IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-CA-01306

CARL KEITH BLACKSTON and
JOSHUA M. STAPLETON — **APPELLANTS / CROSS-APPELLEES**

VERSUS

GEORGE COUNTY, MISSISSIPPI — **APPELLEE / CROSS-APPELLANT**

BRIEF OF APPELLEE / CROSS-APPELLANT GEORGE COUNTY, MISSISSIPPI

On Appeal from the Circuit Court of George County, Mississippi
Civil Action No. 2007-0165(2)

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(ORAL ARGUMENT REQUESTED)

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GEORGE COUNTY, MISSISSIPPI — **APPELLEE / CROSS-APPELLANT**

CERTIFICATE OF INTERESTED PERSONS

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

1. Carl Keith Blackston - Appellant / Cross-Appellee
2. Joshua Stapleton - Appellant / Cross-Appellee
3. George County, Mississippi, by and through Kelly Wright, President of the George County Board of Supervisors, and Cammie Brannan Byrd, George County Chancery Clerk - Appellee / Cross-Appellant
4. Hon. Robert P. Krebs - George County Circuit Judge
5. A. Malcolm N. Murphy, Esquire - Attorney for Appellants / Cross-Appellees
6. Darryl A. Hurt, Esquire - Attorney for Appellants / Cross-Appellees
7. Kimberly S. Rosetti, Esquire - Attorney for Appellee / Cross-Appellant

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STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings and Disposition in the Court Below

Carl Keith Blackston ("Blackston") and Joshua M. Stapleton ("Stapleton"), hereinafter sometimes collectively referred to as "the Plaintiffs", brought this tort action against George County, Mississippi ("George County"), pursuant to the Mississippi Tort Claims Act ("MTCA"), Miss. Code Ann. § 11-46-1, *et seq.* George County filed a Motion to Dismiss and/or for Summary Judgment, based on the untimeliness of the Complaint after a denial letter stopped the tolling of the statute of limitations. See Record of Appeal. "R" at 107-132; Appellee Record Excerpts "ARE" Tab 1. The trial court denied this Motion, (R. at 149-152; ARE Tab 3) and George County petitioned this Court for interlocutory appeal, which was denied. The parties then proceeded with further discovery, depositions, and trial. George County filed a Motion for Summary Judgment prior to trial based upon actual or constructive notice, causation and the open and obvious immunity under the Mississippi Tort Claims Act. (R. at 333-554). The trial court denied the Motion for Summary Judgment (R. at 149-152; ARE Tab 7). The arguments of the Motion for Summary Judgment were again argued by George County in its Motion for Directed Verdict at the conclusion of Plaintiffs case in chief. (See Transcript of Trial at 104-116). Further, George County re-urged its Motion for Summary Judgment regarding the open and obvious exemption under the Mississippi Tort Claims Act. The Court overruled the Motion for Directed Verdict. (TR. at 104-116).

Ultimately, a bench trial was held in this case before the Honorable Robert P. Krebs, George County Circuit Judge, at the conclusion of which, the trial court entered a verdict in favor of George County. (R. at 655-659). Thereafter, Blackston and Stapleton filed an unsuccessful Motion for Reconsideration or for New Trial. Blackston and Stapleton appeal the trial court's

verdict in favor of George County and the court's denial of their Motion for Reconsideration/New Trial. George County cross-appeals the trial court's denial of its Motion to Dismiss and/or for Summary Judgment based upon the statute of limitations.

B. Statement of the Facts

On February 28, 2006, at approximately 9:00 p.m., Blackston was driving his pickup truck westbound on Mount Pleasant Road in George County, Mississippi. Stapleton was a passenger in the truck. Blackston contends that a vehicle travelling in the opposite direction approached, but the road was not wide enough for his truck and the oncoming vehicle to pass each other in their current paths. So Blackston maneuvered his truck to the right edge of the pavement in his lane of travel. The Plaintiffs allege that Blackston's truck hit a five-inch-high "mound" of dirt protruding into the roadway in front of the private driveway at 2218 Mount Pleasant Road ("the subject driveway"), which caused Blackston's truck to ramp upwards and veer to the left. According to Blackston, when he tried to regain control of the vehicle by turning the steering-wheel to the right, he overcorrected and lost control, and the truck flipped over and wrecked. Blackston and Stapleton alleged that the dirt they encountered was fill dirt negligently left in the roadway by the George County road crew after installing a culvert in the subject driveway several weeks or months prior to the accident. (R. at 4-5).

Blackston and Stapleton sent notice of their claim to the president of the George County Board of Supervisors ("the Board") and the George County Chancery Clerk on February 21, 2007, (R. at 119), and amended the notice on February 23, 2007. (R. at 123). Zurich North America Ins. Co. was the liability insurance carrier for George County. On April 30, 2007, Zurich sent a notice of denial of Blackston's and Stapleton's claim in the form of a denial letter, (R. at 127), which was received by the Plaintiffs' attorney on May 4, 2007. (R. at 128-30).

Thereafter, on August 30, 2007, the Plaintiffs filed their Complaint in this matter. (R. at 4-7 and 72-75)

On February 21, 2008, George County filed a Motion to Dismiss and/or for Summary Judgment, in which George County asserted that the Plaintiffs' Complaint was untimely filed, including supporting affidavits and exhibits regarding the denial letter. (R. at 107-132; ARE Tab 1). George County averred that the Plaintiffs' May 4, 2007, receipt of the denial letter had ended the 120-day tolling period and commenced the 90-day filing period under Miss. Code Ann. § 11-46-11(3). Thus, the Plaintiffs would have had until August 9, 2007, at the latest, to file their Complaint. Since they did not file the Complaint until August 30, 2007, George County asserted that the Complaint was filed twenty-one days too late and should be dismissed with prejudice pursuant to Section 11-46-11(3). (R. at 108).

