BOARD OF SUPERVISORS OF
SIMPSON COUNTY, MISSISSIPPI — APPELLANT

V. — CA NO. 2009-CA-01874

DON F. McELROY — APPELLEE

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The parties agree that the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 *et seq.*, governs this action; however, they disagree as to the application of certain exemptions under the MTCA.

In its brief on the merits, the County demonstrated that the trial court incorrectly applied Section 11-46-9(1)(b) to this suit and failed to grant the County immunity pursuant to sections 11-46-9(1)(q), (v), (d), and (w). In its Response Brief, the Plaintiff argues the court applied the correct standard and that the County is not entitled to immunity. Plaintiff's arguments lack merit and legal support.

I. THE TRIAL COURT INCORRECTLY APPLIED SECTION 11-46-9(1)(b) OF THE MTCA.

In its Conclusions of Law, the trial court ruled Section 11-46-9(1)(b) of the MTCA controls this matter and that it requires "ordinary care be exercised in the warning of dangerous road conditions." *Id.* In its Brief, the County demonstrated that the application of Section 11-46-9(1)(b) was erroneous and requires the trial court's judgment be reversed. Nevertheless, the Plaintiff argues that Section 11-46-9(1)(b) is applicable. This argument is simply wrong and unsupported by case claw.

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). Simply put, this section requires the use of ordinary care when performing a **statutory duty**. See, *A.B. v. Stone Co. Sch. Dist.*, 14 So.3d 794, 798 (Miss. Ct. App. 2009).

The record clearly reveals that there is no statute, ordinance or regulation that controls the manner in which Simpson County warns of washed out roadways. However, in his Response, the Plaintiff argues that Section 11-46-9(1)(v) of the MTCA imposes a statutory duty to warn on the County. *Plaintiff's Brief*, p. 8-10.

Section 11-46-9, which is entitled "Exemption of governmental entity from liability on claims based on specified circumstances," is the section of the MTCA which contains all of the exemptions from liability available to political subdivisions. In particular, Section 11-46-9(1)(v) states that a governmental entity

> shall not be liable for any claim...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).

A simple reading of the above section reveals that it does NOT impose any duty to warn of a dangerous condition; rather, this section merely provides relief from liability for injuries that arise as a result of dangerous conditions on governmental property. The purpose of Section 11-46-9(1)(v) is to exempt political subdivisions from liability, not impose any particular duty on them.

No case from the Supreme Court or the Court of Appeals has ever found Section 11-46-9(1)(v) brings a political subdivision's duty to warn under the auspices of 11-46-9(1)(b). Grasping at a life preserver to substantiate the application of Section 11-46-9(1)(b), the Plaintiff turns Section 11-16-9(1)(v) on its head.

While the Plaintiff cites *Frazier v. Miss. Dept. Trans.*, 970 So.2d 221 (Miss. Ct. App. 2007) as support for the proposition that Section 11-46-9(1)(v) imposes a duty to warn on a County, the Plaintiff wholly misconstrues that case. In *Frazier*, a plaintiff sued the Department of Transportation for failing to warn of loose gravel that covered a roadway as a result of their refurbishing a section of the same. *Frazier*, 970 So.2d at 223.The *Frazier* Court never held that Section 11-46-9(1)(v) imposes a statutory duty to warn on a political subdivision. In fact, Section 11-49-9(1)(v) is not even mentioned in that case. While *Frazier* does talk about a duty to warn, that duty is a general, common law duty. The express language of Section 11-46-9(1)(b) makes it clear that only a duty governed by a statute, ordinance or regulation is governed by that section.

