

IN THE SUPREME COURT OF MISSISSIPPI

BOARD OF SUPERVISORS OF
SIMPSON COUNTY, MISSISSIPPI

APPELLANT

V.

CA NO. 2009-CA-01874

DON F. McELROY

APPELLEE

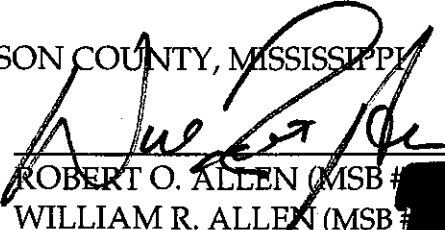
CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and the Court of Appeals may evaluate possible disqualification or recusal.

1. Don F. McElroy, Appellee/Plaintiff
2. Terrell Stubbs, Esq., counsel of record for the Appellee/Plaintiff
3. Simpson County, Mississippi, Appellant/Defendant
4. Robert O. Allen, Esq., counsel of record for Simpson County, Mississippi
5. William R. Allen, Esq., counsel of record for Simpson County, Mississippi
6. The Honorable Robert G. Evans, trial court Judge.

SIMPSON COUNTY, MISSISSIPPI

By:


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STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT PROPERLY FOUND THAT THIS MATTER IS GOVERNED BY SECTION 11-46-9(1)(b) OF THE MISSISSIPPI TORT CLAIMS ACT.
- II. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT SIMPSON COUNTY, MISSISSIPPI, IMMUNITY UNDER SECTION 11-46-9(1)(q) OF THE MISSISSIPPI TORT CLAIMS ACT.
- III. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT SIMPSON COUNTY, MISSISSIPPI, IMMUNITY UNDER SECTION 11-46-9(1)(v) OF THE MISSISSIPPI TORT CLAIMS ACT.
- IV. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT SIMPSON COUNTY, MISSISSIPPI, IMMUNITY UNDER SECTION 11-46-9(1)(d) OF THE MISSISSIPPI TORT CLAIMS ACT.
- V. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT SIMPSON COUNTY, MISSISSIPPI, IMMUNITY UNDER SECTION 11-46-9(1)(w) OF THE MISSISSIPPI TORT CLAIMS ACT.

STATEMENT OF THE CASE

A. Nature of the Case

This matter arises out of a single car accident that occurred in the early 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 washed out condition of 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 pertinent sections of the Mississippi Tort Claims Act. The trial Court reserved ruling on the County's Motion for Summary Judgment and the matter went to trial.

Following the trial of this matter, the 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, p. 000148-248]. The 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. [R. Vol. 3, p. 1] The Court again reserved ruling. [R. Vol. 3, p. 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 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

Plaintiff's claims arise out of an automobile accident caused by heavy rains. [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, Tab 4, p. 11-12]. More specifically, on February 5, 2004, Simpson County was inundated with rain that wreaked havoc on many of the County's roads and/or bridges and, in fact, required the County to close and/or block off a number of the same. [R. Vol. 1, p. 000143-144, 000146-147; Vol. 3, p. 58, 134-142; R.E. Tab 3, p.8-9, Tab 4, p. 10-11]. One of the roads that the County closed on February 5, 2004, was Shorter Road, the Road on which less than nine (9) hours later, the Plaintiff had his automobile accident. [R. Vol. 1, p. 000143-144, 000146-147; Vol. 3, p. 14-15, 24-27, 57-58, 61-62, 121-123; R.E. Tab 3, p.9-10, Tab 4, p. 11-12].

The County became aware of the wash out on Shorter Road on the evening of February 5, 2004, when residents living near that section of Shorter Road discovered the same and contacted a Simpson County supervisor. More specifically, on that evening, Chris and Patti Patton were returning from Jackson, Mississippi, to their home on Shorter Road. [R. Vol. 3, p. 11, 23]. While traveling on Shorter Road, the Pattons crossed over what they call "the branch." [R. Vol. 3, p. 11-12, 23]. While crossing the branch, Mr. and Mrs. Patton both noticed that the heavy rain that plagued the County had caused water in the branch to rise to the very top of the road. [R. Vol. 3, p. 12, 23]. Having crossed the branch, Mr. Patton noticed something out of the ordinary and had his wife stop their vehicle. [R. Vol. 3, p. 23]. Mr. Patton exited the vehicle and went back to the branch whereupon he realized that the culverts under Shorter Road that directed the

flow of water in the branch under the road had completely washed out from under the roadway. [R. Vol. 3, p. 23]. In fact, the culverts washed out from under the road and into a nearby pasture leaving the approximately three to four inches of asphalt that made up Shorter Road itself as the only support for that portion of the roadway. [R. Vol. 3, p. 23, 49].

