BOARD OF SUPERVISORS OF SIMPSON COUNTY, MISSISSIPPI **APPELLANTS**

VS. **CA NO. 2009-CA-01874**

DON F. McELROY **APPELLEE**

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STATEMENT OF THE CASE

A. Nature of the Case

This matter arises out of an accident that occurred in the morning hours of February 6, 2004, on Shorter Road in Simpson County, Mississippi. More specifically, the Plaintiff filed suit against Simpson County alleging that it was responsible for personal injuries he received after he drove his automobile over a section of Shorter Road that had washed out as a result of heavy rainstorms the day before. The Plaintiff asserted that the County was liable because it allegedly: (1) failed to properly construct, repair and/or design Shorter Road; and (2) failed to properly warn of the washout on Shorter Road.

Simpson County responded to Plaintiff's Complaint by answering the same and, after completing the discovery process, filed a Motion for Summary Judgment based upon several sections of the Mississippi Tort Claims Act (MTCA). The trial Court reserved ruling on the County's Motion for Summary Judgment and the matter proceeded to trial.

Following the bench trial of this matter, the trial Court ruled in favor of the County as to the negligent construction, repair and design claim but ruled in favor of the Plaintiff as to the failure to warn claim. In particular, the trial Court ruled that the suit was governed by Section 11-46-9(1)(b) of the MTCA and that Simpson County failed to exercise ordinary care in warning of the washed out section of Shorter Road.

B. Course of Proceedings Below

On June 26, 2008, Simpson County filed its Motion for Summary Judgment, Memorandum of Authorities in Support of Motion for Summary Judgment and Itemization of Undisputed Facts. (R. Vol. 1, p. 000087-147). The Plaintiff filed his Response to the County's Motion on July 30, 2008, and the County submitted its Reply to Plaintiff's Response on August

29, 2008. (R.Vol.1 & 2, p. 000148-248). The trial court heard oral argument on the Motion on October 10, 2008, and reserved ruling until trial. (R. Vol. 1, p. 000002).

On March 30, 2009, the parties appeared for the trial of this matter and the County again raised its Motion for Summary Judgment. (T. 1). The Court again reserved ruling on the Motion. (T. 1). As such, on that same day, the issues in this matter were joined, all parties appeared in open court, announced ready for trial and presented evidence both oral and documentary.

On August 6, 2009, the Circuit Court of Simpson County, Mississippi, issued its Findings of Fact, Conclusions of Law and Final Judgment. The same was filed with the Clerk on August 7, 2009. (R. Vol. 2, p. 000263-266). On August 14, 2009, Simpson County filed its Motion to Alter or Amend Judgment or for a New Trial. (R. Vol. 2, p. 000267-277). The Plaintiff filed his response on September 10, 2009. (R. Vol. 2, p. 000278-279). On November 9, 2009, the trial court denied the County's Motion. (R. Vol. 2, p. 000280). On November 17, 2009, Simpson County timely filed its Appeal in this matter appealing the trial court's ruling on Plaintiff's failure to warn claim. (R. Vol. 2, p. 000281-282).

C. Statement of Facts

On February 5, 2004, heavy rains caused a section of Shorter Road located in Simpson County, Mississippi to be washed out leaving a trench across the entire roadway. (R. Vol. 1, p. 000146; T. 12, 32, 42, 48, 84). For the sake of clarity, Shorter Road predominantly runs in a north-south direction connecting to Harrisville-Braxton Rd. to the north and Harrisville Rd. to the south. However, the section of road where the washout occurred runs in an east-west direction.

Mr. Bennie Bridges, elected Supervisor for District 5 in Simpson County, Mississippi, received a call about the washout on Shorter Road on the evening of February 5, 2004. (R. Vol.

1, p. 000143). Mr. Bridges in turn called Mr. Gary Sullivan, Road Manager, instructing him to close the washed out section of Shorter Road. (R. Vol. 1, p. 000143; T. 142). Mr. Sullivan then called Mr. William "Red" Busby, Road Foreman, instructing him to close the washed out section of Shorter Road and any other road that needed to be closed. (R. Vol. 1, p. 000146; T. 58, 143). Mr. Busby arrived at the washout around 6:30 p.m. (T. 14, 16, 58,). Mr. Busby put out two hand-made "road closed" signs one quarter of a mile east of the washout. (R. Vol. 1, p. 146; T. 61-62). The white fiberglass signs were approximately two feet by two feet with four (4) inch fluorescent orange lettering. (R. Vol. 1, p. 000146; T. 122). One sign was erected on a wire stand and placed on the shoulder of the road. (R. Vol. 1, p. 000146; T. 26, 78). The other sign was attached to a wooden block and placed in the middle of the road at the same location as the sign on the shoulder of the road. (R. Vol. 1, p. 000146; T. 26, 78). Next, Mr. Busby stretched two strands of yellow tape with black writing across the road at this same location with orange strands of tape placed vertically between the two strands of yellow tape. (R. Vol. 1, p. 000146; T. 59, 123). He tied one end of the tape to some bushes and the other end to a fence post. (T. 123). Additionally, Mr. Busby placed tape across Shorter Road in an identical manner approximately one hundred (100) yards east of the washout. (R. Vol. 1, p. 000146-147; T. 123).