The appropriate test to determine whether or not Section 11-46-9(1)(b) applies is to examine whether or not the duty in question is discretionary or ministerial. Case law reveals that those duties that are ministerial fall under Section 11-46-9(1)(b) while those duties that are discretionary in nature fall under Section 11-46-9(1)(d). A ministerial 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." *Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 5 (Miss. 2010). On the other hand, a

duty is discretionary if, rather than being imposed by law, requires an "official to use her own judgment and discretion in the performance thereof." *Id.*

While there is, no doubt, a general duty to warn, that general duty is neither a statutory duty nor a ministerial duty. This fact is made crystal clear by the Court of Appeal's decision in *Willing v. Benz*, 958 So.2d 1240 (Miss. Ct. App. 2007). In *Willing*, the Court held that political subdivision's do have a general duty to warn of dangerous conditions; however, that duty is discretionary in nature, not ministerial. *Id.* at p. 1251. As evidence of the discretionary nature of the duty to warn, the Court noted that the plaintiffs could not cite any authority that prescribed the "exact conduct expected of" the City and, in fact, could not even identify the conduct they expected of the City. *Id.* The Court held that because the "precise time, manner and conditions upon which [the] duty could be carried out involve an element of choice or judgment," the duty to warn was discretionary, not ministerial. *Id.*

No case from the MSSC or the MSCA has ever held that Section 11-46-9(1)(v) imposes a ministerial duty on a political subdivision in terms of warning of dangerous conditions on its property. This is simply because that section is a defense—an exception to immunity. Furthermore, the *Willing* decision makes it clear that the duty to warn imposed upon counties and city's is discretionary in nature and, thus, Section 11-46-9(1)(b) does not apply.

II. SIMPSON COUNTY IS IMMUNE FROM PLAINTIFF'S CLAIM BASED UPON SECTION 11-46-9(1)(q) OF THE MTCA

The Plaintiff argues that Section 11-46-9(1)(q) of the MTCA—the weather exception—is inapplicable in this case because the "accident would not have happened but for" the County's alleged "failure to use ordinary care in carrying out its duty to warn of the dangerous condition." *Pl. Brief*, p. 10. That is, the Plaintiff contends that the weather was not the "sole" cause the accident in question. Furthermore, the Plaintiff argues that this exemption only applies when the claimant fails to exercise ordinary care. Finally, the Plaintiff asserts that this exemption is against public policy. *Id.*

A. The weather was the sole cause of the wash out on Shorter Rd.

Section 11-46-9(1)(q) 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." This section has been applied to exempt political subdivisions in a variety of situations including accidents where pooled rainwater causes an automobile to hydroplane; rain causes potholes in a road which damages a car's undercarriage; ice causes an automobile to slide uncontrollably; and, fog causes an automobile to crash into another. *Lee v. MDOT*, 2009 Miss. App. LEXIS 604, *16; *Schepens v. City of Long Beach*, 924 So.2d 620 (Miss. Ct. App. 2006); *Willing v. Benz*, 958 So.2d 1240 (Miss. Ct. App. 2007); *Hayes v. Greene County*, 932 So. 2d 831 (Miss. Ct. App. 2005).

In this case, it is undisputed that the heavy rains that inundated Simpson County the day before Plaintiff's accident caused the washout which resulted in his automobile accident. [R.Vol.1, p.000118, 000143-144, 000146-147; Vol. 3, p. 12, 19, 23, 32, 57, 84; R.E.

Tab 3, p. 9-10]. Nevertheless, the Plaintiff argues that the accident would not have happened if the County had not allegedly failed to properly warn of the condition. *Pl. Brief*, p. 10. Plaintiff's argument is without merit and, in fact, has already been addressed by the MSCA in *Willing v. Benz*, 958 So.2d 1240 (Miss. Ct. App. 2007).

In *Willing*, the plaintiff made an argument identical to that being made by the Plaintiff here; however, the Court noted that if such an argument "were thought to be sound, the weather immunity statute would, in effect, be written out of the books." *Willing v. Benz*, 958 So.2d at 1254, fn. 10. Citing to *Horan v. State*, 514 A.2d 78, 79 (N.J. Super. Ct. App. Div. 1986), the Court explained that "only when the government creates or exacerbates a weather hazard will immunity be lost." *Id.* The Court then held that the weather exception provided the governmental entity immunity because there was no evidence that the entity "contributed to or [was] otherwise responsible for the **formation of the patch of ice**" which caused the accident." *Id.* To the contrary, the weather caused the water to pool up and freeze and was, thereby, the "sole" cause of the accident. *Id.*(emphasis added).