Upon realizing that the culverts underneath the roadway had washed out, the Patton's made certain that County officials were notified of the same. [R. Vol. 3, p. 12-14, 23-24]. In fact, Patti Patton's sister, Denise Shows, called Simpson County Supervisor Bennie Bridges that same evening and informed him of the washout. [R. Vol. 1, p. 000143-144; Vol. 3, p. 13; R.E. Tab 3, p. 9-10]. After speaking with Ms. Shows, Supervisor Bridges called his Road Manager, Gary Sullivan, and instructed him to call out his road crew to close the section of Shorter Road that had washed out. [R. Vol. 1, p. 000143-144; Vol. 3, p. 142-143; R.E. Tab 3, p. 9-10].

Sullivan received the call from Mr. Bridges at approximately 6:00 p.m. on February 5, 2004, and immediately called Simpson County employee William "Red" Busby and relayed instructions to close the section of Shorter Road that had washed out. [R. Vol. 1, p. 000143-144; Vol. 3, p. 142-143; R.E. Tab 3, p. 9-10]. Supervisor Bridges, William Busby and another County employee, Buddy Stewart, went to the site of the washout and Busby and Stewart closed that portion of Shorter Road that had washed out. [R. Vol. 1, p. 000143-144, 000146-147; Vol. 3, p. 57, 61-62, 122-124; R.E. Tab 3, p. 9-10, Tab 4, p. 11-12]. In particular, William Busby placed two (2), white, fiberglass signs, approximately two foot by two foot (2X2) in size, with orange letters that said "Road

Closed," approximately one (1) quarter of a mile east of the washout.¹ [R. Vol. 1, p. 000146-147; Vol. 3, p. 61-62, 78-79 122-124; R.E. Tab 4, p. 11-12]. Mr. Busby nailed one of the signs to a block of wood and placed it in the middle of Shorter Road just down from Chris and Patti Patton's driveway. [R. Vol. 1, p. 000146-147; Vol. 3, p. 25-27, 61, 78-79, 122-124; R.E. Tab 4, p. 11-12]. The other sign was mounted on a three-legged reinforcement bar ("re-bar") stand and driven into the ground on the side of the road near the first sign. [R. Vol. 1, p. 000146-147; Vol. 3, p. 61-62, 78-79, 122-124; R.E. Tab 4, p. 11-12].

Next, right at the Patton's driveway, Mr. Busby stretched strips of four (4) inch yellow tape with black writing across the entire width of the roadway and then hung orange strips of tape vertically from the yellow tape to further close off that section of Shorter Road² [R. Vol. 1, p. 000146-147; Vol. 3, p. 123; R.E. Tab 4, p. 11-12]. Approximately one hundred (100) yards east of the wash out, but west of the Patton home and the road closed signs, Busby again stretched ribbon across the width of Shorter Road in an identical manner to that done at the Patton's' driveway. [R. Vol. 1, p. 000146-147; R. Vol. 3, p. 123; R.E. Tab 4, p. 10-11].

Chris and Patti Patton remained on the scene after Sullivan, Busby and Stewart arrived and Patti Patton saw Busby stretch the yellow ribbon across Shorter Road at her driveway, as did her husband, Chris. [R. Vol. 3, p. 12-15, 23-25]. Furthermore, Chris

¹ The stretch of Shorter Road on which the washout occurred runs east and west.

² Although the other side of the washout had never been an issue in this suit, for clarity's sake, it is worth noting that similar precautions were taken that side of the washout. [R. Vol.1, p. 000146-147; R.E. Tab 4, p. 11-12].

Patton saw Busby erect the two (2) "Road Closed" signs—one in the middle of Shorter Road and the other on the shoulder of Shorter Road just down from their home. [R. Vol. 3, p. 23-25, 32-33].