On May 22, 2008, the trial court denied George County's Motion to Dismiss. (R. at 149-150). The trial court held that the April 30, 2007, denial letter was ineffective because it was sent by George County's liability insurer, Zurich, not by George County or the Board of Supervisors itself. As such, the trial court found that there never was a denial of the Plaintiffs' claim, the 120-day tolling period had not stopped, and the Complaint thus was timely. (R. at 150). George County sought interlocutory appeal of the trial court's May 22nd Order, but it was denied by this Court. (R. at 153).

George County filed a Motion for Summary Judgment on or about September 1, 2009 on the basis of notice of the alleged dangerous condition, causation and the open and obvious immunity under the Mississippi Tort Claims Act. (R. at 333-554; ARE Tab 5). The Court denied the Motion for Summary Judgment. (R. at 149-152; ARE Tab 7).

The trial began on October 19, 2001. During the trial, Blackston testified regarding the events surrounding the crash. He stated that he was driving the truck at approximately forty-five (45) miles per hour. (TR. at 45, 54). Blackston stated that a truck coming in the opposite direction forced him to maneuver to the right-hand side of the pavement, where he hit a "mound" of dirt on the road in front of the subject driveway. (TR. at 49). He said striking the dirt on the road caused him to lose control of the truck. (TR. at 41-42). Blackston testified that, prior to the accident, he knew the dirt was there because he had driven past and seen it on numerous occasions before the accident, including once or twice earlier on the date of the crash. (TR. at 68-71).

Blackston's brother, Jerome Blackston ("Jerome Blackston"), also testified regarding the accident. He testified that he was travelling behind Blackston and Stapleton and had seen Blackston's truck strike the dirt, veer to the left, then to the right, and then Blackston's truck flipped over. (TR. at 94-95). Stapleton testified that he had no memory of the accident. (TR. at 80).

Joel Hyatt, the George County Sheriff's Deputy who investigated the scene ("Deputy Hyatt"), testified that black skid marks and debris on the road indicated that Blackston's truck had skidded from the right lane, into the left lane, off the left side of the road, back onto the road, and back into the right lane, and then it had flipped over. (TR. at 125-26). Also, Deputy Hyatt testified that there was no driveway, culvert, or dirt in the road anywhere in the vicinity of the beginning of the skid marks. (TR. at 126-27).

Ralph Ayers ("Ayers") and Marisa Christian ("Christian"), residents in the house where the subject driveway is located, testified that, immediately after the culvert installation, there was dirt left protruding into the road. (*See* TR at 27-28, 183). However, neither Ayers nor Christian

could testify definitively whether the dirt remained there in the same condition at the time of the accident. Christian, as plaintiffs rebuttal witness, testified that she exited her house and went to the scene of the crash just after it happened and that Blackston's truck had come to rest approximately fifteen (15) feet from the subject driveway marking the resting location of the truck on Plaintiffs' photograph trial exhibit 1 (ARE Tab 9; TR at 173-174).

Finally, Stanley Anderson ("Anderson"), foreman and manager of the George County road department, testified about the installation of the culvert. He stated that he remembered installing the culvert in the subject driveway, but that his crew did not leave any dirt that extended into the roadway after the installation. He testified that the dirt may have washed out into the road due to weather conditions. (TR at 151, 158).

Blackston and Stapleton also introduced several exhibits during the trial. The most pertinent of these are Exhibit 1 and Exhibit 3, which depict the alleged condition of the subject driveway, the culvert, and the dirt approximately two to three months after the accident. (ARE Tab 9; at 52) (trial court noting that "I have an accident of February 28th, and any pictures that I am going to be looking at as a fact finder are two to three months old").

On January 14, 2010, the trial court rendered a verdict in favor of George County. (R. at 655-59). The trial court stated that the questions before it were whether the dirt in the roadway was the cause of the accident, and if so, whether George County is liable or exempt from liability by virtue of the MTCA. (R. at 657). The court found that there was conflicting evidence as to whether the dirt was in the road at the time of the accident, and if so, whether it constituted a dangerous condition.

However, the court specifically noted the testimony of Christian that Blackston's truck had come to rest only fifteen (15) feet from the subject driveway.[1] The court explained that:

> It defies logic that a truck traveling forty miles per hour can strike a mound of dirt, swerve left, th[e]n right, then flip and land only fifteen feet from the mound of dirt it suck. Based on the evidence as presented the Court cannot say that this mound of dirt was the cause of this accident by a preponderance of the evidence. If the mound of dirt was not the cause of the accident, then George County cannot be liable.

(R. at 658). As an alternative finding, the court went on to state that, even if the mound of dirt was placed by George County and was the cause of the accident, George County would still be immune from suit under the MTCA because the dirt in the road was open and obvious, as evidenced by Blackston's own testimony that he had driven past and noticed the culvert and the dirt on several occasions prior to the crash. (R. at 658).