As in *Willing*, there is no record evidence that the County caused or contributed to the **formation of a trench** across Shorter Road. To the contrary, as the trial court noted, rain caused the trench to form—not a design or maintenance defect. [R.Vol.1, p. 000263, 000266; R.E. Tab 2, p. 5,8]. The weather was undeniably the sole cause of the washout on Shorter Road and, therefore, the County is entitled to immunity under the weather exception.

B. <u>A motorist's failure to exercise ordinary care is not a condition to the application of the weather exemption.</u>

The Plaintiff also argues that the weather exception only applies wherein a motorist "does not act with reasonable care" and does not adjust "his or her driving to compensate for the prevailing weather conditions and avoid open and obvious conditions." *Pl. Brief,* p. 11. This argument is wholly without support.

The obligation and privilege of amending state statutes is reserved for the Mississippi Legislature, nevertheless, the Plaintiff attempts to amend Section 11-46-9(1)(q) here. The Court of Appeals explained in *Knight v. Miss. Transp. Comm'n,* 10 So. 3d 962, 967-968 (Miss. Ct. App. 2009) that

> when [the supreme court] abolished common-law sovereign immunity in *Pruett v. City of Rosedale,* 421 So. 2d 1046 (Miss. 1982), [the court] expressly stated that [it] [was] doing so because the judiciary was not the appropriate branch of government to regulate sovereign immunity.

Knight, 10 So.3d at 976-968. *Pruett* "was a mandate to the [L]egislature to assume full responsibility for the regulation of sovereign immunity[.]" *Id.* The State Legislature has the duty of writing the laws that regulate sovereign immunity and they have done so here. Had the Legislature chosen to insert a condition like that proposed by the Plaintiff, they could have done so but they did not.

The MTCA is to "be interpreted as **expressly written** or by necessary implication in order to carry out the Legislature's intent to **strictly limit** the State's waiver of state sovereign immunity." *Knight,* 10 So. 3d 962, 967 (emphasis added). It is well-settled that

the courts of this State must, "strictly construe section 11-46-9(1)(a-y) in accordance with its express wording." *Id.* at p. 202.

Plaintiff's contention that the weather exception is only applicable when the claimant fails to act with reasonable care would require this Court to judicially amend Section 11-46-9(1)(q)[1]. Furthermore, applying this condition would clearly broaden liability for political subdivisions rather than restrict it which is in direct contradiction of well-established case law. The condition the Plaintiff proposes certainly cannot be found within the statutory language of Section 11-46-9(1)(w) and therefore, must be rejected.

C. <u>The weather exemption is not against public policy</u>.

Finally, the Plaintiff argues that application of the weather exception in this case is against public policy. In particular, the Plaintiff explains that 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. *Pl. Brief*, p. 12. Plaintiff argues that if *Willing's* reasoning is correct, a county could "escape liability by tying a string to a limb in the dark of night in a rainstorm to warn of a very large washed out section of a road." *Id.*

[1] To the extent the Plaintiff is arguing that all exemptions under the MTCA require the exercise of ordinary care, such an argument has previously been rejected. More specifically, in *Strange v. Itawamba County Sch. Dist.*, 9 So. 3d 1187, 1191-1192 (Miss. Ct. App. 2009), the MSCA noted that although the dissent in *Jones v. Mississippi Department of Transportation*, 744 So. 2d 256, 260 (P11) (Miss. 1999) may have suggested that all of the exemptions to liability under section 11-46-9 require a minimum standard of ordinary care "further decisions of the supreme court have expressly rejected this proposition." *Id.*

First, it must be noted that that this is not the "extreme end" of the "spectrum." The County did not tie a string to a limb; rather, it used signs and ribbon to warn of the washout. [R. Vol. 1, p. 000146-147; Vol. 3, p. 61-62, 78-79 122-124; R.E. Tab 4, p. 1-12]. Furthermore, Plaintiff's allegation that a County would never be held liable for failing to warn is silly as this exception does not apply to all failure to warn claims—only those where the injury arises out of the effect of weather on road conditions.

