IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2011-CA-00540

ARNETRIA L. AULTMAN — APPELLANT

VS.

LAWRENCE COUNTY, MISSISSIPPI — APPELLEE

ON APPEAL FROM THE
CIRCUIT COURT OF LAWRENCE COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certify 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. Arnetria L. Aultman – Appellant/Plaintiff.

2. C.E. Sorey, II, Esq. – Attorney for Appellant/Plaintiff.

3. Lawrence County, Mississippi – Appellee/Defendant.

4. Roy A. Smith, Jr., Esq., and Steven J. Griffin, Esq., of Daniel Coker Horton & Bell, P.A. – Attorneys for Appellees/Defendants.

5. Honorable Prentiss G. Harrell – Lawrence County Circuit Court Judge.

Respectfully submitted, this the 11th day of October, 2011.

Roy A. Smith, Jr.
Steven J. Griffin
Attorneys of Record for Appellee
Lawrence County, Mississippi

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Appellee submits that oral argument is unnecessary because the facts and legal arguments are adequately presented in the Appellee's brief and the Appellate Record. Accordingly, this Court's decisional process will not be aided by oral argument. However, should this Court so require, Appellee is available for oral argument.

I. STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting summary judgment to Lawrence County, Mississippi, under the immunities provided by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-9(1)(d) and § 11-46-9(1)(v).

II. STATEMENT OF THE CASE

A. Nature of the Case

This is a personal injury action based on common law negligence and filed pursuant to MISS. CODE ANN. § 11-46-7. (R. 4-7).[1] Defendant, Lawrence County, Mississippi, raised affirmative defenses based upon immunity provided by the Mississippi Tort Claims Act under MISS CODE ANN. § 11-46-9. (R. 8-12). The trial court granted summary judgment in favor of Defendant based on discretionary function immunity under § 11-46-9(1)(d). (R. 49-54).

B. Course of Proceedings and Disposition in the Court Below

Plaintiff, Arnetria L. Aultman (hereinafter referred to as "Plaintiff"), filed her Complaint against Defendant, Lawrence County, Mississippi (hereinafter referred to as "Defendant"), in the Circuit Court of Lawrence County, Mississippi, on June 15, 2010. (R. 4-7). Plaintiff charged Defendant with negligence for failing to properly warn the public that Oak Grove Road had washed out. *Id.* Defendant filed its Answer and Affirmative Defenses on July 15, 2010, (R. 8-12), and it filed its Motion for Summary Judgment and its memorandum in support on October 23, 2010. (R. 13-15, 37A-37J). Plaintiff filed her response to the motion for summary judgment and her memorandum in opposition on November 1, 2010. (R. 38-39, 37K-37O). Defendant filed its rebuttal memorandum on November 10, 2010. (R. 37P-37W).

The Circuit Court of Lawrence County, Mississippi, granted Defendant's Motion for Summary Judgment based on discretionary function immunity under § 11-46-9(1)(d) and entered

[1] Citations to "R." refer to page numbers in the Appellate Record.

a Memorandum Opinion and Order on March 14, 2011. (R. 49-54). Plaintiff then filed her notice of appeal on April 7, 2011. (R. 55).

C. Summary of the Facts

Just after midnight on April 13, 2009, Plaintiff was injured when the vehicle she was driving crashed into a crevasse formed by a washed out section of Oak Grove Road in Lawrence County, Mississippi, following a heavy rainfall. (R. 4, 26-29). Another vehicle, driven by Angelean Ball, had fallen into the crevasse a few hours earlier around 9 p.m. when the road first gave way. (R. 25, 30-37). The front right tire on Ball's vehicle was initially stuck in a hole in the road, but before a tow truck could respond, the roadway completely collapsed and her vehicle fell into the newly-formed crevasse. (R. 25). The crevasse was estimated to be about twenty feet across and ten feet deep. (R. 25, 47). Heavy rains that evening caused flash flooding and the washing out of other roads across Lawrence County, as well. (R. 34).

Immediately following the first accident involving Angelean Ball, Lawrence County supervisors Archie Ross and Steve Garrett placed barricades blocking traffic from entering Oak Grove Road at its intersections with F.E. Sellers Highway to the west and John Peyton Lane to the east. (R. 34-35). The barricades, which had three orange and white planks going across them, were placed in such a way that a motorist could not misconstrue that the road was closed, and a motorist would have had to drive her vehicle off the roadway to go around them. (R. 30-37). When Archie Ross left the scene around 11:30 p.m., he confirmed that the barricades were properly in place. (R. 35). Construction barrels were also placed within several feet of each side of the hole where the road had washed out, according to sworn affidavits from sheriff's deputy Jonathan Alford and volunteer firefighter John Fuller. (R. 30-31, 36-37).