The trial court ultimately stated its final conclusions as follows:

> The Court finds that the plaintiffs have failed to prove by a preponderance of the evidence that this mound of dirt in the road was the cause of the accident and their resulting injuries. Furthermore, the Court finds that even if the dirt mound were the cause of the accident, the Tort Claims Act's open and obvious exemption provides George County with immunity from suit in this case.

(R. at 658). The trial court thus entered judgment in favor of George County and dismissed the case with prejudice. (R. at 659-60).

Blackston and Stapleton filed a Motion for Reconsideration/New Trial on February 8, 2010. In this Motion, the Plaintiffs raised several pieces of evidence which they claimed the trial court had overlooked, including certain excerpts of some of the witnesses' testimony and the photograph of the driveway, culvert, and dirt marked as Plaintiff's Exhibit 1. (R. at 663-69). The trial court denied the Plaintiffs' Motion on July 29, 2010. (R. at 697).

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[1] Ms. Christian testified as a rebuttal witness for Plaintiffs over the objections of George County. (TR. at 164-182).

The Plaintiffs filed their Notice of Appeal on August 4, 2010, (R. at 699), and George County filed its Notice of Appeal (Cross-appeal) on August 14, 2010. (R. at 712).

SUMMARY OF THE ARGUMENT

The trial court relied upon substantial, reasonable, and credible evidence to find that the driveway dirt in the roadway was not the cause of the accident. This evidence included Blackston's and Jerome Blackston description of the truck's movements and path before and during the accident, Deputy Hyatt's testimony regarding his investigation of the accident and the skid marks left by Blackston's truck, and especially Christian's testimony (Plaintiffs' rebuttal witness) regarding the final position of Blackston's truck following the accident. All of this evidence supports the trial court's verdict and must be accepted as true. The trial court specifically found the alleged mound of direct could not have logically caused the plaintiffs' accident. The decision regarding causation was based upon evidence and testimony presented by both parties. The trial court judges the credibility and weight of such evidence. Therefore, this Court should affirm the trial court's finding that the Plaintiffs failed to prove by a preponderance of the evidence that the "mound" of driveway dirt in the road was the cause of the accident.

The trial court also relied upon substantial, reasonable, and credible evidence to conclude that, even if the driveway dirt in the roadway had caused the accident, it was open and obvious to Blackston. This evidence included the Plaintiffs' own description of the width and height of the dirt in the road and Blackston's own testimony that he had driven that road and had seen the "mound" of dirt on multiple occasions prior to the accident, including once or twice earlier the date of the accident. The open and obvious exemption and Blackston's substantial knowledge of the alleged dirt in the road under the Mississippi Tort Claims Act were argued on Motion for Summary Judgment, but denied. Accordingly, this Court should affirm the trial court's holding that George County is immune from liability in this case pursuant to the MTCA because the "mound" of driveway dirt in the road was open and obvious to a person exercising due care.

As an additional argument in support of dismissal of all claims against George County, in the initial stages of the instant litigation, the trial court clearly erred when it denied George County's Motion to Dismiss and/or for Summary Judgment based upon the statute of limitations. Upon receiving notice of the Plaintiffs' claim, George County's liability insurer, Zurich, sent a "notice of denial of the claim" to the Plaintiffs, which plaintiffs' received, thereby ending the 120-day MTCA tolling period and starting the clock running on the Plaintiffs' 97-day filing period. However, the Plaintiffs did not file their Complaint until 118 days after receiving the notice of denial of the claim, thereby making the Complaint untimely under the MTCA and subject to dismissal with prejudice. Hence, if this Honorable Court concludes any error occurred with reference to the trial determination by the trial judge, George County asserts alternatively on cross appeal the error of the trial court for failing to dismiss the matter, which was barred by the statute of limitations.

ARGUMENT

I. On Appeal:

The Plaintiffs correctly note that the trial court was faced with resolving two questions at trial. The first question was whether the dirt in the roadway was the cause of the accident, and if so, the second question was whether George County is liable or exempt from liability by virtue of the MTCA. The first question is a question of fact, and the second question is one of law.

The standard of review of a judgment entered following a bench trial is well-settled. "The trial court is entitled to the same deference accorded to a chancellor, that is, [the Supreme Court] will uphold the trial court's findings of fact, so long as they are supported by 'substantial, credible, and reasonable evidence.'" *City of Jackson v. Presley*, 40 So.3d 520, 522 (Miss. 2010) (quoting *City of Jackson v. Brister*, 838 So.2d 274, 278-79 (Miss. 2003)). That means the Court will not disturb the circuit court judge's findings "unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *City of Jackson v. Perry*, 764 So.2d 373, 376 (Miss. 2000)). However, the Supreme Court reviews conclusions of law, including the proper application of the MTCA, *de novo*. *Presley*, 40 So.3d at 522.

A. The trial court's finding the Plaintiffs failed to prove by a preponderance of the evidence that the dirt in the road was the cause of the accident was supported by substantial evidence, is not manifestly wrong or clearly erroneous, and no incorrect legal standard was applied.

Blackston and Stapleton spend most of their appellate brief re-hashing all the evidence presented at trial which they contend supports their position that George County is liable for their damages. However, this proves the point that the trial judge heard the witness testimony, observed all witnesses and judged credibility. The Plaintiffs gloss over the evidence against

liability, upon which the trial court relied, and which is substantial, credible, and reasonable to allow the defense verdict on proximate cause.

