How about if there was a driveway intersecting the road that was elevated, could that create a problem?

MS. BERTUCCI:

Object to the form. Go ahead.

MR. DAVIS:

Q: Go ahead.

A: If it's not grated right or sloped right to where the water can get off before it gets to the road.

Q: Okay.

A: But they're not supposed to be like that. **They're supposed to six inches lower over the pipe than the highway.**

Q: All right. Go ahead and explain that. Six inches lower over the pipe, I'm confused.

A: Well, it stops your water from getting to the highway. If it's just coming straight down into the highway. **If it's just coming straight down into the highway, that's an illegal driveway.**

Q: Okay. **And were y'all supposed to go look for these illegal driveways?**

A: **Oh, yeah. Oh, yeah**... . [R. 466-467] (Emphasis added).

***

Further, John Bates issued a report where he opined that "... the driveway should have been corrected by MDOT many years prior to the Pettis accident. [R.543]. Roger Ladner, the owner of the property on which the subject driveway is located, testified that once a year the

"State" would inspect the driveway and "[i]f it needs a little material on it, they put it. If it don't, they don't fool with it." [R. 546]. As such, there is evidence that the Appellee was maintaining the subject driveway. John Bates, Appellants' expert, gave an opinion that the Appellee failed to properly maintain the subject driveway, thereby causing a dangerous condition to the Plaintiffs in June 2003.

John Bates, Appellants' expert, gave his trial deposition on August 20, 2008. John Bates was offered as an expert in the field of civil engineering specializing in traffic accident reconstruction and evaluation of highway design, highway maintenance and highway construction zones. [R.470]. John Bates, before coming to an opinion, had a survey conducted of the driveway and road where the Appellants' accident occurred. [R.475]. The survey did not detect any depressions or dips in the driveway where water had been rushing onto the road at the time of Appellants' accident. [R.477]. John Bates then gave an opinion as to whether the manner in which the driveway was maintained and constructed created a dangerous condition on the date of Appellants' accident. [R.478] John Bates testimony on this issue, to wit:

Q: Now, do you have an opinion as to whether the way the driveway was maintained and constructed created a dangerous condition on the date of the accident?

A: Absolutely, it did.

Q: Okay. Can you tell us your opinion and reasons for it?

A: Yes. The standard that MDOT has for building a driveway requires that the driveway first go downward from the asphalt pavement to a dip of six inches lower than the asphalt elevation is and then goes back up. We don't have that dip. The purpose of the dip is that the water coming down the hill on the driveway will

be diverted laterally into the ditches on that side and this side of the driveway, and we don't have that situation here, but yet that is the standard of MDOT, and it's a good engineering standard, no doubt about it, and that's so that this situation would not occur, that a force of water coming down through here will not cause a diversion - - a diverting of traffic into the wrong lane... .

Q: Mr. Bates, just for purposes of clarity, where - - tell us - - excuse me - - tell us where this six-inch dip should have been located in terms of how far from the edge of the asphalt.

A: Well, there are - - there are varying distances, but the testimony of the MDOT representative, Mr. Carl Ladner... . But Mr. Carl Ladner had worked for MDOT for 28 years, as I recall his testimony, and five of those years he was the superintendent, and the road superintendent for this areas of the highway. His responsibility included that he was to - - to go and inspect every single mile of highway within his area and he was to do that every month. ... [R. 478-479].

***

An eyewitness, Donata Gipson, was driving behind the Appellants' vehicle and witnessed the water rushing down the driveway. Gipson, who saw the water rushing down from the driveway testified that: "**[i]t was like somebody standing there with a fire hose. That's how hard it was coming off of there** because even after she hit it and I came through it, it was still coming up from underneath my car - - my truck." [R. 521] (Emphasis added).

Carl Ladner's testimony that failure to include a six- inch dip at the end of the driveway to divert water from rushing onto the road is an "illegal driveway" combined with Carl Ladner's

admission that he was supposed to look for those "illegal driveways" and repair them are evidence of reasonable steps determined by the Appellee to minimize the risks of personal injury. Carl Ladner admitted to monitoring Highway 603 "monthly." There is no evidence that Appellee even attempted to make repairs to the "illegal driveway." As such, Appellee failed to take steps to repair the driveway where feasible, thus the discretionary function exception does not apply to the Appellants here.

B. The Trial Court erred by finding that Appellee was immune pursuant to Miss. Code Ann. § 11-46-9(1) because Appellants' submitted evidence that Appellee had actual knowledge of a dangerous condition on Highway 603 where the subject accident occurred.