Shortly after midnight, Plaintiff turned from F.E. Sellers Highway onto Oak Grove Road and proceeded in an easterly direction until she crashed into the crevasse left by the washed out section

of the roadway. (R. 26-29). In response to Defendant's Motion for Summary Judgment, Plaintiff and the two passengers in her vehicle at the time submitted affidavits stating they encountered an orange and white barricade on the side of the roadway about 12-15 car lengths back from the crevasse, or near where they turned from F.E. Sellers Highway onto Oak Grove Road. (R. 44-46). They claim they did not see any other warning devices prior to the accident. *Id.* However, John Fuller stated that when he returned to the scene following Plaintiff's accident, he found that construction barrels he had placed on the west side of the crevasse had been knocked into the crevasse. (R. 36-37). Sid King, the tow truck driver who worked both accidents that night, also stated that Plaintiff admitted to him that she had driven around a barricade prior to the subject accident. (R. 33).

III. SUMMARY OF THE ARGUMENT

This action was filed against Lawrence County, Mississippi, pursuant to the Mississippi Tort Claims Act ("MTCA"), MISS. CODE ANN. § 11-46-1, *et seq*. The MTCA provides governmental entities such as Defendant and its employees with immunity from claims for money damages for certain conduct performed within the course and scope of their employment. MISS. CODE ANN. § 11-46-9(1).

Plaintiff has charged Defendant with negligence for failing to warn the public of a dangerous condition after it received notice that a section of Oak Grove Road in Lawrence County had been washed out due to heavy rainfall. (R. 4-7). Any decision of Lawrence County officials to put out warning signs and the manner in which it did so was a discretionary function for which it receives immunity under § 11-46-9(1)(d). Such decisions require county officials to use their judgment and discretion. There is no statutory requirement as to if or when Defendant should put out warning signs, nor is there a requirement regarding the manner in which they should be put out. Mississippi courts have consistently held that the duty of local government entities to warn motorists of dangerous road conditions constitutes a discretionary function for which immunity applies under § 11-46-9(1)(d). Defendant's decision regarding the placement of warning barricades and barrels on the night of the subject accident was also rooted in sound public policy. Putting out warning barricades and barrels to block motor vehicle access to the washed out section of the roadway until it could be repaired the next day was reasonable given the county's limited resources and the fact that other roads across the county had also been washed out that night. Thus, discretionary function immunity applies and Defendant is entitled to judgment as a matter of law.

Although Plaintiff claims the only warning sign she saw on the night of the accident was an orange and white barricade off to the side of the roadway, Defendant is immune under § 11-46-9(1)(w) from any claims arising out of the removal by third persons of warning devices it had

previously placed near the dangerous condition where it had no notice of such.

Also, despite Plaintiff's argument that Defendant is not immune under § 11-46-9(1)(v), the Court need not even address this argument due to the fact that Defendant has immunity under the discretionary function exception under § 11-46-9(1)(d). Even if § 11-46-9(1)(v) were applicable, Plaintiff's claims would be completely barred since the dangerous condition which caused the subject accident was open and obvious to motorists exercising due care. Plaintiff admitted that she passed a warning barricade some twelve to fifteen car lengths prior to reaching the crevasse, which has been described as ten feet deep and twenty-four feet wide.

Accordingly, there is no genuine issue of material fact and the trial court properly granted summary judgment in favor of Defendant based upon the immunities provided by the MTCA.

IV. THE ARGUMENT

This action was filed against Lawrence County, Mississippi, pursuant to the Mississippi Tort Claims Act ("MTCA"), MISS. CODE ANN. § 11-46-1, *et seq*. The MTCA provides governmental entities such as Lawrence County and its employees with immunity from claims for money damages for certain conduct performed within the course and scope of their employment. MISS. CODE ANN. § 11-46-9(1). Immunity is provided for discretionary functions involving policy decisions. § 11-46-9(1)(d). The MTCA also grants immunity for claims arising out of the removal by third parties of warning signs where the government entity has no notice of such. § 11-46-9(1)(w). Further, a plaintiff's claims for failure to warn are barred where an allegedly dangerous condition is open and obvious. § 11-46-9(1)(v).

A. Standard of Review

This matter is before the Court on review of the trial court's decision to grant summary judgment on the basis of immunity under the Mississippi Tort Claims Act. This Court utilizes a de novo standard when examining a grant or denial of summary judgment. *Fortenberry v. City of Jackson*, 2011 Miss. LEXIS 88 (Miss. Feb. 10, 2011). Review of a government entity's immunity under the MTCA triggers de novo review, since immunity is a question of law. *Id.* (citing *City of Jackson v. Harris*, 44 So. 3d 927, 931 (Miss. 2010)).