Generally, "the jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of the testimony given by each witness." *Doolie v. State*, 856 So.2d 669, 671 (Miss. Ct. App. 2003) (citing *Meshell v. State*, 506 So.2d 989, 991 (Miss. 1987)). But "[i]n a bench trial, as in this case, the trial judge is 'the jury' for all purposes of resolving issues of fact." *Id.* (citing *Evans v. State*, 547 So.2d 38, 40 (Miss. 1989)). *See also Yarbrough v. Camphor*, 645 So.2d 867, 870 (Miss. 1994) ("trial judge is charged with determining the credibility of witnesses when he sits as the finder of fact"). Finally, "[i]n determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Tentoni v. Slayden*, 968 So.2d 431, 441 (Miss. 2007) (quoting *Wal-Mart Stores v. Frierson*, 818 So.2d 1135, 1143 (Miss. 2002)). The trial court did not abuse its discretion in the judgment in favor of George County.

The Plaintiffs rely on the testimony of several witnesses to make their case, but they address the wrong question. The Plaintiffs point to the testimony of Blackston, Jerome, Ayers, and Christian to establish the fact that the dirt from the driveway extended into the roadway of Mount Pleasant Road on the date the driveway was completed by George County. And they note critically that only one witness, Anderson, testified that the dirt was <u>not</u> in the road when the culvert/driveway installation was done. Based on this testimony, the Plaintiffs assert that the overwhelming weight of the evidence establishes George County's liability for their damages. However, the plaintiffs also have the burden of proof on the element of causation.

The testimony of Keith Blackston, Jerome Blackston, Ayers, and Christian that the dirt was in the roadway does nothing to prove the causation element for plaintiffs. In fact, the only evidence presented on this question was the testimony of Keith Blackston and Jerome Blackston regarding how the accident occurred and the width and height of the driveway dirt in the roadway, the testimony of Deputy Hyatt regarding his investigation of the crash and the skid marks, and the testimony of Christian regarding the final resting place of Blackston's truck.

Blackston testified that, after driving over the dirt in the roadway at night, he lost control of his truck, it veered far to the left, and that he overcorrected, bringing the truck back to the right side of the road too quickly, causing the truck to turn sideways and flip over. (TR. at 41, 48-49, 73) Jerome Blackston corroborated this narrative of the crash. However, Deputy Hyatt testified based upon his observations and based on the tire tracks and skid marks, the truck had veered so far to the left that it had partially left the roadway before coming back onto it, back into the right lane, and flipping over. (TR. at 117-129).

The Plaintiffs assert that the condition Blackston that caused him to lose control of his truck was the "mound" of dirt in the roadway in front of the subject driveway (Ayers driveway). However, Christian (plaintiffs' rebuttal witness) testified unequivocally that Blackston's truck had come to its final resting place in the roadway after the crash, only fifteen (15) feet from the subject driveway, where the alleged "mound" of dirt was located. (TR. at 168-182; Plaintiffs trial Exhibit 1 – ARE Tab 9). Deputy Hyatt testified that there was no driveway, culvert, or dirt in the vicinity of the beginning of the skid marks. (TR. at 122-128). The testimony of Christian and Deputy Hyatt is reasonable and credible evidence viewed by the trial judge as a basis for determining the plaintiffs failed to prove the mound of dirt was the cause of the accident.

The circuit judge below, sitting as the fact-finder, was within his authority to determine the credibility of these witnesses and to accept and believe any parts of this testimony he saw fit. Obviously, he gave more credibility to Deputy Hyatt's and Christian's testimony than he did to some parts of the Blackstons'. The judge simply found it extremely unreasonable, or that it "defies logic," to believe that Blackston's truck, travelling forty-five miles per hour, could hit the "mound" of dirt in front of the subject driveway, veer, and flip over and only end up fifteen (15) feet from the driveway dirt it suck initially. (R. at 655-659).

Based upon the language and analysis within the Court's Findings of Fact and Conclusion of Law, the testimony of all witnesses and exhibits were clearly taken into account in the reciting of the facts and the Court's final opinion. There is no merit to the argument that the Court did not consider all the evidence or that the Court erred in its weighing of such evidence. The conclusions of the trial court that the plaintiff failed to prove causation was appropriate and in line with the evidence at the trial especially the testimony of plaintiff rebuttal witness, Ms. Christian. George County significantly disputed and substantially contested the plaintiff claims through cross examination of plaintiff witnesses and presentation of defense witnesses. The evidence presented by George County and the lack of evidence presented by the plaintiff provided more than sufficient grounds for the Court to find for the defendant. There was no abuse of discretion. The plaintiff failed to prove the mound of dirt caused the accident by a preponderance of the evidence. The substantial, credible and reasonable evidence including plaintiff rebuttal non-party witness, Ms. Christian, supported the Court's finding in favor of George County.

The trial court thus was correct when it held that "the plaintiffs have failed to prove by a preponderance of the evidence that th[e] mound of dirt in the road was the cause of the accident and their resulting injuries." (R. at 658). Accordingly, this Court should affirm the trial court's finding that that the Plaintiffs failed to prove by a preponderance of the evidence that the driveway dirt was the cause of the accident.

B. The trial court's conclusion that, if the dirt in the roadway was the cause of the accident, it was open and obvious, and George County was thus immune from liability, was supported by substantial evidence, is not manifestly wrong or clearly erroneous, and no incorrect legal standard was applied.

It is undisputed that Blackston knew of the existence of the dirt in the roadway. As noted above, the trial court stated that the question before it was, if the accident was in fact caused by the driveway dirt in the roadway, whether George County is liable or exempt from liability by virtue of the MTCA. The trial court thus was correct when it noted that, to hold George County liable for the Plaintiffs' damages, it must "find that George County created a dangerous condition and then failed to warn of it." (R. at 658).