The Trial Court erred by finding that Appellee was entitled to immunity pursuant to Miss. Code Ann. § 11-46-9(1) because Appellee had actual knowledge of the dangerous conditions on Highway 603 in Hancock County. Immunity for discretionary duties under Miss. Code Ann. § 11-46-9(1) is granted only when ordinary care is used when a government actor has been placed on either actual or constructive notice of a dangerous condition. *Mississippi Dept. of Transp. v. Cargile,* 847 So.2d 258, 268 (Miss.2003) citing *Jones v. Mississippi Department of Transportation,* 744 So.2d 256, 260 (Miss.1999). **If the 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.** *Id.* at 268 citing *Brewer v. Burdette,* 768 So.2d 920, 923 (Miss.2000) (Emphasis added). There is no doubt that the Appellee had notice of a dangerous condition regarding the surface of Highway 603 prior to the Appellants' accident in June 2003.

The Appellee had **actual** notice of the unsafe and dangerous road conditions on Highway

603 in Hancock County. By way of letter dated October 18, 2000, sent to Wayne Brown, the Mississippi Department of Transportation Southern District Highway Commissioner, the Hancock County Board of Supervisors notified Defendant that they wished to "voice concerns regarding some road conditions on State Highways, **(Hwy. 603, North - Hwy. 43 from Hwy. 603 to Pearl River County line - Small Box Culvert needed on Highway 604).**" [R. 523] (Emphasis added). Todd Jordan, an Assistant District Engineer - Maintenance for Appellee, responded by way of a letter dated October 31, 2000. There, Todd Jordan stated that **"I understand your concern over the pavement conditions on SR 603 and SR 43. SR 603 and SR 43 are in the schedule to be overlaid within the next three years ... . I want to assure you that when funds become available, we will let these projects on a prioritized basis."** [R. 525] (Emphasis added).

Further, Roland Ladner, who lived nearby the location where the Appellants' accident occurred on Highway 603, submitted a complaint to the Appellee on March 10, 2003, regarding the surface of Highway 603. This complaint was made just three (3) months prior to the Appellants' accident, which occurred on June 24, 2003. The complaint/incident report reported that, **"This man called again - said last 7 miles of 603 (inter 53) has never been surfaced - on h'wy or curves where he lives - *many wrecks* - wants to meet with someone to check it out ,etc."** [R. 530] (Emphasis added). Under the "Corrective Action Taken" portion of Roland Ladner's complaint/incident report, Todd Jordon wrote **"Plan to overlay this summer. Advised Mr. Ladner of this."** [R. 530] (Emphasis added).

Clearly, the letters from the Hancock County Board of Supervisors and the complaint/incident report from Roland Ladner addressed to the Appellee prior to the Appellants'

accident places the Appellee on actual notice that a dangerous condition existed as to the paving conditions on Highway 603 in Hancock County. Because Appellee had notice of the dangerous condition that existed on Highway 603, the Appellee is not entitled to immunity or summary judgment under Miss. Code Ann. § 11-46-9(1). If the 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. *Id.* at 268 citing *Brewer v. Burdette,* 768 So.2d 920, 923 (Miss.2000). Appellants' have put forth ample evidence to support their claim that the Appellee failed to repair the ruts in Highway 603 by way of trial deposition testimony from Appellants' expert, John Bates.

John Bates, during his trial deposition, testified about the road condition of Highway 603, to wit:

Q: Well, let me ask a different question. Do you have an opinion as to whether hydroplaning on Highway 603 at the time this accident occurred was likely when the wheel rutting measured .375 inches, such as those that your assistant Mr. Attaway found at the scene of the accident?

A: Oh, yes. That was three times - - over three times the threshold speed, yes.

Q: Do you have an opinion about whether allowing wheel ruts to reach - -

A: I said the wrong word. It was over three times the threshold depth. I miss - - I said the wrong word.

Q: Okay. Do you have an opinion as to whether allowing wheel ruts to reach a depth of .375 inches on Highway 603 at the accident site was improper highway maintenance?

A: Oh, yes.

Q: Can you please explain why?

A: That is all sorts of published reports that would show that - - that a highway with .375 depth is - - **a dangerous condition that would at - - at a speed limit of 55 - - of 50 miles per hour, that would be a very dangerous condition and should have been rectified one way or another.**

Q: Okay. Do you have any opinions about how it could have been rectified?

A: Yes. Of course, the - - the most thorough repair would be an asphalt overlay of the entire asphalt - - of the entire highway.

But short of that, there is a very low-cost way of - - of doing a remedial action on that highway. The speed limit is 50 miles per hour at the time of this accident but yet the study - - the research by Dr. Glennon is showing that it takes speeds above 45 mile per hour... . [R. 472-474].