Prior to leaving the scene, Busby turned his truck around and shined his lights on the signs and ribbons to make certain they were adequate. [R. Vol. 1, p. 000146-142; Vol. 3, p. 76, 79-80, 123-24]. Having satisfied himself, Busby, as well as the other County employees, left the area. [R. Vol. 3, p. 79-80, 123-124].

At approximately 6:15 a.m. on February 6, 2004, the Plaintiff was traveling west on Shorter Road on his way to eat breakfast with his son and, having passed the home of Chris and Patti Patton, traveled across the washed out section of Shorter Road that Simpson County had closed only nine (9) hours before. [R. Vol. 3, p. 84]. At that time, the Plaintiff did not see any "Road Closed" signs or warning tape and, therefore, proceeded towards the washed out portion of Shorter Road. [R. Vol. 3, p. 84-85]. When the Plaintiff crossed the washed section of Shorter Road, the roadway apparently gave way causing him to crash and suffer personal injuries. [R. Vol. 1, p. 118; Vol. 3, p. 84].

Following the accident, Chris Patton noticed that the signs Simpson County put in place hours only nine (9) hours before were missing and that the ribbons that had been stretched across the roadway at Patton's drive were broken. [R. Vol. 3, p.29]. All Mr. Patton saw were small pieces of the ribbon where Busby had tied the same to trees near his drive way. [R. Vol. 3, p. 29].

The Plaintiff and Simpson County Deputy Jeff Smith—the officer that investigated Plaintiff's accident—also saw strips of the ribbon on the side of Shorter Road following the accident. [R. Vol. 1, p. 000120; Vol. 3, p. 96-97].

SUMMARY OF THE ARGUMENT

As to Plaintiff's failure to warn claim, the trial court incorrectly applied the MTCA and failed to grant Simpson County immunity under the MTCA.

First, the trial court incorrectly held that Section 11-46-9(1)(b) of the MTCA applies to this case and held the County to an ordinary care standard insofar as warning of the washout on Shorter Road. While section 11-46-9(1)(b) requires a government entity to exercise ordinary care, this section only applies when the governmental entity's conduct is specifically governed by a statute, ordinance or regulation. In this suit, no statute, regulation or ordinance controls the manner in which Simpson County warns of a washed out road and, as such, Section 11-46-9(1)(b) is inapplicable.

Next, Section 11-46-9(1)(q) of the MTCA wholly bars Plaintiff's suit as the accident in question was caused "solely by the effect of weather conditions on the use of streets and highways."

Even if Section 11-46-9(1)(q) did not bar Plaintiff's suit, Section 11-46-9(1)(v) does as Simpson County warned of the washed out condition of Shorter Road by erecting two "road closed" signs and stringing multiple ribbons across the roadway in two (2) locations.

Next, while the trial court correctly concluded that Simpson County warned of the condition of Shorter Road, it incorrectly held that the warning provided was

inadequate. The time, manner and method by which Simpson County warned of the washed out portion of Shorter Road was discretionary and, therefore, the County is immune pursuant to Section 11-46-9(1)(d) of the MTCA.

Finally, in addition to the above-reasons, Simpson County should have been granted immunity in this suit based upon Section 11-46-9(1)(w). This section provides immunity from a claim arising out of the "absence, condition, malfunction or removal by third parties of any sign...warning device" or the like, unless the condition is not corrected by the entity after a reasonable time after notice of the condition. It is uncontested that Simpson County placed warning signs and warning devices (ribbons) at the scene of the washout and, to the extent that Plaintiff's accident occurred because of the absence of signs and ribbons, Section 11-46-9(1)(w) bars liability.

ARGUMENT

The MTCA is the exclusive remedy for a party allegedly injured by the acts or omissions of a Mississippi governmental entity or its employee and, as such, governs this suit. Miss. Code Ann § 11-46-7(1); *L.W. v. McComb Sep. Mun. Sch. Dist.*, 754 So. 2d 1136 (Miss. 1999). Under the MTCA, sovereign immunity is waived for the State of Mississippi and its political subdivisions; however, this waiver is subject to numerous exceptions. See, Miss. Code Ann. § 11-46-9.

In the case at bar, 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).