County road foremen completed 11 work orders related to work done on February 5, 2004. (T. 59- 72). Only 5 of those work orders stated that roads needed to be blocked off due to the weather and the different equipment used to block of those respective roads. (T. 59-72). There were anywhere from ten to fifteen roads that needed to be blocked off due to the adverse affects of the weather that night. (T. 59-72, 134-142).

Although there were more effective warning signs in the county barn, Mr. Busby only utilized materials he had in his truck at the time to warn of the washout. (T. 75). The washout on Shorter Road was probably the worst washout in the county that night. (T. 124, 155). In

February of 2004, Simpson County had four to six barricades constructed from bridge lumber and four or five other metal barricades that were used for road closures. (T. 133, 161-162, 168). The County did not utilize any of the more sturdy barricades to block off any roads after the storms on February 5, 2004. (T. 157). However, according to a work order dated February 7, 2004, the County put up a barricade on Merritt Road. (T. 161).

Mr. Sullivan arrived at the washout around 8:00 p.m. on February 5, 2004 from the north. (T. 143). He observed that the foremen had put out "road closed" signs and stretched ribbon across the road. (T. 143).

On February 6, 2004, Plaintiff was traveling north bound on Shorter Road to meet his son for breakfast around 6:15 a.m., when his truck ran into the washout tearing the front undercarriage of his truck off and slamming him into the dashboard of his truck. (T. 28, 84). Plaintiff approached the washout from the east side. (R. Vol. 1, p. 000013, 15; T. 85). This was the side where Mr. Busby had placed his warning signs. (R. Vol. 1, p. 000146; T. 61-62). It was just around daybreak that morning. (T. 44, 84). Plaintiff sustained neck and knee injuries as a result of the accident. (T. 89).

Plaintiff did not notice any warning devices while traveling along Shorter Road. (T. 84-85, 96). Mr. William Shorter was also traveling along Shorter Road that morning and saw Plaintiff run into the washout. (T. 38-40, 84). Mr. William Shorter, also, did not notice any warning devices along the road. (T. 38, 40). Mr. William Shorter then took Plaintiff to Mr. G.W. Shorter's house so Plaintiff could make some necessary phone calls. (T. 40, 84). Mr. William Shorter drove around to the other side of the washout around 2:30 p.m. that same day and did not see any other warning devices on that side. (T. 41).

Mr. G. W. Shorter accompanied Plaintiff back to his truck. (T. 86). Mr. G.W. Shorter did not see any warning signs or ribbons along the road, either. (T. 50). Mr. G.W. Shorter observed

that the washout was not noticeable "until you got right up on it." (T. 51). Mr. Chris Patton arrived on the accident scene after Plaintiff and Mr. G.W. Shorter. (T. 86). The only evidence of any warning device Mr. Patton saw that morning were pieces of ribbon tied to a tree at his driveway. (T. 29, 34).

Simpson County Sheriff's Deputy, Jeff Smith, responded to Plaintiff's accident and completed an accident report. (R. Vol. 1, p. 000012-15; T. 170-178). Deputy Smith's report included a sketch of the accident scene. (R. Vol. 1, p. 000013). While at the scene, the only evidence of any warning signs he noted were two pieces of yellow marking tape lying on the ground on the north and south sides of the road; one piece on the east side of the washout, and one on the west side of the washout. (R. Vol. 1, p. 000013; T. 175-176). Each piece was approximately ten to fifteen feet away from the washout on its respective side of the washout. (T. 175-176).

SUMMARY OF THE ARGUMENT

The trial court's application of Section 11-46-9(1)(b) was proper in this case. Section 11-46-9(1)(v) and corresponding case law requires governmental entities charged with the duty of maintaining the roads to warn motorists of dangerous non-obvious conditions of which it has notice. And, Section 11-46-9(1)(b) requires that governmental employees use ordinary care when performing duties mandated by statute.