***

Appellee had notice of dangerous conditions that related to pavement condition on Highway 603 in Hancock County. Appellants have put forth ample evidence that a dangerous condition existed on Highway 603 in Hancock County. As such, the issue of whether Defendant is immune for discretionary acts under Miss. Code Ann. § 11-46-9(1) is reserved for the fact finder at Appellant's trial. *Id.* at 268 citing *Brewer v. Burdette,* 768 So.2d 920, 923 (Miss.2000). As such, Defendant is not entitled to summary judgment for exercising discretionary duties under Miss. Code Ann. § 11-46-9(1).

Appellants' implore this Court not to grant immunity to the Appellee because it

eviscerates the intent of Mississippi Tort Claims Act found at Miss. Code Ann. 11-49-9 based on Appellee's actual knowledge of the dangerous condition that existed on Highway 603 at the time of Appellant's accident. If this Court finds that Appellee is entitled to immunity, notwithstanding the undisputed fact that Appellee had actual notice of the dangerous conditions existing on Highway 603, injured persons such as the Appellants, will have no tort remedy under the Mississippi Tort Claims Act for improper highway maintenance and design. A finding of immunity in the matter *sub judice* is contrary to the intent of the Mississippi Tort Claims Act, which provides tort remedies for those injured by government entities. At 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,* 768 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.

In the matter *sub judice*, there is no evidence in the record that Appellee took any action to repair the ruts on Highway 603, notwithstanding the complaint letters they received prior to the Appellant's car accident in June 2003. The Appellant's failure to take any action is not within the discretionary function exception under Miss. Code Ann. 11-49-9(1)(d), and the Trial Court erred by finding that Appellee was immune under Miss. Code Ann. 11-49-9(1)(d). Whether Appellee's failure to perform any maintenance prior to Appellant's accident after receiving notice of dangerous conditions on Highway 603 (or at least the Appellee's failure to produce any evidence of maintenance on Highway 603 prior to Appellants accident), is a liability question that should be reserved for the fact finder at trial. The proposition set forth in *Mississippi Dept. of Transp. v. Cargile,* 847 So.2d 258, 268 (Miss. 1999) mandates that

Appellants are given their opportunity to be heard and present their case at trial.

The public policy objectives underlying the discretionary function immunity provision would be not be advanced if the Trial Court's Judgment is affirmed. A finding that Appellee is entitled to immunity under Miss. Code Ann. 11-49-9(1) is contrary to the Mississippi Supreme Court's interpretation of discretionary function immunity. *Ladner v. Stone County,* 938 So.2d 270,275 (Miss.2006). The Mississippi Supreme Court's interpretation is derived from *Wright v. United States,* 866 F.Supp. 804, 806 (S.D.N.Y.1994) (Emphasis added), to wit:

> "The discretionary function is intended to protect public policy objectives. It would run counter to the discretionary function exemption to second-guess or micro-manage the kinds of steps appropriate to maximize safety in government facilities, even where decisions are made below that policy level. ***With that broad discretion, reasonable steps of a type determined by management to minimize risks of personal injury are necessary. Failure to take such steps where feasible is negligent and not within the discretionary exemption, even though the particular nature of the appropriate steps is discretionary.***"

A finding that Appellee is immune from liability under Miss. Code Ann. 11-49-9(1)(d) would provide the Appellee with absolute immunity for highway maintenance, because Appellee could ignore warnings of dangerous conditions and rely on the discretionary function immunity provision found at Miss. Code Ann. 11-49-9(1)(d). Prior to the Appellants accident in June 2003, Bridget Travirca, a young twenty-seven (27) year old woman from Waveland, Mississippi, was traveling southbound on Highway 603. Travirca lost control on Highway 603 South, crashed into a large pine tree, and tragically died. [R. 540]. Linda Pettis testified that she hit the tree with a cross that was placed in memoriam for Bridget Trivirca after her untimely passing. Linda Pettis, as Bridget Trivirca, lost control traveling southbound on Highway 603. [R. 536-537]. The prior accidents on Highway 603, the death of Bridget Trivirca, and the letters sent to Appellee warning

Appellee about the dangerous condition on Highway 603 in Hancock County, Mississippi, provides ample evidence that Appellee's conduct was not feasible and negligent. In the matter *sub judice*, a finding that Appellee is entitled to immunity for exercising a "discretionary" act under Miss. Code Ann. 11-49-9(1)(d) runs contrary to the policy objectives behind the discretionary function immunity provision explained in *Ladner v. Stone County,* 938 So.2d 270,275 (Miss.2006). Moreover, a finding that Appellee is entitled to immunity under Miss. Code Ann. 11-49-9(1)(d) eviscerates the intent of the Mississippi Tort Claims Act, because such a finding will grant government entities absolute immunity for tort claims pertaining to improper highway maintenance.