The Plaintiffs' appellate brief is filled with statements arguing that, although Blackston was aware of the driveway dirt in the roadway prior to the accident, he did not know the dirt constituted a hazard because George County had not warned of it. But as with the first issue, the plaintiffs argument is without merit. The MTCA explicitly provides as much, stating 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).

Blackston was well aware of the dirt in the road and proceeded on the road at night with that knowledge. Blackston admitted at trial that he had driven down Mount Pleasant Road daily and had seen the newly installed dirt driveways, including the dirt extending into the roadway,

on several occasions, including once or twice earlier on the date of the accident. (TR. at 68-71) The Plaintiffs also repeatedly asserted through testimony that the "mound" of dirt extended well into the roadway and that it was at least five inches thick. The trial court cited *Barr v. Hancock County,* 950 So.2d 254 (Miss. Ct. App. 2007) as did George County in its Motion for Directed Verdict and previous Motion for Summary Judgment to support immunity (TR. at 104-117). In *Barr*, the issue involved backfill material after installation or upgrade of culverts. Barr knew of the existence of the backfill material prior to the accident because he traveled the same area before by bike. The court found a warning of the alleged dangerous condition (backfill material) did not proximately cause the injury based upon the plaintiff testimony being that he was aware of the condition of the road prior to the accident. *Id.* ¶16. Similarly, Blackston was aware of the condition of the road prior to the accident.

Furthermore, the Plaintiffs' assertion that Blackston did not know the "mound" of dirt in the roadway was dangerous is without merit for a more fundamental reason. The trial court did not find plaintiffs assumed the risk which analyzes evidence as to whether a plaintiff appreciates the actual danger of condition and proceeds anyway. It was found that the dirt in the road was open and obvious to Blackston in light of his testimony. *See Green v. Allendale Planting Co.*, 954 So.2d 1032, 1041 (Miss. 2007) ("Assumption of the risk applies where a person freely and voluntarily chose to encounter a dangerous condition.") (emphasis added).[2]

[2] The "open and obvious" defense was abolished as a complete bar to recovery in negligence cases in *Tharp v. Bunge Corp.*, 641 So.2d 20 (Miss. 1994), and was folded into our general comparative fault doctrine, as codified at Miss. Code Ann. § 11-7-15. The "assumption of the risk" doctrine also no longer presents a complete bar to recovery, as it also largely has been subsumed in our comparative fault doctrine since this Court's decision in *Horton v. American Tobacco Co.*, 667 So.2d 1289, 1293 (Miss. 1995). However, the "open and obvious" defense still constitutes a total bar to recovery against governmental entities under the MTCA, pursuant to Miss. Code Ann. § 11-46-9(1)(v).

It is undisputed that the plaintiff driver, Keith Blackston, was aware of the dirt in the road due to the fact that he traveled this road at least twice a day for a couple of weeks. Mr. Blackston traveled the road twice the day of the accident – before the accident. The plaintiffs knew of this argument prior to trial through deposition questions and the Motion for Summary Judgment filed on or about September 1, 2009. (R. at 333-354). (TR. at 104-117). The plaintiffs now appear to assert a waiver argument for George County's immunity. The plaintiffs did not argue waiver of the immunity argument until its Motion for Reconsideration of the Judgment for George County. Plaintiffs did not argue waiver in response to the Motion for Summary Judgment filed in this matter and argued on October 1, 2009. (R. at 559-594). The argument of waiver by George County does not apply in this case and was not argued by plaintiffs until after the trial court found in favor of George County.

Notably, the applicable provision of the MTCA provides immunity to governmental entities based on the "open and obvious" defense, but not the "assumption of the risk" doctrine. *See* Miss. Code Ann. § 11-46-9(1)(v). Thus, whether or not Blackston appreciated the dangerousness of the "mound" of dirt is irrelevant to the open and obvious exemption under the MTCA. So long as he knew of the presence of the dirt "mound" in the road, the MTCA open and obvious exemption can be applied to immunize George County from liability in this case if a reasonable person exercising due care would have appreciated the dangerousness of it.

Finally, the Plaintiffs are simply incorrect that George County has presented improper and/or inconsistent arguments. Blackston and Stapleton assert that it is illogical for George County to argue on the one hand that the driveway dirt was not a dangerous condition and on the other hand that it was open and obvious. However, George County argument at trial was simply that the driveway dirt on the roadway did not constitute a dangerous condition and did not cause

the accident, but that, should the court find otherwise (*i.e.*, that it was a dangerous condition and it did cause the accident), the dirt was open and obvious, and George County is thus immune from liability. This is known as "pleading in the alternative." These kinds of contingent arguments have always been permitted, and the Plaintiffs have cited no authority for the proposition that they are somehow improper or prohibited.

Therefore, the trial court's conclusion that the so-called "mound" of driveway dirt in the road was "open and obvious" was supported by substantial, credible, and reasonable evidence, namely the Plaintiffs' description of the dirt mound's width and height, and Blackston's own testimony that he had driven by it and seen it on multiple occasions, and that he was fully aware of its presence. And the trial court was correct when it held that, "even if the dirt mound w[as] the cause of the accident, the Tort Claims Act's open and obvious exemption provides George County with immunity from suit in this case." (R. at 658). Accordingly, this Court should affirm the trial court's holding that the open and obvious exemption under Section 11-46-9(1)(v) of the MTCA applies to this case and provides immunity to George County from liability for the Plaintiffs' alleged damages.