Section 11-46-9(1)(q) (the weather exception) does not apply in this case, because if it does, governmental entities would never have to warn motorists of a washed out road, regardless of when the road was washed out.

The trial court properly found that Simpson County failed to use ordinary care when carrying out its duty to warn pursuant to Section 11-46-9(1)(v).

The trial court did not commit error by not granting Simpson County immunity under Section 11-46-9(1)(d) because Simpson County's duty to warn of dangerous conditions for which it has notice is ministerial rather than discretionary.

The trial court did not commit reversible error by not applying Section 11-46-9(1)(w) of the MTCA to this case. Simpson County employees knew or should have known that the methods used that night to warn of the worst washout in the county were entirely insufficient under the circumstances. The County employees had adequate time and appropriate equipment to properly warn and close off that section of Shorter Road that night, but simply chose not to do so.

ARGUMENT

Standard of Review

In an action under the Mississippi Tort Claims Act, the trial court sits as the finder of fact. Miss. Code Ann. § 11-46-13(1). "A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence." *Donaldson v. Covington County,* 846 So.2d 219, 222 (Miss.2003). The trial judge in a bench trial "has sole authority for determining credibility of the witnesses." *Rice Researchers, Inc. v. Hiter,* 512 So.2d 1259, 1265 (Miss.1987). The findings of the trial court will not be disturbed unless the judge abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Mississippi Dep't of Transp. v. Trosclair,* 851 So.2d 408, 413 (Miss.Ct.App.2003). "Questions of law, which include the proper allocation of the Mississippi Tort Claims Act, are reviewed de novo." *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So.2d 60, 63 (Miss. 2005)

The MTCA authorizes suits against the State and its political subdivisions for damages "arising out of the torts of such governmental entities and the torts of their employees while acting within the scope of their employment..." Miss. Code Ann. §11-46-5(1). However, the MTCA also provides enumerated exceptions to the government's waiver of immunity. *See* Miss. Code Ann. §11-46-9.

In the case at bar, the trial court correctly applied Section 11-46-9(1)(b) to this suit and properly rendered judgment in favor of the Plaintiff.

I. THE TRIAL COURT CORRECTLY APPLIED SECTION 11-46-9(1)(b) TO THE CASE AT BAR BECAUSE THE MTCA REQUIRES THAT SIMPSON COUNTY EXERCISE ORDINARY CARE WHEN CARRYING OUT ITS DUTY TO WARN IMPOSED BY THE MTCA

In its Conclusions of Law, the trial court correctly ruled that this matter is controlled by Section 11-46-9(1)(b) of the MTCA; and that Section 11-46-9(1)(b) "requires that ordinary care be exercised in the warning of dangerous road conditions." (R. Vol. 2, p. 000265). The trial court found that "larger and more effective signs and barricades were easily available" and the failure to utilize the available warning signs and barricades constituted a failure to exercise ordinary care. (R. Vol. 2, p. 000264-265).

Section 11-46-9(1)(b) of the MTCA provides that a political subdivision shall not be liable for any claim 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...be valid.

Miss. Code Ann. §11-46-9(1)(b) (emphasis added).

Simpson County contends "there is no statute, ordinance or regulation that governs how the County must warn of a washed out roadway." When the very statute the parties are

proceeding under imposes such a duty. Section 11-46-9(1)(v) provides that a political subdivision and its employees acting within the course and scope of their employment or duties shall not be liable for any claim: ...

> 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) (emphasis added).

Construing Section 11-46-9(1)(v), The Mississippi Court of Appeals, in *Frazier v. Mississippi Dep't of Trans.*, held that under the MTCA and corresponding case law, "the governmental entity charged with maintaining and repairing roads owes a duty to warn motorists" of dangerous conditions of which it has notice. *Frazier v. Mississippi Dep't of Trans.*, 970 So.2d 221, 224 (Miss. Ct. App. 2007) (quoting *Jones v. Mississippi Trans. Comm'n*, 920 So.2d 516, 518-19 (Miss. Ct. App. 2006). *Frazier* is a failure to warn of a dangerous condition case where the Mississippi Court of Appeals affirmed the trial court's granting of summary judgment because MDOT was found to not have notice of the dangerous condition. *Frazier* at 224-225.