Rule 56 of the Mississippi Rules of Civil Procedure provides that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law. MISS. R. CIV. P. 56. Evidence is analyzed in the light most favorable to the non-moving party. *Fortenberry*, 2011 Miss. LEXIS 88. However, the presence of a hundred contested issues of fact will not prevent summary judgment where there is no genuine dispute regarding material issues of fact. *Shaw v. Burchfield*, 481 So.2d 247, 252

(Miss. 1985). A fact is "material" if it "tends to resolve any of the issues properly raised by the parties," *Morgan v. City of Ruleville*, 627 So.2d 275, 277 (Miss. 1993), and a dispute over a material fact is "genuine" only if the evidence is such that "reasonable minds in a jury could differ on such an issue." *Strantz v. Pinion*, 652 So.2d 738, 741 (Miss. 1995).

B. Trial Court Properly Granted Summary Judgment Based Upon Immunities Provided by the Mississippi Tort Claims Act.

Defendant constitutes a "governmental entity" and "a political subdivision" pursuant to the Mississippi Tort Claims Act ("MTCA"). MISS. CODE ANN. § 11-46-1. The MTCA provides the exclusive remedy against a governmental entity or its employees for the acts or omissions which give rise to the suit. MISS. CODE ANN. § 11-46-7(1) (Rev. 2002). The intent of the MTCA is to provide immunity from suit to the state and its political subdivisions for wrongful or tortuous acts or omissions. *See* MISS. CODE ANN. § 11-46-3(1) (Rev. 2002). However, the MTCA waives immunity for claims for money damages arising out of the torts of governmental entities and employees while acting within the course and scope of their employment, to the extent set forth in the MTCA. MISS. CODE ANN. § 11-46-5 (1) (Rev. 2002).

MISS. CODE ANN. § 11-46-9 provides specific circumstances and/or claims in which a governmental entity is exempt from the waiver of immunity; thus, the governmental entity is not liable. If any one of these exceptions apply, "the government is completely immune from any claim arising from the act or omission complained of." *Simpson County v. McElroy*, 2011 Miss. App. LEXIS 220 (Miss. Ct. App. Apr. 19, 2011). In the instant action, the trial court properly granted summary judgment in Defendant's favor under Miss. Code Ann. § 11-46-9(1)(d). Defendant is also immune from Plaintiff's claims pursuant to §§ 11-46-9(1)(w), and -(v).

1. The placement of traffic control devices or warning signs is a discretionary function for which Lawrence County has immunity under MISS. CODE ANN. 11-46-9(1)(d).

The MTCA provides government entities and their employees acting within the course and scope of their employment with immunity from claims "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused[.]" MISS. CODE ANN. § 11-46-9(1)(d). If a government employee is performing a discretionary function, then the governmental entity is immune, regardless of whether the employee has abused his discretion. *Collins v. Tallahatchie County*, 876 So. 2d 284, 289 (Miss. 2004). Under the plain language of the statute, immunity applies regardless of whether Defendant failed to exercise or perform the discretionary duty. *See Miss. Transp. Comm'n v. Montgomery*, 2011 Miss. LEXIS 489, *21-22 (Miss. Oct. 6, 2011).

The Mississippi Supreme Court has adopted a two-part public-function test to determine whether government conduct constitutes a discretionary function. *Knight v. Miss. Transp. Comm'n*, 10 So. 3d 962, 968 (Miss. Ct. App. 2009). The first inquiry is whether the activity "involved an element of choice or judgment." *Id.* If so, the next question is whether the choice involved social, economic, or political policy. *Id.* If both prongs of this test are met, a governmental entity is entitled to retain its immunity under the discretionary function exception. *Strange v. Itawamba County Sch. Dist.*, 9 So.3d 1187, 1190 (Miss. Ct. App. 2009).

In answering the first inquiry, it must be determined whether a duty is discretionary or ministerial. *Knight*, 10 So. 3d at 968. A duty is discretionary when it is not imposed by law and "requires an official to use her own judgment and discretion in the performance thereof." *Covington County Sch. Dist. v. Magee*, 2010 Miss. LEXIS 45, 7 (Jan. 28, 2010). On the other hand, governmental conduct is considered ministerial "if the duty is one which has been positively

imposed by law and its performance required at a time and in a manner or under conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." *Id.* If the District's conduct is deemed ministerial, liability is only imposed if the district did not act with ordinary care in performing or failing to perform its statutory duty. *Id.* Discretionary duties under MISS. CODE ANN. § 11-46-9(1)(d), however, do not require a duty of ordinary care. *Montgomery*, 2011 Miss. LEXIS 489, *17; *Barrentine v. Miss. Dep't of Transp.*, 913 So. 2d 391, 394 (Miss. Ct. App. 2009) (recognizing "the Mississippi Supreme Court has overruled the line of cases holding that the placement of traffic control devices should be analyzed within the context of ordinary care").

The second prong limits the scope of discretionary function immunity to those functions "which by nature are policy decisions, whether made at the operational or planning level." *McElroy*, 2011 Miss. App. LEXIS 220, at *12. The purpose of this provision of the MTCA is to "prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.*

a. Lawrence County used its judgment and discretion in warning traffic of a dangerous condition on Oak Grove Road.