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

In its Conclusions of Law, the trial court 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." *Id.* The trial court then held that Simpson County's "failure to utilize available warning and barricades," which the Court determined were "more effective" and "easily available," amounted to a failure to exercise ordinary care. [R. Vol. 2, p. 000263-266]. The application of Section 11-46-9(1)(b) was erroneous and requires reversal.

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).

In this case, the record reveals that the Plaintiff provided no evidence, oral or documentary, demonstrating that any statute, ordinance or regulation controls the manner in which Simpson County warns of washed out roadways. The reason for the absence of such evidence is simple—there is no statute, ordinance or regulation that governs how Simpson County must warn of a washed out roadway.

The trial court's application of Section 11-46-9(1)(b) was incorrect and requires reversal.

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

The trial court erred when it failed to grant Simpson County immunity pursuant to Section 11-46-9(1)(q) of the MTCA. 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.”

In *Lee v. MDOT*, 2009 Miss. App. LEXIS 604, the Mississippi Court of Appeals' most recent pronouncement on the weather exception, the Court found MDOT immune from liability where two cars collided after one (the “Sipp vehicle”) hydroplaned on pooled water in the highway. The Court succinctly explained that (1) it had been raining prior to the accident; (2) the rain pooled on the highway; and (3) the pooled water caused the Sipp vehicle to hydroplane. *Id.* at p. *16. The weather was the sole cause of the accident and immunity under Section 11-46-9(1)(q) was appropriate. *Id.*

In *Schepens v. City of Long Beach*, 924 So.2d 620 (Miss. Ct. App. 2006)—a case similar to the one at bar—the MSCA found that the City was immune under the weather exception. In *Schepens*, a claimant brought suit against the City for failing to maintain a roadway which damaged his vehicle. In particular, the claimant argued that potholes formed on Nicholson Avenue after it rained and that his vehicle's undercarriage was damaged when he drove over the potholes. *Id.* at 623. The MSCA upheld the trial court's grant of a motion to dismiss stating that the “claim arose from

an injury which resulted solely from the effect rain had on North Nicholson Avenue” and, as such, the weather exception provided complete immunity. *Id.*

In this case, it is undisputed that the wash out on Shorter Road was caused by the heavy rains that inundated Simpson County the day before Plaintiff’s 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]. The wash out on Shorter Road caused Plaintiff’s accident and, according to *Lee* and *Schepens*, Simpson County is entitled to immunity under Section 11-46-9(1)(q). This Court must therefore reverse the trial Court’s decision and should render a verdict in Simpson County’s favor granting it immunity under the weather exception.

To the extent that the Plaintiff is claiming that Simpson County’s duty to warn of known dangerous conditions trumps immunity under the weather exception, this argument has already been disposed of by the MSCA. More specifically, in *Willing v. Benz*, 958 So.2d 1240 (Miss. Ct. App. 2007), the estate of a pedestrian brought suit against the City of Greenville after the decedent was killed by a motor vehicle that hit a patch of ice, slid across a median and struck the decedent while he was repairing a construction sign. *Id.* at p. 1243-44. Significantly, the construction sign was damaged only one (1) hour earlier when a different motorist hit the same patch of ice, slid across the same median and crashed into the construction sign. *Id.* The estate sued the City because a city police officer worked the first wreck—the one in which the construction sign was damaged—and, according to the Estate, the officer failed to take appropriate action to warn of the ice in the roadway which caused both wrecks. *Id.*

In upholding the trial court's grant of summary judgment based upon Section 11-4-9(1)(q), the Court was careful to explain that it was not holding that the City "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.'" *Id* at p. 1254, quoting, *Horan v. State*, 514 A.2d 78, 79 (N.J. Super. Ct. App. Div. 1986)(emphasis added). Thus, a governmental entity's duty to warn does not negate immunity under the weather exception, even where the duty to warn is breached. When an accident is caused solely by the effects of weather on the use of streets and highways—as it was in this case—the governmental entity is entitled to immunity. The trial court's failure to grant Simpson County immunity based upon the weather exception was erroneous. This Court must reverse the trial court's decision and should render a judgment in the County's favor based upon Section 11-46-9(1)(q).

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

The trial court erroneously failed to apply Section 11-46-9(1)(v) of the MTCA which immunizes Simpson County from Plaintiff's failure to warn claim. 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).