The plain language of Section 11-46-9(1)(b) requires a governmental entity to carry out its statutory duties with ordinary care or else immunity is waived. According to *Frazier*, Simpson County has a duty to warn of dangerous conditions for which it has notice under the MTCA and corresponding case law. It is undisputed throughout the record that Simpson County had notice of the washout on Shorter Road. (R. Vol. 1, p. 000143, 146; T. 24, 58, 142). After hearing and considering all of the evidence at trial, the trial court concluded that Simpson County

failed to use ordinary care in carrying out it's statutory duty to warn of the dangerous condition on Shorter Road. (R. Vol. 2, p. 000265).

The methods utilized by Simpson were clearly insufficient because the only evidence of any attempt to warn remaining the following morning were the remnants of the yellow and black tape tied to their respective anchors and some lying by the washout. There were no signs to be found, and the trial court found that the wind had blown the signs and tape away. (R. Vol. 2, p. 000264). There was no evidence in the record to suggest any interference by third parties. (R. Vol. 2, p. 000264). The County was in the best position to avoid the foreseeable harm by reasonably and adequately warning motorists of the washout. However, the methods employed by the County were equivalent to a failure to warn under these circumstances.

The MTCA and corresponding case law impose a duty on the County to warn motorists of dangerous conditions of which it has notice. The MTCA also requires that employees of the County exercise ordinary care when performing a statutory duty. After considering all of the evidence, the trial court properly found that the County failed to exercise ordinary care in warning of the washout on Shorter Road. Therefore, the judgment of the trial court should be affirmed.

II. SECTION 11-46-9(1)(q) DOES NOT APPLY BECAUSE PLAINTIFF WAS ACTING REASONALBY AND THERE WAS NO INIDICATION OF A POSSIBLE DANGEROUS CONDITION, AND MOREOVER, THE CURRENT APPLICATION OF THIS SECTION IS CONTRARY TO PUBLIC POLICY AND IRRECONCILABLE WITH THE DUTY TO WARN

The trial court did not err when it did not grant Simpson County immunity pursuant to Section 11-46-9(1)(q) of the MTCA. Although the rain may have caused the washout on Shorter Road, the accident would not have happened but for Simpson County's failure to use ordinary care in carrying out it's duty to warn of the dangerous condition. Simpson County was in the

best position to avoid the foreseeable harm by reasonably and adequately warning motorists of the washout. Moreover, the principle that this exception was enacted to completely immunize the government for any breach of its duty to warn of the dangerous condition was simply caused by the weather is contrary to public policy and irreconcilable with Simpson County's duty to warn of dangerous conditions. If the weather exception immunizes government entities in cases such as this, then the government would **never** have to warn motorists of a washed out road.

Section 11-46-9(1)(q)—the weather exception—provides that a governmental entity shall not be liable for any injury "caused solely by the effect of weather conditions on the use of streets and highways." Miss. Code Ann. § Section 11-46-9(1)(q).

Simpson County cites three cases to support its contention that it is immune from liability pursuant to the weather exception. The weather exception has been applied to provide immunity in cases involving hydroplaning, potholes on a dirt road, patches of ice on the road, and fog. See *Lee v. Miss. Dep't of Transp.*, 2009 WL 2929827 (Miss. Ct. App. 2009); *Schepens v. City of Long Beach*, 924 So.2d 620 (Miss. Ct. App. 2006); *Willing v. Estate of Benz*, 958 So. 2d 1240, 1253 (Miss. Ct. App. 2007); *Hayes v. Greene County*, 932 So.2d 831 (Miss Ct. App. 2005). The above-cited cases involve examples of inherent risks created by weather on the use of streets and highways or open and obvious conditions, e.g., potholes. A motorist using reasonable care would adjust their driving accordingly to compensate for the potential risks associated with the prevailing weather conditions. Therefore, the weather exception provides immunity to the government where a motorist does not act with reasonable care and adjusts his or her driving to compensate for the prevailing weather conditions and avoid open and obvious conditions.

There was absolutely nothing to indicate that a section of Shorter road had completely washed out. However, Simpson County had notice of the washout and more than adequate opportunity to properly warn and close off that section of Shorter road. Simpson County was in

the best position to avoid this foreseeable harm by reasonably and adequately warning motorists of the washout on Shorter Road.