The Mississippi Legislature addressed the duty of local government entities to place warning signs in MISS. CODE ANN. § 63-3-305, which states:

> Local authorities in their respective jurisdictions shall place and maintain such traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this chapter or provisions of local traffic ordinances or to regulate, warn, or guide traffic. All such traffic-control devices hereafter erected shall conform to the state manual and specifications.
>
> Local authorities in exercising those functions referred to in the preceding paragraph shall be subject to the direction and control of the state highway commission.[2]

[2] The same duties are placed upon the commissioner of public safety and the state highway commission by § 63-3-303. That statute provides:

(Emphasis added). "Official traffic-control devices" has been defined as "all signs, signals, markings, and devices not inconsistent with this chapter placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic." MISS. CODE ANN. § 63-3-133.

The "as they may deem necessary" language contained in the statute clearly indicates that local authorities must make a judgment regarding the types and placement of traffic control devices on the roads within their jurisdictions. *Jones v. Miss. DOT*, 744 So. 2d 256, 262 (Miss. 1999). These statutes "do not impose any specific directives as to the time, manner, and conditions for carrying out" a government entity's "duty in maintaining highways or posting traffic-control or warning devices; thus, the above duties are not ministerial in nature." *Lee v. Miss. DOT*, 2009 Miss. App. LEXIS 604 (Miss. Ct. App. Sept. 15, 2009), citing *Knight*, 10 So. 3d at 970 (Miss. Ct. App. 2009).

It is well-established in Mississippi that warning of road hazards by local government jurisdictions is a discretionary function that triggers immunity under § 11-46-9(1)(d). *See Montgomery*, 2011 Miss. LEXIS 489 at *20 ("whether and how to warn of a dangerous condition on a highway involves judgment calls and choices and thus is not ministerial under § 63-3-305"); *McElroy*, 2011 Miss. App. LEXIS 220 at *11-12 (county's actions regarding which warning signs to use and placement of those signs after a road washout "were discretionary, not ministerial"); *Knight*, 10 So. 3d at 970 (Miss. App. 2009) (placement of highway warning signs discretionary); *Barrentine*, 913 So. 2d at 393-94 ("The decision to place traffic control signs is a discretionary

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> The commissioner of public safety and the state highway commission shall place and maintain such traffic-control devices conforming to its manual and specifications, upon all state and county highways as it shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic. No local authority shall place or maintain any traffic-control device upon any highway under the jurisdiction of the commissioner of public safety and the state highway commission except by the latter's permission.

governmental function"); *Jones*, 744 So. 2d at 263 (Miss. 1999) ("the placement of traffic control devices is in the discretion of the responsible entity"); *Willing v. Estate of Benz*, 958 So. 2d 1240, 1250 (Miss. Ct. App. 2007) (method of warning of icy patch on highway discretionary).

The duty to place warning signs after having notice of a dangerous condition was addressed by the Mississippi Court of Appeals in a recent case similar to the present action. *See Willing*, 958 So. 2d 1240. In *Willing*, a driver on Highway 82 in Greenwood lost control of her vehicle after hitting a patch of ice. *Id.* at 1243. The driver reported the patch of ice to Officer Beck of the Greenwood Police Department, who reported the ice to the police dispatcher. *Id.* After Officer Beck left the scene of the accident, a second driver drove over the patch of ice, lost control of her vehicle, and struck and killed Joseph Willing, Sr., who was repairing a sign damaged in the first accident. *Id.* at 1243-44. Mr. Willing's wrongful death beneficiaries sued the City of Greenwood, alleging Officer Beck failed to warn motorists of the ice on the highway. *Id.* The trial court granted summary judgment in favor of the City of Greenwood. *Id.* at 1245. The appellate court affirmed the ruling, finding that Greenwood's duty to warn was discretionary: "Although the Willings are correct in that the city generally has a duty to warn of dangerous conditions of which it has knowledge, the precise time, manner, and conditions upon which this duty could be carried out involve an element of choice or judgment." *Id.* at 1251 (emphasis added).

The Mississippi Supreme Court recently reaffirmed that the duty to warn motorists of dangerous road conditions is discretionary. In *Montgomery*, 2011 Miss. LEXIS 489, the plaintiff was traveling north on Interstate 55 near Vaughan when her vehicle struck a 12-foot-by-15-foot pothole in her lane of travel, causing injuries. She alleged the Mississippi Transportation Commission had notice of the pothole and failed to repair it, failed to use proper precautions in responding to hazardous conditions, and failed to properly warn motorists of the hazardous condition. *Montgomery*, 2011 Miss. LEXIS 489 at *6-7. Although there was a dispute over whether

the Commission had notice of the pothole prior to the accident, the Court held "the decision of whether and how to warn of a dangerous condition on a highway involves judgment calls and choices and thus is not ministerial under § 63-3-305."[3] *See Id.* at *20.