II. On Cross-Appeal:

A. The trial court clearly erred when it denied George County's Motion to Dismiss and/or for Summary Judgment based upon the statute of limitations, because the denial letter sent by George County's liability insurer qualifies as a "notice of denial of claim" under the MTCA.

All claims under the MTCA are subject to a one-year statute of limitations, Miss. Code Ann. § 11-46-11(3). The statute of limitations for claims falling under the Mississippi Tort Claims Act are covered by Miss. Code Ann. § 11-46-11(3) which states as follows:

> All actions brought under the provisions of this chapter shall be commenced within one (1) year next after the date of the tortuous, wrong, or otherwise

> actionable conduct on which the liability phase of the action is based, and not after; provided, however that the filing of a notice of claim as required by subsection (1) of this section shall serve to toll the statute of limitations for a period of ninety-five (95) days form the date the chief executive officer of the state agency received the notice of claim, or for one hundred twenty (120) days from the date the chief executive officer or other statutorily designated official of a municipality, county or other political subdivision receives the notice of claim, during which time no action may be maintained by the claimant unless the claimant has received a notice of denial of claim. After the tolling period has expired, the claimant shall then have an additional ninety (90) days to file any action against the governmental entity served with proper claim notice. However, **should the governmental entity deny any such claim, then the additional ninety (90) days during which the claimant may file an action shall begin to run upon the claimant's receipt of notice of denial of claim from the governmental entity.** All notices of denial of claim shall be served by governmental entities upon claimants by certified mail, return receipt requested, only. For purposes of determining the running of limitations periods under this chapter, **service of any notice of claim or notice of denial of claim shall be effective upon delivery by the methods statutorily designated in this chapter...**

Miss. Code Ann. § 11-46-11(3) (Rev. 2002) (Emphasis Added).

Pursuant to subsection (3) of Section 11-46-11, the proper and timely filing of a notice of claim under subsection (1) temporarily pauses or "tolls" the running of the one-year MTCA statute of limitations. This "tolling period" is, by default, 120 days if the governmental entity is a political subdivision. However, if the governmental entity denies the claim, the "tolling period" ends on the date the claimant receives notice of that denial. At the end of the "tolling period," the claimant then has an additional ninety (90) days, plus the number of days he had remaining on his original one-year MTCA limitations period, in which to file his complaint. For purposes of clarity, this 90-day time period will be called the "filing period."

The specific issue presented to the trial court focused on a denial letter from George County's liability carrier, Zurich. (R. at 107-132; TR. at 144-148; TR. at 5-15). The Mississippi Supreme Court discussed at length the time requirements of Miss. Code Ann § 11-46-11(3) in

Page v. University of Southern Mississippi, 878 So.2d 1003 (Miss. 2004). In addressing the effect a denial has on the tolling of the statute of limitations, the court sated that, "Once the claims is denied, the tolling period ends immediately, and the additional 90 days is added to the remaining time left in the original one year period not used at the time notice was received." *Id.* at 1005 (¶8).

The Court in *Page* provided several scenarios to demonstrate the timing aspects of Miss. Code Ann. § 11-46-11(3) including the following:

> If the cause of action occurs on January 1, 2003, and notice is received on November 1, 2003 (304 days later), the 120-day tolling period would end on February 29, 2004. However, if the claim were denied on December 1, 2003, the Tolling period would end immediately. The claimant would have 61 days left in The original one-year statute (365 days minus 304 days). Adding the additional 90 Days to file suite, the action would have to be filed by April 30, 2004.
>
> *Id.* at 1008 (¶ 20).

Here, the accident occurred on February 28, 2006. Thus, Blackston and Stapleton had to file their notice of claim no later than February 28, 2007. They filed their notice of claim on February 21, 2007, so they had seven (7) days remaining on their original one-year MTCA limitations period. However, George County, by and through its contracted liability insurance carrier, Zurich, denied Blackston's and Stapleton's claims, as indicated by the denial letter dated April 30, 2007. (*See* R. at 127). The Plaintiffs received this notice of the denial of their claim on May 4, 2007. (*See* R. at 128-30). Therefore, the Plaintiffs' "tolling period" ended and their "filing period" began on May 4, 2007. They thus had ninety-seven (97) days from that date, or until August 9, 2007, to file their Complaint (90 days under the MTCA plus 7 days remaining on the limitations period). Blackston and Stapleton did not file their Complaint until August 30, 2007, which is 118 days after they received notice of the denial of their claim. Hence, the

Plaintiffs' Complaint was untimely filed, twenty-one (21) days too late. Blackston and Stapleton did not deny receipt of the letter from Zurich denying the claims. (R. at 137-141; TR. at 5-15).