While the Plaintiff may not like the weather exception, it upholds the public policy of this State rather than contravenes it. More specifically, lest we forget, the MTCA is in derogation of the common law. For more than one hundred years, Mississippi adhered to the doctrine of sovereign immunity and steadfastly held to the maxim that "the King can do no wrong." See, Richard Smith-Monahan, comment, *Sovereign Immunity in Mississippi, 1982 to 1995: A Practical Tool for Lawyers and Judges,* 16 Miss. C. L. Rev. 215-16 (Fall 1995). After prompting from the MSSC, the Mississippi legislature passed the MTCA which "codifies the doctrine of sovereign immunity and shields the state and its political subdivisions from liability for certain acts and omissions." *Brown v. Delta Reg'l Med. Ctr.*, 997 So. 2d 195, 196-197 (Miss. 2008). In enacting the MTCA, the Legislature of the State of Mississippi specifically stated that it

> finds and determines **as a matter of public policy** and does hereby declare, provide, enact and reenact that the "state" and its "political subdivisions," as such terms are defined in Section 11-46-1, are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune from suit at law or in equity on account of any wrongful or tortious act or omission or breach of implied term or condition of any warranty or contract

Miss. Code Ann. § 11-46-3 (emphasis added). Thus, public policy is upheld by the statutory scheme that is the MTCA, including the weather exception.

Because the public policy of the State of Mississippi is validated via the MTCA and the MTCA is unequivocally in derogation of the common law, it must be strictly construed in favor of the State. *Potter v. Fidelity & Deposit Co. of Maryland*, 58 So. 713 (Miss. 1912). That is, the MTCA must be construed so as to broaden sovereign immunity, not narrow it.

Here, the Plaintiff seeks to judicially amend the MTCA and to do so in a manner that would contravene public policy and narrow the immunity provided political subdivisions. This simply cannot be allowed. The weather exception clearly applies to provide immunity to Simpson County and requires a reversal of the trial court's decision.

III. SIMPSON COUNTY IS ENTITLED TO IMMUNITY UNDER SECTION 11-46-9(1)(v) OF THE MTCA

In its brief, the County explained that Section 11-46-9(1)(v) of the MTCA immunizes it from Plaintiff's failure to warn claim. While the County had notice of the washout, the record clearly demonstrates that the County took action to warn of the same. [R.Vol.1, p. 000146-000147; Vol. 3, p. 19, 24-27, 61-62, 78-79, 122-124; R.E. Tab 4, p. 11-12]. Nevertheless, the Plaintiff argues that not just "any action to warn" will suffice under Section 11-46-9(1)(v). *Pl. Brief*, p. 14. According to the Plaintiff, Section 11-46-9(1)(v) must be construed in light of Section 11-46-9(1)(b) and a County must use

ordinary care to warn in order to qualify for immunity under Section 11-46-9(1)(v). *Id.* Plaintiff's argument is without legal support.

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 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). Nowhere does this statue prescribe how a political subdivision must give such a warning. Furthermore, nowhere does this statute condition immunity upon a reasonable warning. As previously noted, the Courts of this State are bound to interpret the provisions of the MTCA in a manner that strictly limits the State's waiver of sovereign immunity. *Knight*, 10 So. 3d 962, 967. Clearly, adding language to a statute within the MTCA would contravene this admonition and is impermissible.

Perhaps more significantly, this very argument was specifically addressed in *Willing v. Benz*, 958 So.2d 1240 (Miss. Ct. App. 2007). In that case, the Court explained that the time, manner and conditions upon which a political subdivision's duty to warn

are carried out involve an element of choice or judgment. Thus, the duty to warn of a dangerous condition is discretionary[2] and, is not subject to an ordinary care standard.

Here, the decision as to how to warn is discretionary in terms of time, place and manner of the warning as it is not specified by statute. Thus, Section 11-46-9(1)(v) applies inasmuch as the County undeniably warned of the washout. Similarly, the discretionary function exemption negates any question regarding the method of warning utilized.