In the case *sub judice*, it is undisputed that Lawrence County officials responded following an incident on Oak Grove Road involving Angelean Ball where heavy rains washed out a large section of the roadway. (R. 30-31, 34-37). It is also undisputed that county officials, including county supervisors and volunteer firefighters, put out barricades and construction barrels following Ball's incident. *Id.* While there is some dispute regarding what warning devices were in place at the time of Plaintiff's accident a couple hours later, Plaintiff and two of her passengers each submitted affidavits admitting that they passed at least one warning barricade at or near Oak Grove Road's intersection with F.E. Sellers Highway prior to the accident. (R. 44-46).

Lawrence County officials exercised their judgment and discretion in choosing to place warning barricades and barrels on Oak Grove Road following the first accident. They also used their judgment in determining which signs to put out and where to place them. *See Montgomery*, 2011 Miss. LEXIS 489, at *20.

Plaintiff argues on appeal that Defendant had a ministerial duty under§ 63-3-305 regarding the types and placement of warning devices on streets within its jurisdiction pursuant to the provisions of the Manual of Uniform Traffic Control Devices (MUTCD). Plaintiff cites several provisions of the MUTCD which are marked as "Guidance" for the placement of "Road Closed" signs in the event of a road closure. *See* MUTCD (Rev. 2009), Section 6, F.08. However, the provisions of the MUTCD cited by Plaintiff do not place any mandates upon Lawrence County officials regarding the placement of warning signs. In fact, the manual states that it generally

[3] The *Montgomery* court remanded the case to the trial court for determination of whether the duty to warn of the pothole was grounded in policy considerations under the second prong of the discretionary public-function test. Neither party addressed the policy prong of the public-function test in their briefs. *Id.* at *24-25.

"describes the application of traffic control devices, but shall not be a legal requirement for their installation." MUTCD § 1A.09 (2009 Ed.). The Mississippi Supreme Court has held the provisions and guidelines of the MUTCD are advisory in nature to a finder of fact but have no significance with respect to questions of law. *Chisolm v. Miss. Dep't of Transp.*, 942 So. 136, 143 (Miss. 2006).

In interpreting the language of § 63-3-303 and § 63-3-305, the Mississippi Supreme Court has found that these statutes direct local authorities "to refer to 'the manual' for guidance on the placement of traffic control devices. However, §§ 63-3-303 and 63-3-305 both contain language indicating that the placement of traffic control signs or devices is dependent upon the discretion of the responsible entity." *Jones*, 744 So. 2d at 263 (emphasis added) (finding the use and placement of warning signs by MDOT and Tunica County was a discretionary function for which Defendants had immunity, rejecting the plaintiff's argument that there was a ministerial duty under the MUTCD). The plain language of § 63-3-303 indicates that Lawrence County officials must use their own "judgment or discretion" in choosing the types and placement of warning signs, and these decisions are discretionary. *Id.*

Sections 63-3-303 and 63-3-305 "do not impose any specific directives as to the time, manner, and conditions for carrying out" a government entity's "duty in maintaining highways or posting traffic-control or warning devices; thus, the above duties are not ministerial in nature." *Lee*, 37 So. 3d at 79, citing *Knight*, 10 So. 3d at 970. In fact, all the statutes relating to placing warning signs require that government entities use their "judgment and discretion in carrying out the duties prescribed therein." *Id.* Although the MUTCD may be useful in providing *guidance* to Lawrence County officials, ultimately it is the persons charged with maintaining roadways who are best suited to determine the necessary signs and their placement based on their judgment and discretion. *See Jones*, 744 So. 2d at 263

The Mississippi Court of Appeals recently found a county was immune under § 11-46-

9(1)(d) in a similar set of circumstances. *See McElroy*, 2011 Miss. App. LEXIS 220. In *McElroy*, heavy rains had washed out a culvert below a county-maintained road. The county road crew placed small, hand-painted "road closed" signs on each side of the washout and stretched yellow warning tape across the road with fluorescent streamers hanging between the strands of tape. *Id.* at *2. The road crew then left that location to work on other road hazards created by the storm. *Id.* The next morning, the plaintiff was injured when he crashed his vehicle into the washout driving fifty miles per hour, and he testified he saw no warning signs or warning tape prior to the accident. *Id.* The trial court denied the county's summary judgment motion, finding it failed to exercise ordinary care under MISS. CODE ANN. § 11-46-9(1)(b) by using inadequate signs "in light of the attendant weather circumstances" instead of getting larger signs and barricades. *Id.* at *3. The appellate court reversed and rendered, finding the county immune under § 11-46-9(1)(d) because the road crew used its judgment and discretion in choosing to use the hand-painted warning signs and caution tape for a temporary road closure, and its actions were grounded in economic policy. *Id.* at *12-13.