II. Whether the Trial Court erred by granting summary judgment and finding that the rutting on highway was "a dangerous condition which is obvious to one exercising due care" under Miss. Code Ann. § 11-46-9(1)(v), thus entitling Appellee to immunity thereunder.

The Trial Court erred by making a finding that "[t]he danger at issue, the risk of hydroplaning when the pavement was wet, is an open and obvious one." [R. 581]. Miss. Code Ann. § 11-46-9(1)(v) grants immunity when a government entity fails to warn of a "dangerous condition which is obvious to one exercising due care." The Trial Court found that the risk of hydroplaning in wet conditions was an "open and obvious" dangerous condition. [R. 581]. Miss. Code Ann. § 11-46-9(1)(v) provides that:

> (1) A government 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 negligence or other wrongful conduct of an employee of the government entity or of which the government entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided; however, that a government 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).

The Trial Court's finding assumes that Linda Pettis should be able to discern, while driving in rain at approximately 50 miles per hour, that the depth of the ruts in Highway 603 were too deep. The Trial Court's finding belies common sense. It is important to note the depth at which the ruts become dangerous. John Bates testified that the depths of the ruts measured .375 inches, and that the depth of the ruts filled by pools of water created a dangerous condition. [R. 472-473]. In short, to adopt the Trial Court's finding, this Court will have to make a finding that Linda Pettis, while driving at 50 mile per hour in the rain, should have been able to discern the dangerous risk of hydroplaning based measurement of ruts in Highway 603 in tenth of an inch increments. Further, there is undisputed evidence that Linda Pettis reduced her speed prior to the accident. [R. 502]. It is axiomatic to say that the depth of the ruts were not "open and obvious" to Linda Pettis. As such, the Trial Court erred by finding that Appellee was immune pursuant to Miss. Code Ann. § 11-46-9(1)(v).

CONCLUSION

The Trial Court's Judgment granting Appellee's Motion for Summary Judgment is due to be reversed. The Trial Court erred by finding that Appellee was entitled to immunity under Miss. Code Ann. § 11-46-9(1)(d) (Supp. 2002) for two reasons. First, the Road Superintendent for the Appellee at the time of Appellants' accident testified in his deposition that he "had to" inspect and maintain Highway 603 in Hancock County Mississippi for "illegal driveways" and "maintenance" demonstrates that Carl Ladner was performing a ministerial, and not a discretionary. Second, the Trial Court erred by finding Appellee was entitled to immunity under

Miss. Code Ann. § 11-46-9(1)(d) (Supp. 2002) because Appellee had actual notice of the dangerous conditions on Highway 603, and no evidence was submitted that Appellee took any steps to mitigate the dangerous conditions on Highway 603 where Appellants' accident occurred. Finally, the Trial Court erred by finding that Appellee was entitled to immunity, and thus summary judgment, under Miss. Code Ann. § 11-46-9(1)(v), because there was no evidence that Linda Pettis, the driver, could have known, nor could it be "open and obvious" to Linda Pettis, that the dangerous depths in the ruts on Highway 603 filled with water were approximately three (3) tenths of inch too deep.

RESPECTFULLY SUBMITTED, this the 22nd day of January 2010.

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.

By: _____

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CERTIFICATE OF SERVICE

I, IAN A. BRENDEL, hereby certify that the original and three (3) copies of the above, and one (1) copy of an electronically formatted medium in the form of the CD, have been forwarded, via United States Mail, postage prepaid, to the following:

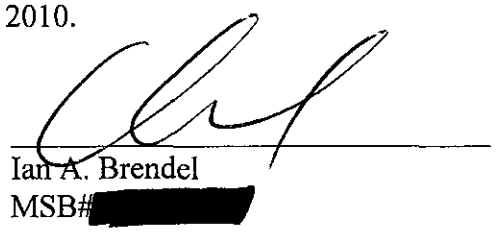
Supreme Court Clerk:
Betty Sephton
Supreme Court Clerk
P. O. Box 249
Jackson, Mississippi 39520-0249

I further certify that one copy of the above has been forwarded, via United States Mail, postage prepaid, to the following:

Counsel for Appellant:
Steven G. Peresich, Esquire
Page, Mannino, Peresich & McDermott
P. O. Drawer 289
Biloxi, Mississippi 39533

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

SO CERTIFIED this, the 22nd day of January 2010.



Ian A. Brendel
MSB#[redacted]