The evidence at trial clearly demonstrated that the storms that struck Simpson County caused the culvert under Shorter Road to washout. [R.Vol.1,p. 000143-144, 000146-147; Vol.3,p. 12, 23, 48-49, 57; R.E. Tab 3, p. 9-10]. Thus, Simpson County 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.

The County did receive notice of the washout; however, the testimony of Supervisor Bennie Bridges, Simpson County Road Manager Gary Sullivan, County employee William Busby, Chris Patton, Patti Patton, the Plaintiff and Simpson County Deputy Jeff Smith make it clear that once the County received notice of the washout, it took action to protect and warn of the same. As Bridges, Sullivan, Busby and the Pattons testified, on the night prior to Plaintiff's accident, County employees erected two (2) "Road Closed" signs and stretched yellow and orange ribbon across the width of the roadway at two (2) different locations to warn of the wash out. [R.Vol.1, p. 000146-147; Vol.3, p.19, 24-27, 61-62, 78-79, 122-24; R.E. Tab 4, p. 11-12]. Following the accident, the Plaintiff, Deputy Smith and Chris Patton all saw remnants of ribbon County employees stretched across Shorter Road the night before the accident. [R. Vol.1, p. 000120; Vol. 3,p.29, 96-97]

The straight forward, unambiguous language of Section 11-46-9(1)(v) entitles Simpson County to immunity as the evidence is uncontested that Simpson County took

action to warn of the washed out section of Shorter Road. The trial court's failure to grant Simpson County immunity under Section 11-46-9(1)(v) is contrary to law and requires this Court reverse the trial court's decision. Furthermore, this Court should render a decision in Simpson County's favor based upon the immunity of Section 11-46-9(1)(v) of the MTCA.

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

It is undisputed that, upon receiving notice of the wash out on Shorter Road, Simpson County took action to warn the public of the same. In fact, the trial Court even noted the same in its Findings of Fact. [R. Vol. 2, p. 000263-264]. The trial court had no trouble determining that the County warned of the condition of Shorter Road; however, the trial court was troubled by the manner in which Simpson County chose to warn of the condition. Ultimately, the trial court questioned the adequacy of the warning given and found it to be insufficient. [R. Vol. 2, p. 000264-266]. In particular, the trial court held that Simpson County had "more effective signs and barricades" available and the failure to utilize them amounted to a failure to exercise ordinary care. [R. Vol. 2, p. 266].

The Court's inquiry into the adequacy of the warning given is wholly misplaced. The time, manner and method which Simpson County chose to warn of the washed out roadway is discretionary and, therefore, the County is entitled to immunity under Section 11-46-9(1)(d) of the MTCA regardless of the adequacy of the warning given.

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). The MSSC has explained that when determining whether governmental conduct is discretionary, the court must answer two questions “(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.” *Dancy v. E. Miss. State Hosp.*, 944 So.2d 10, 16 (Miss. 2006). 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 p. 16. 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. 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). To meet the public policy prong of the discretionary function test, the act or conduct in question must have been subject to some form of public policy analysis. *Dotts v. Pat Harrison Waterway Dist.*, 933 So.2d 322, 326 (Miss. Ct. App. 2006). The application of the “public policy” prong of the discretionary function analysis “does not require proof of the thought processes of pertinent decision makers. Rather, the focus is on the nature of actions taken, and whether they are susceptible to policy analysis.” *Id.* at p. 328.

The record evidence clearly demonstrates that the manner in which Simpson County warned of the washed out section of Shorter Road falls under the protection of the discretionary function exemption. First, the manner and method by which Simpson

County chose to warn of the washed out section of Shorter Road—"Road Closed" signs and multiple strands of ribbon stretched across the roadway at two (2) locations—involved an element of choice or judgment. That is, there is absolutely no record evidence of any statute or regulation that prescribes how a County is to warn of a washout on one of its roadways. In fact, the MSCA specifically explained the discretionary nature of warning of road conditions in *Willing v. Benz*, 958 So.2d 1240 (Miss. Ct. App. 2007), wherein it ruled 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." *Id.* at p. 1251; see also, *Dotts*, 933 So. 2d at 326 (holding that water district had discretion in decisions as to operation of water park where there were no Mississippi statutory requirements on the topic).