Plaintiff in the instant action takes issue with the types of warning devices used by Lawrence County officials and their placement on Oak Grove Road prior to her accident. However, the decisions of county officials regarding the manner, conditions, and placement of warning signs for temporary road closures were clearly discretionary. County officials used their judgment and discretion in determining which signs to place and where to place them. The county officials and a tow truck driver who submitted affidavits on behalf of Defendant all stated that the warning barricade used at the intersection of Oak Grove Road and F.E. Sellers Highway was wide enough that a vehicle would have to drive off the roadway to go around it. (R. 30-37). These actions were not an abuse of discretion; but even if they were, Defendant would still have immunity under § 11-46-9(1)(d).

As supported by the extensive case law discussed supra, the decisions of Lawrence County

officials regarding the use and placement of warning signs were discretionary. Therefore, the first prong of the public-function test has been met.

b. Lawrence County's decisions regarding the placement of warning signs were grounded in public policy.

The choice and judgment of Lawrence County officials in placing warning barricades on Oak Grove Road was also grounded in sound policy considerations under the second-prong of the public-function test. "The purpose of the [discretionary function] exception is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Dancy v. East Miss. State Hosp.*, 944 So. 2d 10, 16 (Miss. 2006). "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute ... but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Montgomery*, 2011 Miss. LEXIS 489, at *21, citing *U.S. v. Guabert*, 499 U.S. 315, 325 (1991). To avoid summary judgment, Plaintiff – under the public-function test – has to rebut the presumption that the duty to warn of a washed out section of Oak Grove Road was grounded in policy considerations. *See Montgomery*, at 23-24, citing *Dancy*, 944 So 2d at 18 (When "established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.").

Mississippi courts have previously held that the placement of traffic control or other warning devices requires the consideration of policy grounds in doing so. *See Knight*, 10 So. 3d at 18 (duty to maintain highways and place warning signs requires policy considerations); *McElroy*, 2011 Miss. App. LEXIS 220, at *12-13 (finding that the county's use of hand-painted road closure signs for temporary road closures during bad weather conditions was grounded in economic policy); *Jones*, 744 So. 2d at 262 (placement of traffic control devices based upon public policy considerations).

Plaintiff here has failed to set forth any facts to rebut this presumption.

Defendant posted warning barricades at Oak Grove Road's intersections with F.E. Sellers Highway to the west and John Payton Lane to the east, as well as construction barrels at the actual site of the crevasse, upon its first notice of the washout in order to block access to the washed out portion of the roadway. (R. 30-37). Lawrence County supervisor Archie Ross stated in his affidavit that heavy rains had caused flash flooding and had washed out several roads across the county that night. (R. 34). Given the county's limited resources and the flash flooding taking place around the area at the time, choosing to place warning signs at both ends of the road until a work crew could begin repairing the washed out section of the road the next day was a reasonable decision grounded in economic and social policy. County officials also should not be expected to stand watch over every hazardous road condition every minute of the day to make sure the signs are not removed. Defendant is not required to be an insurer of motorists' safety on roadways in its jurisdiction. *See also Martin v. Franklin County*, 29 So. 3d 862 (Miss. Ct. App. 2010). Defendant presented these same policy arguments in support of its claim for discretionary function immunity before the trial court (R. 37G-37H), which found Defendant's decision to place barricades and barrels at or near the crevasse on Oak Grove Road to be a discretionary function for which it receives immunity under § 11-46-9(1)(d). (R. 49-54).

Accordingly, Lawrence County's placement of warning devices to alert motorists of the dangerous condition on Oak Grove Road, and its decision regarding the time and manner in doing so, constitutes a discretionary function under the public-function test set forth under Mississippi law. Thus, both prongs of the discretionary public-function test have been met and Defendant is immune from Plaintiff's claims under MISS. CODE ANN. § 11-46-9(1)(d).

2. Lawrence County is immune under MISS CODE ANN. 11-46-9(1)(w) for any claims arising out of the removal of warning signs by third parties.

The record makes clear that county officials took precautions to warn motorists of the dangerous condition on Oak Grove Road immediately following the accident of Angelean Ball by strategically placing warning barricades on the roadway. (R. 30-31, 34-37). Plaintiff asserts that prior to the accident, the only barricade she saw was "sitting off to the side of the roadway." (R. 44). Even if Plaintiff's testimony is taken as true, Defendant cannot be liable for the removal of the warning signs by third parties where it had no notice of such. The MTCA grants immunity to government entities for any claims "[a]rising 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) (emphasis added).[4]

Under similar circumstances to the instant action, the Mississippi Court of Appeals, relying on § 11-46-9(1)(w), affirmed summary judgment for a municipality that had put out a sign warning motorists that a road was closed, but where the sign had been knocked over or moved by an unknown third party prior to the plaintiffs' accident. *Mitchell v. City of Greenville*, 846 So. 2d 1028 (Miss. 2003). The plaintiffs were injured when their vehicle struck a pile of dirt and debris from the construction of a boat ramp. When the municipality's contractor had left the work site about twelve to thirteen hours before, warning signs had been placed on both the north and south portions of the road indicating that the road was closed to thru traffic. *Id.* at 1030. However, the plaintiffs