Simpson County relies heavily on *Willing v. Estate of Benz*, 958 So. 2d 1240 (Miss. Ct. App. 2007). In *Willing*, the Mississippi Court of Appeals explained that it was not holding that the City of Greenwood "did not have a duty to warn of the patch of ice on the highway;" rather, it was holding that "the City [was] immune from any alleged breach of that duty because the ice was caused solely by the effect of weather on the use of streets and highways." *Willing* at 1254. If the reasoning in *Willing* is followed to one extreme end of its spectrum, then a governmental entity cannot be held liable for any breach of its duty to warn, no matter how egregious the act or omission, the time frame involved, or the warning devices at its disposal. Under this logic, any governmental entity could escape liability by tying a black piece of string to a limb in the dark of night in a rainstorm to warn of a very large washed out section of a road. The accident in *Willing* occurred within one hour of the city receiving notice, where in this case the accident occurred twelve (12) hours after the County received notice. (T. 58, 84).

If a governmental entity charged with warning of dangerous conditions on its roads of which it has notice is not responsible for the manner in which it carries out that duty, then essentially that entity has no duty to warn of a dangerous condition as long as that condition was created by the effect of weather. This position is contrary to public policy. Governmental entities charged with repairing and maintaining roads should be required to carry out their duty to warn motorists of known dangerous conditions that are not open and obvious according to some standard of conduct. Motorists have a right to expect that their government will take reasonable steps to warn of dangerous conditions, like a washout. The MTCA requires the government to use ordinary care when carrying out certain mandated duties. Why would that standard of ordinary care not attach to the government's duty to warn when the government has

sufficient equipment and an adequate opportunity to properly warn of a very dangerous condition? Under *Willing*, the government cannot be held responsible for any breach of their duty to warn, no matter how reckless. A driver acting reasonably under the circumstances or prevailing weather conditions has a right to feel confident that the government entity charged with maintaining the roads has adequately warned of any dangerous conditions of which it has notice and not open and obvious to him or her.

Once Simpson County undertook the action to warn of the dangerous condition, some sort of standard of conduct should apply to the method of the warning to ensure the safety of the traveling public. Why would a governmental entity even bother with warning if it is not held responsible for a failure to warn or a failure to use ordinary care when carrying out its mandatory duty to warn of dangerous conditions? The two positions of, (1) a duty to warn and (2) no liability for any breach of that duty, are irreconcilable. How can there be a duty on the one hand, and no standard by which to measure the performance of that duty on the other?

The weather exception provides immunity to the government where a motorist does not act with reasonable care and adjusts his or her driving to compensate for the prevailing weather conditions and avoid open and obvious dangerous conditions. Moreover, the principle that this exception was enacted to completely immunize the government for any breach of its duty to warn if the dangerous condition was simply caused by the weather is contrary to public policy and irreconcilable with Simpson County's duty to warn of dangerous conditions. Therefore, the trial court did not err when it did not grant Simpson County immunity pursuant to Section 11-46-9(1)(q) of the MTCA.

III. SIMPSON COUNTY IS NOT ENTITLED TO IMMUNITY UNDER SECTION 11-46-9(1)(v) OF THE MTCA BECAUSE THE TRIAL COURT CORRECTLY HELD THAT THE COUNTY FAILED TO USE ORDINARY CARE WHEN CARRYING OUT ITS DUTY TO WARN OF THE DANGEROUS CONDITION

The trial court properly found that Simpson County failed to use ordinary care when carrying out its duty to warn pursuant to Section 11-46-9(1)(v). Section 11-46-9(1)(v) provides that a governmental entity shall not be liable for any claim arising out of an injury:

> caused by a dangerous condition on property of the governmental entity...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).

According to Simpson County, it can only be held liable for any injury arising out of the washed out road if (1) it had notice of the condition and (2) it failed to protect or warn of the same. Under this rationale, if the County has notice of the dangerous condition, then it is shielded from liability as long as it takes any action to warn of the same. This is an extension of the *Willing v. Benz* reasoning. Essentially, the County is conceding that it has a duty to warn of dangerous conditions on its road, but it is not liable for any breach of that duty.

Simpson County overlooks the fact that Section 11-46-9(1)(v) clearly imposes a duty to warn motorists of dangerous conditions if it has notice of the same. See *Frazier*, 970 So.2d at 224. Therefore, Section 11-46-9(1)(v) must be read *in pari materia* with Section 11-46-9(1)(b) of the MTCA. Section 11-46-9(1)(b) requires the County to use ordinary care in carrying out its statutory duty to warn of dangerous conditions. See Miss. Code Ann. §11-46-9(1)(b).