As for the second prong of the discretionary function test, "it must be presumed that [an] agent's acts are grounded in policy" when the action is discretionary in nature. Even in the absence of such a presumption, it is clear that Simpson County's decision as to which signs and barriers to utilize to warn of the wash out was grounded in both social and economic policy. *Dancy*, 944 So.2d at p.16, quoting, *United States v. Gaubert*, 499 U.S. 315, 334 (1991). The testimony in this matter clearly demonstrated that County officials conduct was grounded in concerns for the welfare of the entire County as well as constraints on County resources. Simpson County Road Manager Gary Sullivan and employee William Busby both testified that a number of 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]. Furthermore, 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]. Like any governmental entity, Simpson County did not have unlimited resources, whether in terms of finances, equipment or manpower. Notably, 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 because the County could not afford to purchase many of the pre-fabricated signs/barriers. [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 circumstances with which he was presented. [R.Vol.,p.65, 74-78]. See also, *Barrentine v. Miss. Dep't of Transp.*, 913 So.2d 391 (Miss. Ct. App. 2005)(holding the placement or non-placement of traffic control devices or signs involves social, economic or political policy). The very purpose of the discretionary function exemption is to prevent judicial second-guessing of the types of decisions County officials were forced to make in this case.

Notably, the MSSC has made it clear that there is no “ordinary care” component to the discretionary function analysis. *Collins v. Tallahatchie Co.*, 876 So.2d 284, 289 (Miss. 2004) Thus, when conduct is discretionary, it is inappropriate to analyze whether the conduct was carried out utilizing ordinary care.

The Court’s inquiry into the sufficiency of the method the County utilized to warn of the washed out road and determination that, that method was inadequate was erroneous. The discretionary function clearly applies to the County’s conduct and immunizes it from liability. This Court must reverse the trial court’s decision and

should render a decision in favor of the County based upon the discretionary function exemption.

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

The trial court also erred by failing to apply Section 11-46-9(1)(w) of the MTCA.

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

a political subdivision is entitled to 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 held that the warning signs and ribbons put in place by Simpson County "were blown away as a result of the night's storm" rather than by "third party removal." Apparently, because the Court found that the warnings were not removed by a third party it did not apply Section 11-46-9(1)(w). This was in error as Section 11-46-9(1)(w) applies to an absent sign or warning device, regardless of whether or not the same was removed by a third party. The operative language of that section, in particular, the article "or," 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. That is, Section 11-46-9(1)(w) states that an entity is immune from liability that arises out of the "absence, condition, malfunction or removal by third parties of any sign, signal, warning device."

(emphasis added). Had the Legislature intended to limit the section to incidents wherein the warning sign/device was removed by a third party they certainly could have done so and would have utilized language to affect such an intention. In this case, the Legislature clearly did not intend such a result and their language reflects that fact.

The MSSC applied Section 11-46-9(1)(w) in *Mitchell v. City of Greenville*, 846 So.2d 1028 (Miss. 2003), a case much like this one. In *Mitchell*, the plaintiffs alleged they sustained personal injuries when their automobile plowed into a pile of dirt and debris from the construction of a boat ramp. *Mitchell*, 846 So.2d at 1030. Testimony demonstrated that a warning sign and orange cones were in place at the construction site approximately twelve (12) to thirteen (13) hours prior to the accident; however, at the time of accident, the sign was lying face up on the roadway and the orange cones were scattered. *Id.* The MSSC applied Section 11-46-9(1)(w) and granted the City immunity there under.

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.

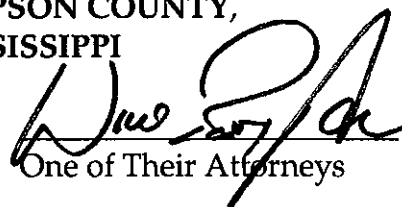
CONCLUSION

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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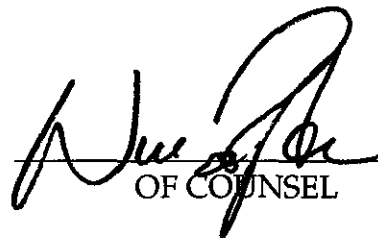
CERTIFICATE OF SERVICE

I, William R. Allen, attorney 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 Brief for Appellant to :

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This the 12th day of May, 2010.


OF COUNSEL