Based on these facts, George County filed its Motion to Dismiss and/or for Summary Judgment, asserting that the case should be dismissed with prejudice because the Complaint was untimely filed, pursuant to Section 11-46-11(3). (R. at 107-09; TR. at 575). However, the Plaintiffs argued in response, and the trial court held, that the Zurich denial letter was not binding on George County and was thus not effective as a notice of denial under Section 11-46-11(3). (*See* R. at 150). Therefore, the court found that no denial of claim was issued by George County, the 120-day "tolling period" was not stopped, and the Plaintiffs' Complaint was timely filed. *Id.*

This was error, for the following reasons. First, the statutory scheme embodied in the MTCA recognizes the fact that governmental entities, such as George County, will engage the services of private liability insurance companies. Section 11-46-16 allows governmental entities to purchase such liability insurance policies to cover wrongful or tortious acts of itself or its employees. Miss. Code Ann. § 11-46-16. And Section 11-46-17(3) requires all political subdivisions of the state, including George County, to procure such coverage, either through private liability insurance or a self-insurance fund or a combination of both. Miss. Code Ann. § 11-46-17(3). These sections would be without merit if the Legislature would allow, or basically require, George County to contract for the services of a liability insurance carrier, such as Zurich, but prohibit Zurich from satisfying its contractual obligations to investigate, evaluate, and (when appropriate) pay or deny claims such as occurred herein.

Second, George County conferred authority on Zurich to investigate, evaluate, and pay/deny claims, by virtue of its decision to contract for and purchase liability insurance from Zurich. An agency relationship existed and a principal is bound by the acts of the agent as

against a third party where the agent had (1) express authority directly granted by the principal to bind the principal as to certain matters, (2) implied authority to bind the principal to those acts of the agent that are necessary, proper and usual in the exercise of the agent's express authority, (3) apparent authority, *i.e.* authority that the principal has by words or conduct held the alleged agent out as having, and (4) authority that the principal is estopped to deny. *Patriot Commercial Leasing Co. v. Jerry Enis Motors, Inc.*, 928 So.2d 856, 864 (Miss. 2006) (citing *Bolus v. United Penn Bank*, 525 A.2d 1215, 1221 (Pa. Super. 1987), *alloc. denied*, 541 A.2d 1138 (Pa. 1988)).

Here, Zurich had actual and apparent authority to deny the Plaintiffs' claim on behalf of George County. The Board contracted with Zurich for liability insurance coverage, which contractually obligated Zurich to investigate and evaluate claims against George County. Furthermore, Zurich's decision to pay or deny such a claim is a necessary, proper, and usual act in the exercise of Zurich's express authority to investigate and evaluate the claim by Zurich which it may be obligated to pay the asserted claim under the insurance contract. Thus, by executing an insurance contract with Zurich, George County expressly and directly conferred actual authority upon Zurich to investigate, evaluate, and pay/deny claims against the County. Blackston and Stapleton clearly knew George County had insurance and then received a denial letter regarding their specific claims. Blackston and Stapleton could have had no doubt that George County would not pay their claims when its insurance company had denied the claim.

Similarly, by entering into the insurance contract, George County held Zurich out as having the authority to investigate, evaluate, and pay/deny such claims. "Apparent authority exists when a reasonably prudent person, having knowledge of the nature and the usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have." *Barnes, Broom, Dallas and*

McLeod, PLLC v. Estate of Cappaert, 991 So.2d 1209, 1211-12 (Miss. 2008) (quoting *Eaton v. Porter*, 645 So.2d 1323, 1325 (Miss. 1994)). One of the situations in which an agent has apparent authority to bind a principal is "acts or conduct by the principal indicating the agent's authority[.]" *Id.*

Here, George County's act of entering into the insurance contract with Zurich indicates Zurich's authority to handle claims. And when the Plaintiffs' attorney received the denial letter from Zurich, he was at least put on notice of Zurich's apparent authority to deny Blackston's and Stapleton's claim. The letter expressly states that Zurich's insured is the "George County Board," and specifically refers to "our insured" three times, including once when it states that Zurich "do[es] not feel that our insured is responsible for your client's damages [and] we are unable to pay your client's claim." (R. at 127). The denial letter was sent via certified mail. (R. at 131-132).

If this language is not a denial of the Plaintiffs' claim, it is difficult to imagine what would be. With respect to the required language of the denial letter, this Court is confronted with a far different legislative requirement than that of the claimant's notice of the claim. Section 11-46-11(2) sets our seven specific categories of information that the claimant's notice of claim must contain. *See* Miss. Code Ann. § 11-46-11(2). However, there is no similar statutory provision outlining the specific required contents of the governmental entity's notice of denial of the claim. The statute simply speaks of a "notice of denial of claim." *See* Miss. Code Ann. § 11-46-11(3). It does not specifically require the notice to contain the words "deny," "denied," or "denial." Hence, all it requires is some reasonable "notice" that the "claim" is "denied." *Id.*

Therefore, based on a simple and straightforward reading of the language of the denial letter, a reasonably prudent person would be justified in knowing that an insurer has the power to pay or deny claims against its insured. Thus, the Plaintiffs and their attorneys should have known that Zurich's decision to deny the claim was made on behalf of its insured, George County, that the denial letter was sent on behalf of George County, and thus, that it constituted a notice of denial under Section 11-46-11(3). If it is assumed for purposes of this argument that Zurich had decided to pay the Plaintiffs' claim and had sent them a check to pay for it, the Plaintiffs certainly would not have challenged Zurich's authority to do so and would have had no problem accepting the check.

Moreover, the argument by the Plaintiffs in response to the Motion to Dismiss that George County may only act through its Board of Supervisors does not render the Zurich denial letter ineffective as a notice of denial of claim under Section 11-46-11(3). The effect and intent of the letter from Zurich on behalf of its insured George County was to deny the claims. The Plaintiffs argued to the trial judge that the Board may only take those actions that are spread upon its minutes, but that there is no mention in the Board's minutes of the Board's denial of their claim or a request by Zurich to deny it. (R. at 139-42) (citing Miss. Code Ann. § 19-3-27; *Rawls Springs Utility District v. Novak*, 765 So.2d 1288 (Miss. 2000)). However, George County clearly had a contract for insurance with Zurich who was acting on its behalf.