IV. SIMPSON COUNTY IS ENTITLED TO IMMUNITY UNDER SECTION 11-46-9(1)(d) OF THE MTCA

The Plaintiff argues that the discretionary function exemption does not apply here as the duty to warn is ministerial. *Pl. Brief*, p. 16-20. In particular, the Plaintiff alleges that the time, place and manner of the duty to warn are specified in various sections of the MTCA. *Id.* Furthermore, the Plaintiff argues that the decision as to how the County warned does not implicate social, political or economic policy. *Id.*

A. The decision as to how to warn of the washout on Shorter Road involved an element of choice or judgment.

As this Court well knows, a discretionary function is one that involves an element of choice or judgment and that choice or judgment involves social, economic or political policy alternatives." *Dancy v. E. Miss. State Hosp.*, 944 So.2d 10, 16 (Miss. 2006). On the other hand, an act is ministerial if it is positively imposed by law and if the performance of the conditions imposed are not dependent on an officer's judgment or discretion." *L.W.*, 754 So. 2d at 1141, citing, *Davis v. Little*, 362 So. 2d 642, 644 (Miss.

[2] The *Willing* Court found the duty to warn was discretionary but remanded the case for a determination as to whether or not the City's choice involved social, economic or political policy.

1978); see also, *Barrett v. Miller*, 599 So.2d 559, 567 (Miss. 1992)(noting that there is no choice or judgment when a statute, regulation or policy specifically prescribes a course of action to be followed).

The Plaintiff again attempts to turn Section 11-46-9(1)(v) on its head and use it to try demonstrate a statutory duty to warn. *Pl. Brief*, p. 18. The Plaintiff argues that this statute provides a time, place and manner of warning a County should utilize and, thus, the duty is ministerial. This is absurd. The statute has absolutely no instructions on the time, place and manner a political subdivision should utilize in warning of road conditions.

The Court of Appeals' decision in *Fisher v. Lauderdale County Bd. of Supervisors*, 7 So. 3d 968, 970-971 (Miss. Ct. App. 2009) properly demonstrates a statute containing a ministerial duty. More specifically, in *Fisher*, a plaintiff whose lands were flooded alleged the County failed to properly install and maintain culvert pipes. The County argued its duty to install and maintain those pipes was discretionary; however, the plaintiff argued that Section 65-21-1 made the duty ministerial. Section 65-21-1 provides that "[a]ll culverts hereafter built, rebuilt, or placed in any public road in this state shall be not less than the full width of the crown of the roadway, and shall have guide or warning posts on either side."

The *Fisher*, Court held that Section 65-21-1 did not impose any obligation on the County as to installation and maintenance of culverts; rather, it merely set the minimum length for a culvert should the County decide to install one. *Id.* Any decision by the County made outside of those minimum requirements are discretionary functions of

government. *Id.*, citing, *Barr v. Hancock County*, 950 So. 2d 254, 258 (P13) (Miss. Ct. App. 2007).

The statute in *Fisher* was explicit in its instructions as to what size culvert had to be installed and, thus, the decision as to what size culver to utilize was not discretionary—it was ministerial. Nothing else about the installation and maintenance of the culver in question was specified in the statute so those things were discretionary in nature.

Here, the Plaintiff cites statutes which are shields from immunity. Nevertheless, even were this Court to allow the Plaintiff to use those statutes as swords, they do not impose specific ministerial duties on the County.

Even more significantly, the Court's decision in *Willing* clearly and unequivocally holds that the manner in which a political subdivision warns of a dangerous condition on a roadway involves an element of choice or judgment. *Willing v. Benz*, 958 So.2d 1240 (Miss. Ct. App. 2007).

B. The decision as to how to warn of the washout on Shorter Rd. implicated social, economic and/or political policy.

The Plaintiff also argues that even if the decision as to how to warn is discretionary in nature, the County is not entitled to immunity under Section 11-46-9(1)(d) because such a decision does not implicate social, political or economic policy. *Pl. Brief*, p. 19. Plaintiff's argument is without merit.