All of Simpson County's arguments reach the same conclusion. On the one hand, the County has a duty to warn of dangerous conditions of which it has notice, and on the other hand, the County cannot be held accountable for any breach of that duty. These two positions are

contrary to Miss. Code Ann. §11-46-9(1)(b), irreconcilable and against public policy. The two positions are mutually exclusive. Either you perform the duty correctly or you don't, and therefore, you have breached said duty. The traveling public should feel confident that their governing bodies charged with the duty of warning of dangerous conditions carry out that duty adequately and with ordinary care. To rule any other way is simply to abrogate any standard of conduct attributed to the duty to warn motorists of dangerous conditions no matter how those conditions may come about. Hypothetically speaking, under this reasoning, all the County had to do was go out and place a thread on any random tree limb around the washout to be shielded from liability under the MTCA. Certainly, the Legislature did not intend for this to be the law.

The methods utilized by Simpson were clearly insufficient because the only evidence remaining the following morning were the remnants of the yellow and black tape tied to their respective anchors and some lying by the washout. There were no signs to be found and the trial court found that the wind had blown the signs and tape away. There was no evidence in the record to indicate third party interference with the warning signs.

According to the testimony at trial, Simpson County received notice of the washout and undertook steps to warn of the washout. (R. Vol. 1, p. 143, 146, T. 58, 61-62, 78). However, the trial court concluded those steps did not amount to the ordinary care required by Section 11-46-9(1)(b). (R. Vol. 2, p. 265). Gary Sullivan, Simpson County Road Manager, testified that the County had four to six barricades constructed from bridge lumber and four or five other metal barricades that were used for road closures that were available. (T. 133, 161-162, 168). Gary Sullivan also stated that the Shorter Road washout was the worst road condition in the county at the time and the County did not utilize any of the more effective barricades to block off any roads after the storms on February 5, 2004. (T. 156-157). However, according to a work order

dated February 7, 2004, the County did place a barricade on Merrit Road, Simpson County closing a portion of said road. (T. 161).

After hearing and considering all of the evidence at trial, the trial court found that "larger and more effective signs and barricades were easily available" to the County and the failure utilize said signs and barricades constituted a failure to exercise ordinary care. (R. Vol. 1, p. 264-265). "A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence." *Donaldson v. Covington County,* 846 So.2d 219, 222 (Miss.2003). The trial judge in a bench trial "has sole authority for determining credibility of the witnesses." *Rice Researchers, Inc. v. Hiter,* 512 So.2d 1259, 1265 (Miss.1987). The trial court's decision should be affirmed because it is not contrary to the law. Furthermore, this Court should not render a decision in favor of Simpson County because their position is contrary to Section 11-46-9(1)(b) of the MTCA, irreconcilable, and contrary to public policy.

IV. THE TRIAL COURT DID NOT COMMIT ERROR BY NOT GRANTING SIMPSON COUNTY IMMUNITY UNDER SECTION 11-46-9(1)(d) BECAUSE SIMPSON COUNTY'S DUTY TO WARN OF DANGEROUS CONDITIONS FOR WHICH IT HAS NOTICE IS MINISTERIAL RATHER THAN DISCRETIONARY

The trial court did not commit error by not granting Simpson County immunity under Section 11-46-9(1)(d) of the MTCA—the discretionary function exemption. Section 11-46-9(1)(d) of the MTCA provides immunity for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty...whether or not the discretion be abused." Miss. Code Ann. §11-46-9(1)(d). Under *Frazier*, this exemption is

clearly inapplicable because the County's duty to warn in this case is ministerial. See *Frazier* at 224. There the MSCA succinctly explained:

> This statute [MTCA] and 'the corresponding case law make it clear that a governmental entity is immune from claims arising from a non-obvious dangerous condition on government property, or failure to warn of the dangerous condition absent actual or constructive notice of the danger condition.' Therefore, a governmental entity charged with maintaining and repairing roads, owes a duty to warn motorist or repair roads only if it is 'given notice of a dangerous condition.' As we have previously stated, '**in the absence of notice**, a governmental entity's decision to maintain or repair roads, or to place traffic control devices or signs, is purely discretionary, and the entity will be immune from suit even upon proof of an abuse of discretion.'

Frazier v. Miss. Dep't. of Transp., 970 So.2d 221, 224 (Miss. Ct. App. 2007) (quoting *Jones v. Mississippi Transp. Comm'n*, 920 So.2d 516, 518-19 (Miss. Ct. App. 2006); Miss. Code Ann. §11-46-9(1)(v).