Finally, the statutory language regarding the notice of denial of claim is not so abundantly clear as the trial court suggested. Strict compliance is required for the duty to send a notice of claim under Section 11-46-11(1), and substantial compliance is required with respect to the contents of the notice. *See Price v. Clark*, 21 So.3d 509, 520 (Miss. 2009). There is no case law or other authority in this state requiring strict compliance as to "who" sends the notice of

denial of a claim, much less which expressly requires a notice of denial of a claim to come directly from the governmental entity itself and not from its representative insurance company. Although the trial court noted that "[t]here is case law in Mississippi on this point[,]" (R. at 149), the court nonetheless ultimately held that the provisions and directions of the MTCA are abundantly clear that the notice of denial of a claim must be specifically prepared and sent by the governmental entity, here George County, instead of the County's liability insurer.

George County disagrees that the MTCA is so clearly defined. Section 11-46-11(3) speaks of the governmental entity "denying" the claim and "serving" the notice of denial, and of the claimant receiving the notice "from the governmental entity." Miss. Code Ann. § 11-46-11(3). However, to interpret these phrases to require, absolutely, the governmental entity itself to send the notice of denial cannot be what the Legislature intended. If such a strict reading of Section 11-46-11(3) requires the Board of Supervisors itself to send the notice of denial of claim to the claimant, then a similarly strict reading of Section 11-46-11(1) would require the claimant himself to send the notice of claim to the County. Section 11-46-11 states that:

> [A]ny person having a claim for injury arising under the provisions of this chapter against a governmental entity or its employee shall proceed as he might in any action at law or in equity; provided, however, that ninety (90) days prior to maintaining an action thereon, such person shall file a notice of claim . . . .

Miss. Code Ann. § 11-46-11(1) (emphasis added). Thus, the MTCA requires the "person having the claim" to file the notice of claim, not that person's agent, attorney, or other representative.

Here, the claimants are Blackston and Stapleton. But the notice of claim was signed by, and sent to and filed with George County by their retained attorney not the Plaintiffs themselves. (*See* R. at 119-26). If a strict reading of subsection (3) requires the George County Board of Supervisors itself to send the notice of denial of claim to the Plaintiffs, then the Plaintiffs' notice

of claim would also be ineffective under subsection (1), because it was not filed by Blackston and/or Stapleton. Miss. Code Ann. § 11-46-11(1). These interpretations could not have been the intent of the legislature.

In sum, the statutory scheme of the MTCA recognizes the ability of liability insurers to handle claims against their insured governmental entities, such as George County. Although Section 11-46-11 is exceedingly clear as to the contents of the notice of claim, there is no similar clear statutory expression related to the notice of denial of claim, its contents, or exactly who must send it. Furthermore, the specific statutory language is not so clear or definite to prohibit such an entity's insurer, like Zurich, from preparing and issuing a notice of denial of a claim on behalf of its insured.

Therefore, the denial letter sent by Zurich on behalf of the George County Board of Supervisors on April 30, 2007, did in fact constitute a "notice of denial of claim" under Section 11-46-11(3), and the Plaintiffs' receipt of the notice on May 4, 2007, ended the 120-day tolling period and started the 97-day filing period. Since Blackston and Stapleton filed their Complaint more than ninety-seven days after May 4th, it was untimely filed. Thus, the circuit court clearly erred on May 22, 2008, when it denied George County's Motion to Dismiss and/or for Summary Judgment. Accordingly, this Court should reverse the trial court's denial of George County's Motion to Dismiss and/or for Summary Judgment, grant the Motion, and dismiss this case with prejudice.

CONCLUSION

The trial court's ultimate findings of fact were supported by substantial, credible, and reasonable evidence, and its conclusions of law were not manifestly wrong or clearly erroneous. However, the trial court erred when it denied George County's Motion to Dismiss, or in the

Alternative, for Summary Judgment. The Plaintiff's Complaint clearly was time-barred by Section 11-46-11(3) because the Plaintiffs filed their Complaint more than ninety-seven days after they received notice of George County's denial of their claim.

WHEREFORE, PREMISES CONSIDERED, George County respectfully requests that this Court issue an opinion reversing and rendering the trial court's denial of George County's Motion to Dismiss, or in the Alternative, for Summary Judgment, and granting said Motion. In the alternative, George County respectfully requests that this Court issue an opinion affirming the trial court's ultimate verdict in favor of George County, as said verdict is supported by substantial, reasonable, and credible evidence and is not manifestly wrong, clearly erroneous, or against the overwhelming weight of the evidence.

RESPECTFULLY SUBMITTED, this the 24th day of May, 2011.

GEORGE COUNTY, MISSISSIPPI

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CERTIFICATE OF SERVICE

I, the undersigned, attorney of record for the Defendant, Marion County, do hereby certify that I have this day forwarded, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to:

A. Malcolm N. Murphy
P.O. Box 35
Lucedale, MS 39452

Darryl A. Hurt
385 Ratliff Street
Lucedale, MS 39452

Hon. Robert P. Krebs
Circuit Judge
P.O. Box 998
Pascagoula, MS 39568-0998

THIS, the 24th day of May, 2011.

Kimberly S. Rosetti
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