First, when a decision allows a governmental employee to exercise discretion," it must be presumed that the [employee's] acts are grounded in policy when exercising

that discretion." *Dancy v. East Miss. State Hosp.*, 944 So. 2d 10, 18 (Miss. 2006). Thus, in this case, there is a presumption that the County's discretionary conduct in determining how to warn of the condition of Shorter Road is grounded in social political and/or economic policy. *Strange v. Itawamba County Sch. Dist.*, 9 So. 3d 1187, 1191 (Miss. Ct. App. 2009). Furthermore, the discretionary function test "does not require proof of the thought processes of pertinent decision makers," rather, the "focus is on the nature of the actions taken, and whether they are susceptible to policy analysis." *Strange*, 9 So. 3d at 1191, citing, *Dotts v. Pat Harrison Waterway Dist.*, 933 So. 2d 322 (Miss. Ct. App. 2006).

In this case, the record evidence demonstrates that Simpson County employee William Busby made a decision to utilize the barricades and ribbon he had with him to warn of the washout on Shorter Road. County Road Manager Gary Sullivan and Busby both testified that a on the night they closed Shorter Rd., a number of other roads and bridges throughout the County required closure and/or warning of certain conditions caused by the bad weather. [R.Vol.3, p. 72-73, 120-121, 134-142}. Like any governmental entity, Simpson County did not have unlimited resources, whether in terms of finances, equipment or manpower. At least while Sullivan was Road Manger, Simpson County never had enough funds to do all of the road projects the County wanted to do. [R.Vol.3, p. 130]. Nowhere is this fact more evident than the fact that the County built a number of homemade signs—like those used in this case—to supplement the pre-fabricated signs the County was able to purchase. [R.Vol.3, p. 56, 77-79, 70, 81, 130]. Busby chose the signs which were most readily available (in his truck) and which he believed were best under the surrounding circumstances. [R.Vol.,p.65, 74-78].

This is precisely the type of situation that calls for leeway. The Courts of this State are not now, nor have they ever been, in the business of legislating the exact manner in which a County chooses to warn of a condition created by weather conditions. This is due, at least in part, to the fact that different counties and cities have different resources. The discretionary function exemption was created just for situations like the one at bar wherein an employee had to make a decision on the spot on how to address a natural disaster. Busby was on the scene and better able to assess immediate needs based upon resources available than a Court can do in hindsight. See, *Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 8 (Miss. 2010)(district's decision to allow coaches the ability to set and conduct practices is rooted in policy -coaches know their players and must be able to control their teams). Saddling governmental employees with the fear of anticipated litigation should they make a wrong choice in handling a situation that has no specific handling guidelines via statute, will dissuade governmental employees from governmental employment

V. THE TRIAL COURT ERRED IN FAILING TO GRANT SIMPSON COUNTY IMMUNITY UNDER SECTION 11-46-9(1)(w) OF THE MTCA

Finally, the trial court erred by failing to apply Section 11-46-9(1)(w) of the MTCA which provides immunity 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 trial court found that the County had put warning signs and ribbons in place but determined that they "were blown away as a result of the nights storm" rather than by "third party removal" and, the trial court apparently believed that for that reason, Section 11-46-9(1)(w) was inapplicable. As pointed out in the County's brief on the merits, Section 11-46-9(1)(w) applies, regardless of whether or not the warning device was "remov[ed] by a third party or is "absen[t]" for another reason—such as the weather. See, Miss. Code Ann. § 11-46-9(1)(w).

The express language of Section 11-46-9(1)(w) clearly establishes that it applies to bar Plaintiff's claim in this matter. Recognizing this fact, the Plaintiff asks this Court to ignore the plain language of the statute and decide that Mississippi Legislature did not meant what it said. *Pl.Brief*, p. 21; See, *Bailey v. Al-Mefty*, 807 So.2d 1203, 1206 (Miss. 2001) (primary rule of construction is to ascertain the intent of the legislature from the statute as a whole and from the language used therein. Where the statute is plain and unambiguous there is no room for construction"). In particular, the Plaintiff seeks to have this Court judicially amend the statute and include an ordinary care standard in subsection w. *Id.* This is not permissible.