Even if, *Frazier* is found not to be applicable to this case, the County's duty to warn motorists of dangerous conditions does not meet the public policy function test adopted by the Mississippi Supreme Court in *Jones v. Miss. Dep't of Transp.*, 744 So.2d 256, 260 (Miss. 1999) (citing *United States v. Gaubert*, 499 U.S. 315, 322 (1991)). The test requires a court to analyze (1) whether the activity involved an element of choice or judgment; and; if so (2) whether the choice or judgment involves social, economic, or political policy alternatives. *Id.* "An act is not discretionary, but is ministerial, if 'the duty is one which has been positively imposed by law and its performance required at a time and in a manner **or** under conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." *Pritchard v. Von Houten*, 960 So.2d 568 (Miss. Ct. App. 2007) (quoting *Stewart ex rel. Womack v. City of Jackson*, 804 So.2d 1041, 1048 and *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So.2d 1136, 1141 (Miss. 1999)).

Again, the County takes the position that although it has a duty to warn; it is immune from any breach of that duty because the duty is considered discretionary. Specifically, the

County contends that the time, manner, and method which Simpson County chose to warn of the wash out is discretionary. However, he County's argument that the duty to warn falls into the discretionary function category is misplaced. The language of the MTCA prescribes the time, manner, and conditions by which the duty to warn is to be carried out. Section 11-46-9(1)(b) requires government employees to use ordinary care when performing a duty imposed by statute. And, Section 11-46-9(1)(v) requires the governmental entity to warn of a dangerous condition when it has actual or constructive notice of the dangerous condition within an adequate time frame, and the dangerous condition is not obvious to a person exercising due care.

The County relies on *Willing v. Benz* for the proposition that the precise, time, manner, and conditions upon which the duty to warn of a dangerous condition are "carried out involve an element of choice or judgment." *Willing*, 958 So.2d at 1251. There, the *Willing* court stated that the governmental entity generally has a duty to warn of dangerous conditions of which it has knowledge. *Willing* at 1251.

The correct test to apply when determining whether the activity involved an element of choice or judgment is that pronounced in *L.W. v. McComb Separate Mun. Sch. Dist.*, 754 So.2d 1136, 1141 (Miss. 1999). There the MSSC explained that a duty is ministerial if it has been "positively imposed by law and its performance required at a time and manner **or** under conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." *L.W.* at 1141. Under the MTCA, a governmental entity charged with maintaining the roads has a duty to warn motorists of non-obvious dangerous conditions upon receiving notice and within an adequate time frame of receiving that notice. See Miss. Code Ann. §11-46-9(1)(v); *Frazier*, 970 So.2d at 224. Additionally, the MTCA requires a government employee use ordinary care when carrying out a statutory duty. See Miss. Code Ann. §11-46-9(1)(b). Thus, the duty to warn is positively

imposed by law, its performance is required at a time and manner, and its performance is required under conditions, which are specifically designated, the duty to perform under the conditions specified is not dependent upon the employee's judgment or discretion.

Even if the duty to adequately warn is found to involve choice or judgment, it does not involve social, economic, or political policy alternatives. When evaluating a decision, the proper inquiry is "whether the decision 'implicates the exercise of a policy judgment of a social, economic, or political nature.'" *Dotts v. Pat Harrison Waterway Dist.*, 933 So.2d 322, 327 (Miss. Ct. App. 2006) (citing *Elder v. U.S.*, 312 F.3d 1172, 1176 (10th Cir. 2002). More specifically, the "focus is on the nature of the acts taken and their susceptibility to policy analysis;" the actual thought process of the decisionmaker is not examined. *Id* at 328. In *Dotts*, the decisions of the Pat Harrison Waterway District regarding the placement of signage, the provision for safety equipment and lifeguards, and the enclosure of the swimming area were found to be grounded in public policy. *Id* at 327-28.

In the case at bar, the decision at issue is whether Simpson County employees should have placed more effective signs and barricades, which were easily available, at the wash out; not whether Simpson County should purchase or construct any new warning signs. The County argues that William Busby's decision to warn in the manner he did was some how influenced by some constraint on the County's resources. Again, there were more effective methods of warning the traveling public of the washout, William Busby had ample time to, but just chose not to retrieve them. (R. Vol. 2, p. 264).

If a decision of this nature, which does not implicate any policy concerns, is determined to fall into the discretionary category, then literally any decision would fall within the discretionary function immunity. The 10th Federal Circuit rejected this idea because such an "approach would 'eviscerate' the social, economic, or political policy prong of the [public policy

function] test and would allow the discretionary function immunity exception to 'swallow the FTCA's sweeping waiver of sovereign immunity." *Pritchard v. Von Houten*, 960 So.2d 568, 583 (Miss. Ct. App. 2007) (quoting *Duke v. Dep't of Agriculture*, 131 F.3d 1407, 1411 (10th Cir. 1997)). Therefore, the trial court did not commit error by not granting Simpson County immunity under Section 11-46-9(1)(d) because Simpson County's duty to warn of dangerous conditions for which it has notice is ministerial rather than discretionary.