[4] Although the trial court's Memorandum Opinion and Order does not specifically address the immunity provided under MISS. CODE ANN. § 11-46-9(1)(w), Defendant in its rebuttal brief in support of its motion for summary judgment raised and argued this defense in response to Plaintiff's contention in her Response that the warning barricade was not blocking the roadway when she encountered it just prior to the accident. (R. 37T-37V).

testified they never saw any warning signs prior to the accident, and the sign was later found tipped over. *Id.* at 1030-31. The record indicated the city had taken precautions to warn motorists, and there was nothing in the record to indicate the city knew or should have known the sign had been moved or tipped over. *Id.* at 1031. Thus, the municipality was immune under § 11-46-9(1)(w).

The *Mitchell* court reasoned that § 11-46-9(1)(w) "does not require a governmental entity to actively patrol areas containing warning signs to see if a third party has removed the signs." *Id.* *See also Martin v. Franklin County*, 29 So. 3d 862 (Miss. Ct. App. 2010) (state law does not require county to continuously monitor signs warning of a dangerous condition to ensure they are not removed or stolen). It is well-settled under Mississippi law that a local government entity "is not an insurer of the safety of motorists on its streets." *Id.*

The *Mitchell* decision is instructive here. Plaintiff has presented no evidence to dispute the fact that Defendant placed a warning barricade across Oak Grove Road at its intersection with F.E. Sellers Highway following the incident involving Angelean Ball and before Plaintiff's accident. In fact, Plaintiff asserts that she did in fact see a barricade on the side of the road that matches the description of the one placed across the middle of the roadway earlier that night by Lawrence County officials. (R. 44). If the barricade, as Plaintiff asserts, was actually on the side of the road – instead of across the middle of the road blocking traffic, where county officials left it following the first accident – the only logical explanation is that a third party moved the barricade at some point between the time it was placed and the time Plaintiff turned onto Oak Grove Road. Likewise, Plaintiff has presented no evidence disputing the fact that construction barrels were placed in the road at or near the crevasse following the first accident, other than that she did not see them prior to her accident. Volunteer firefighter John Fuller stated in his affidavit that when he arrived on the scene of Plaintiff's accident, the barrels he had previously placed at that location were, in fact, down in the crevasse. (R. 37).

It is clear under the plain language of § 11-46-9(1)(w) and relevant case law that Defendant cannot be liable for the removal by a third party of the warning barricades unless it was not corrected within a reasonable time after actual or constructive notice. Plaintiff has set forth no evidence whatsoever that Defendant had actual notice that its warning barricades had been removed from the roadway after county officials had placed them there. Only about an hour had passed between the time Archie Ross left the scene of the Ball accident with the barricades still in place and the time of Plaintiff's accident, and county officials were tending to other roads that had washed out across other parts of the county. Thus, it also cannot be said that enough time had passed to place Defendant on constructive notice that the barricade had been moved, if they were even moved as Plaintiff contends.

Plaintiff would have the Court place upon Defendant an absolute duty to protect motorists on roadways within its jurisdiction. As found in *Mitchell*, the law simply does not require county officials to stand watch each minute of the day at every location across their jurisdiction where a dangerous condition exists, especially where they have taken precautionary measures to warn motorists of such dangerous conditions. While this was an unfortunate accident, Defendant clearly is not an insurer of Plaintiff's safety and cannot be held liable if the warning signs it put out were subsequently removed by a third party without its knowledge.

Accordingly, Defendant is immune from liability for any removal of the warning barricades by third parties prior to Plaintiff's accident, pursuant to MISS. CODE ANN. 11-46-9(1)(w).

3. Even if MISS. CODE ANN. § 11-46-9(1)(v) were applicable, Defendant would be immune since the dangerous condition was open and obvious to motorists exercising due care.

Although the trial court granted summary judgment in favor of Defendant based upon the discretionary function immunity found in § 11-46-9(1)(d), the trial court opined in its Memorandum Opinion and Order that it would have also found Defendant immune under § 11-46-9(1)(v). (R. 53).

That statute provides that a government entity and its employees shall not be liable for any claims:

> (v) 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.

(Emphasis added).

The trial court reasoned that the dangerous condition – the washed-out section of Oak Grove Road – was open and obvious to one exercising due care, or, alternatively, that Defendant did in fact warn motorists of the dangerous condition by putting out one or more traffic control devices or warning signs. *Id.* Plaintiff argues on appeal that Defendant should not be immune under § 11-46-9(1)(v) because it had notice of a dangerous condition and allegedly failed to properly warn Plaintiff of the dangerous condition. However, because Defendant is immune from Plaintiff's claims under § 11-46-9(1)(d), the Court need not even address whether Defendant is immune under § 11-46-9(1)(v).