Had the Mississippi Legislature intended to include an ordinary care standard in Section 11-46-9(1)(w), it certainly could have done so. For example, the Legislature did include such a standard in Section 11-46-9(1)(b). The absence of such a standard in the

express language of the statute is proof that the Legislature did NOT intend to include such a standard in subsection w.

Significantly, the appellant courts of this state have faced this situation before *i.e.* whether or not a particular exemption includes an ordinary care standard, and have specifically rejected any argument that all of the exemptions require ordinary care. *Strange v. Itawamba County Sch. Dist.*, 9 So. 3d 1187, 1191 (Miss. Ct. App. 2009

The Plaintiff attempts to distinguish this case from *Mitchell v. City of Greenville*, 846 So.2d 1028, 1031 (Miss. 2003) by arguing that there was no evidence in that case that the City "knew or should have known that the" absent sign was missing. *Pl.Brief*, p. 21. The record evidence makes clear that the County did not have actual notice that the signs were absent at the time the Plaintiff was traveling on Shorter Rd. As such, the Plaintiff must argue that the County had constructive notice that the warning devices. Constructive notice is present "where, based on the length of time that the condition existed, the operator exercising reasonable care should have known of its presence." *Drennan v. Kroger Co.*, 672 So. 2d 1168, 1170 (Miss. 1996).

The record evidence Interrogatories his case establishes that the County finished putting up warning signs and ribbon late in evening on the day before Plaintiff's accident. Plaintiff's accident occurred approximately nine (9) hours later. At worst, the condition existed for approximately nine (9) hours, during the middle of the night, on a road that was not well-traveled. In fact, the couple that lived near where the signs were placed only heard one (1) car travel down Shorter Rd. that night and they admitted

never calling the County and letting them know about that single automobile. The County clearly did not have constructive notice of this condition.

Notably, it seems very likely that the condition about which the Plaintiff complains, the "trench" across Shorter Rd. did not actually come into existence until the Plaintiff drove his vehicle over the same. The Plaintiff testified that immediately before the accident he saw what appeared to be a strip of new blacktop approximately a foot wide, not a trench that stretched across the width of the road. As such, it is probable that the condition about which he complains came into existence after he drove over that portion of Shorter Rd.

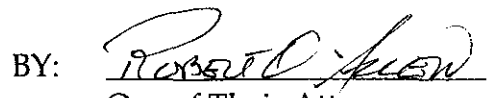
In this case, it is undisputed that Simpson County put warning signs and devices in place after receiving notice of the wash out on Shorter Road and approximately nine (9) hours before Plaintiff's accident. [R. Vol. 3, p. 84]. Simpson County did not receive notice that the signs and devices had been removed—whether by wind or third party—until after Plaintiff's accident. [R. Vol. 1, p. 000143-144, 000146-147; Vol. 3, p. 79-81,144; R.E. Tab 3, p.9-10, Tab 4, p. 11-12]. Thus, the County is entitled to immunity under Section 11-46-9(1)(w) of the MTCA.

CONCLUSION

The trial court's application of Section 11-46-9(1)(b) was in error and requires a reversal. Furthermore, the trial court's failure to grant Simpson County immunity based upon Sections 11-46-9(1)(q), (v), (w) and (d) was in error and this Court should render a decision in favor of the County based upon any and/or all of these exceptions.

Respectfully submitted,

SIMPSON COUNTY, MISSISSIPPI

BY: 
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CERTIFICATE OF SERVICE

I, Robert O. Allen, one of the attorneys for defendant-appellant, Simpson County, Mississippi, hereby certify that I have this day mailed, postage prepaid, by the United States Mail, a true and correct copy of the above and foregoing Reply Brief for Appellant to :

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Honorable Frank Vollor
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This the 21st day of July, 2010.

Robert O. Allen

OF COUNSEL