V. THE TRIAL COURT DID NOT COMMIT ERROR BY NOT GRANTING SIMPSON COUNTY IMMUNITY UNDER SECTION 11-46-9(1)(w) OF THE MTCA BECAUSE SIMPSON COUNTY KNEW OR SHOULD HAVE KNOWN THE METHODS USED THAT NIGHT TO WARN WERE ENTIRELY INSUFFICIENT UNDER THE CIRCUMSTANCES

The trial court did not commit reversible error by not applying Section 11-46-9(1)(w) of the MTCA. The County knew or should have known that the methods used that night to warn of the worst washout in the county were entirely insufficient under the circumstances. They had adequate time and appropriate equipment to properly warn and close off that section of Shorter Road that night, but simply chose not to do so.

Section 11-46-9(1)(w) provides that:

> a governmental entity shall not be held liable for any claim arising out of the "absence, condition, malfunction, or removal by third parties of any sign, signal, warning device, illumination device, guardrail, or median barrier, unless the absence, condition, malfunction, or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice."

Miss. Code Ann. §11-46-9(1)(w).

The County contends that the operative term in Section 11-46-9(1)(w) is the article "or". Which makes it clear, that a governmental entity cannot be held liable for any injury that arises out of an absent warning device unless the entity had notice of the same and a reasonable

opportunity to correct the same. The County argues that this is the Legislature's intended interpretation.

But, clearly it was not the intention of our Legislature to write the duty to warn of dangerous conditions into the law, and then completely abrogate that same duty with subsequent exemptions to the waiver of sovereign immunity. It seems logical that the Legislature intended that governmental entities use ordinary care when carrying out their duty to warn. Reading the MTCA in *pari materia*, this interpretation acts to resolve conflicts within the statute rather than create them.

The County also relies on *Mitchell v. City of Greenville*, 846 So. 2d 1028 (Miss. 2003). The dangerous road condition, in *Mitchell*, was created by contractors hired by the City of Greeneville to build a boat ramp. *Id* at 1030. Those contractors placed the warnings signs around the dangerous condition. *Id.* In an affidavit, a security guard for a gravel company stated that he had seen those signs blown down by the wind in the past. *Id* at 131. However, the *Mitchell* court found that the record did not indicate that he had reported that fact to the City of Greenville, and therefore, the record did not indicate that the City of Greenville knew or should have known that the sign was tipped over. *Id.*

In the case at bar, Mr. Gary Sullivan, Road Manager, and Mr. William "Red" Busby, Road Foreman, knew or should have known that the methods they used that night to warn of the worst washout in the county were entirely insufficient under the circumstances. (T. 124, 155). They had adequate time and appropriate equipment to properly warn and close off that section of Shorter Road that night, but they simply chose not to do so.

Boiled down—this is the same old song, just a different tune. The County's position is that it has a duty to warn, however, it is immune from liability for any breach of that duty. Adopting this position would be tantamount to the government having no duty to warn at all.

The County knew or should have known that the methods utilized were insufficient. The taxpayers of this state and other motorists have a right to expect that their government will adequately warn them of washed out roads and other non-obvious dangerous conditions of which they have notice and adequate time and warning devices. The government is in the best position to avoid the foreseeable harm by reasonably and adequately warning motorists.

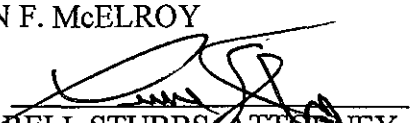
CONCLUSION

The trial court's application of Section 11-46-9(1)(b) was proper in this case. Section 11-46-9(1)(v) requires governmental entities charged with the duty of maintaining the roads to warn motorists of dangerous non-obvious conditions of which it has notice. And, Section 11-46-9(1)(b) requires that governmental employees use ordinary care when performing duties mandated by statute.

The trial court did not commit error in not granting Simpson County immunity based on Sections 11-46-9(1)(q), (v), (w), and (d). This Court should affirm the trial court's decision.

Respectfully submitted,

DON F. McELROY

BY: 
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CERTIFICATE OF SERVICE

I, TERRELL STUBBS, attorney of record for **APPELLEE, DON F. McELROY**, do hereby certify that I have this day mailed postage prepaid a true and correct copy of the above and foregoing Brief of Appellee to the following:

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This the 12th day of July, 2010.

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