The plaintiff in *Montgomery* relied on MISS. CODE ANN. § 11-46-9(1)(v) to argue the Commission was not immune under the MTCA, regardless of the defendant's claim to immunity under § 11-46-9(1)(d). The plaintiff asserted the Commission had actual or constructive notice of a dangerous condition and had an opportunity to warn her against the condition. *Id.* at *14. However, the Supreme Court held that if the alleged act or omission was discretionary under § 11-46-9(1)(d), it need not even reach the plaintiff's arguments under § 11-46-9(1)(v). *Id.* at 17-18. Accordingly, "the allegations that the Commission was aware of a dangerous condition and allegedly failed to warn of this condition does not waive the Commission's immunity under Section 11-46-9(1)(d) -- assuming the duty to warn of a pothole is a discretionary duty." *Id.* at 23. *See also Knight*, 10 So. 3d at 970 ("Because we have found summary judgment appropriate as to section 11-

46-9(1)(d), we need not engage in any analysis regarding the Appellants' claim as to section 11-46-9(1)(v). ... [W]here any of the immunities enumerated in section 11-46-9(1) apply, the government is completely immune from the claims arising from the act or omission complained of."). Likewise, in the present action, Plaintiff's arguments based on§ 11-46-9(1)(v) are irrelevant since Defendant is immune under § 11-46-9(1)(d).

Even if § 11-46-9(1)(v) were applicable in this case, Defendant would be immune since the dangerous condition Plaintiff claims caused her injuries was open and obvious to a motorist exercising due care. When a premises liability claim is made against a government entity (such as Lawrence County) under the MTCA, the "open and obvious" defense is a complete bar to recovery for a claim of failure to warn of a dangerous condition. *Howard v. City of Biloxi*, 943 So. 2d 751 (Miss. Ct. App. 2006), citing *City of Natchez v. Jackson*, 941 So. 2d 865 (Miss. Ct. App. 2006). Thus, where a "dangerous condition" is open and obvious, a government entity is immune from a failure to warn claim and it serves as a complete bar to recovery.

In this case, Plaintiff and two passengers in her vehicle submitted affidavit testimony that they crashed into a "huge crevasse" in the center of Oak Grove Road in Lawrence County. (R. 44-46). The crevasse was estimated to be approximately twenty feet wide and ten feet deep. (R. 25, 47). Plaintiff also claims that approximately twelve to fifteen car lengths back from the crevasse, she saw an orange and white barricade sitting off to the side of the roadway. (R. 44). Although there had been heavy rains earlier in the evening, the weather was clear at the time of the accident. (R. 26).

As held by the trial court, the crevasse in the middle of Oak Grove Road was open and obvious to a motorist exercising due care. Plaintiff saw a warning barricade prior to reaching the crevasse in the roadway, and the crevasse was large enough that she should have been able to see it if she was exercising due care at the time. Because the dangerous condition was open and obvious

to motorists exercising due care, Plaintiff's claims are completely barred under § 11-46-9(1)(v). Alternatively, the record is clear that Defendant did take action to warn motorists of the dangerous condition by placing orange and white barricades on Oak Grove Road to block access to the washed out section of the roadway, as well as barrels around the crevasse itself. Thus, Defendant has immunity under § 11-46-9(1)(v).

V. CONCLUSION

Lawrence County is entitled to judgment as a matter of law pursuant to the immunity provisions of the MTCA. Defendant's decision regarding the placement of warning signs to alert motorists of a washed-out section of Oak Grove Road was based on its judgment and discretion, and it was rooted in sound public policy. Therefore, Defendant has immunity under the discretionary function exemption provided by MISS. CODE ANN. § 11-46-9(1)(d). Further, Defendant has immunity under § 11-46-9(1)(w) for any claims arising out of the removal by third parties of warning signs where it had no notice of such. Because Defendant is immune from Plaintiff's claims under § 11-46-9(1)(d) and -(w), the Court need not engage in any analysis under § 11-46-9(1)(v). Even if the latter statute were applicable, Defendant would be immune because the dangerous condition was open and obvious to motorists exercising due care, and because Defendant did in fact warn of the dangerous condition.

Construing the evidence in the light most favorable to Appellant, there is no genuine issue of material fact regarding whether Defendant is immune from suit under the provisions of the MTCA. Therefore, the trial court's grant of summary judgment was proper and Defendant respectfully requests that the trial court's decision be affirmed.

Respectfully submitted,

LAWRENCE COUNTY, MISSISSIPPI,
APPELLEE

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CERTIFICATE

I, Steven J. Griffin, of counsel for Lawrence County, Mississippi, do hereby certify that I have this day served by United States mail a true and correct copy of the above and foregoing pleading to:

Honorable Prentiss G. Harrell
Circuit Court Judge
Post Office Box 488
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Circuit Court Trial Judge

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THIS, the 11th day of October, 2011.

_____
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