IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Case Number: 2011-IA-00541-SCT

GLEN POPPENHEIMER **APPELLANT**

vs.

ESTATE OF JOE D. COYLE, DECEASED, *Et Al.* **APPELLEES**

Interlocutory Appeal from the
County Court of the DeSoto County, Mississippi
Civil Action No. CO2010-0059CD

BRIEF OF THE APPELLEE, ESTATE OF JOE D. COYLE, DECEASED

Oral Argument is Requested

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vs.

ESTATE OF JOE D. COYLE, DECEASED, *Et Al.* — APPELLEES

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:

Plaintiff-Appellant:

Glen Poppenheimer
1661 Pleasant View Drive
Nesbit, Mississippi 38651

Mississippi Farm Bureau Casualty Insurance Company
6310 I-55 North
Jackson, Mississippi 39211

Defendant-Appellee:

Estate of Joe D. Coyle, Deceased
c/o David Delgado
Administrator of the Estate of Joe D. Coyle, Deceased
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Southaven, Mississippi 38672

***Heirs-at-Law of Joe D. Coyle*:**

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Nesbit, Mississippi 38651

Lisa Helen Coyle Souder (daughter)
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William Glen Coyle (son)
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Trial Judge:

Honorable Allen B. Couch, Jr.
County Court Judge
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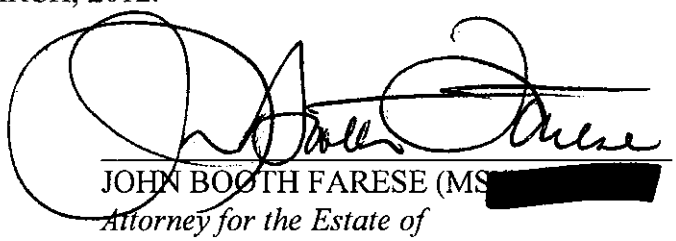
THIS, this 9TH day of MARCH, 2012.



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MISSISSIPPI ATTORNEY GENERAL OPINIONS

M.R.A.P. RULE 34 STATEMENT REGARDING ORAL ARGUMENT

This interlocutory appeal appears to present a question of first impression. The trial court denied a motion for summary judgment, and in its order the trial court stated:

> As no statute or case confers the status of "governmental entity" upon a volunteer fire department and the statute defining political subdivisions of the State of Mississippi is silent on the issue, this Court declines to act as a legislative body by bestowing that title upon the BVFD. To paraphrase (and I use the term liberally) then Hinds County Circuit and now Federal District Court Judge Graves from the *Miller* case, "I'm putting it on the record. I don't know if a Volunteer Fire Department is a government entity. I don't know Supreme Court. Please tell me!" As the parties have already indicated that the non-prevailing party intends to ask for leave to file an interlocutory appeal with the Mississippi Supreme Court, it is this Court's desire that the Supreme Court approve their request and provide guidance to the trial courts on this issue; an issue that, despite the existence of over 10,000 volunteer firemen in this State, has managed to escape judicial scrutiny.[1]

Therefore, because this case presents a question of first impression and involves an issue of general importance, oral argument will greatly assist this Court as this Court analyzes the issue presented in this appeal.

* * * * * *

[1]R. 136-137. See *Miller v. Meeks*, No. 1999-CA-00210-SCT, 762 So.2d 302, 304 (¶ 2) (Miss. 2000).

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This interlocutory appeal comes to this Court from the denial of a motion for summary judgment. The *Brief of the Appellant, Glenn Poppenheimer* previously filed herein states that there are two issues presented for review.[2] To re-state these issues in a neutral fashion, the issues presented are:

Issue 1: Does the Bridgetown Volunteer Fire Department ("BVFD") and its employees receive the protection of the Mississippi Tort Claims Act ("MTCA")?

Issue 2: Did the County Court of DeSoto County err by failing to dismiss the claims of the Estate of Joe D. Coyle?

When the trial court denied the motion for summary judgment, the court included the following statement in its order:

> To paraphrase (and I use the term liberally) then Hinds County Circuit and now Federal District Court Judge Graves from the *Miller* case, "I'm putting it on the record. I don't know if a Volunteer Fire Department is a government entity. I don't know Supreme Court. Please tell me!"

The trial court also stated that "according to the Mississippi Insurance Commissioner's website (www.mid.state.ms.us), there are over 10,000 volunteer firemen in the State of Mississippi." Thus, if this Court finds in this appeal that a volunteer fire department is a "governmental entity," the ruling will, at a stroke, expand and extend the protections of the Mississippi Tort Claims Act ("MTCA") to Mississippi's 10,000 volunteer firemen.

* * * * * *

[2]See *Brief of the Appellant, Glenn Poppenheimer*, p. 1.

II. STATEMENT OF THE CASE

A. *THE NATURE OF THE CASE, THE COURSE OF THE PROCEEDINGS, AND THE DISPOSITION IN THE COURT BELOW*

1. Introduction.

The course of the proceedings of this civil action became complex and confusing because the parties hereto were involved in two separate civil actions arising from the same nucleus of operative facts and the two actions proceeded parallel to each other in both the Circuit Court of DeSoto County and in the County Court of DeSoto County, to-wit: (1) Circuit Court civil action number CV2010-0013; and, (2) County Court civil action number CO2010-0059 (the case in which the present interlocutory appeal is brought).[3] All of the parties in one action were not parties in the other action. Glen Poppenheimer is the Plaintiff in the County Court civil action (which, again, is the case in which the present interlocutory appeal is brought) and named as defendants in the County Court action are The Estate of Joe D. Coyle, Deceased, and Mississippi Farm Bureau Insurance Company.[4] Meanwhile, Dorothy Coyle, Lisa Helen Coyle Souter, and William Glenn Coyle are the Plaintiffs in the Circuit Court civil action, while the sole defendant in the Circuit Court action is Glen Poppenheimer.[5] At all times in this brief, Dorothy Coyle, Lisa Helen Coyle Souder, William Glenn Coyle, and the Estate of Joe D. Coyle, Deceased, with collectively be referred to as "the Coyles."

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[3]R. 9, 122, 328-337, 367.

[4]R. 9, 328-337.

[5]R. 122, 328-329. Dorothy Coyle is the wife of Joe D. Coyle, Lisa Helen Coyle Souder is the daughter of Joe D. Coyle, and William Glenn Coyle is the son of Joe D. Coyle. R. 22, 122.

(a) ***DeSoto County Court civil action number CO2010-0059:*** Relevant pleadings (and relevant dates) pertaining to the civil action pending in County Court are as follows, to-wit:

> **(1) January 14, 2010:** Glen Poppenheimer, as Plaintiff, filed a *Complaint* as civil action number CO2010-0059 in the County Court of DeSoto County and named as defendants The Estate of Joe D. Coyle, Deceased, and Mississippi Farm Bureau Insurance Company.[6]
>
> **(2) January 25, 2010:** The Estate of Joe D. Coyle filed its *Answer and Counter-Claim of Defendant/Counter-Plaintiff, Estate of Joe D. Coyle.*[7]
>
> **(3) January 25, 2010:** The Coyle's filed their *Motion to Transfer to Circuit Court.*[8]
>
> **(4) March 3, 2010:** Poppenheimer filed a *Motion to Dismiss or in the alternative, for Summary Judgment.*[9]
>
> **(5) March 5, 2010:** An *Order* was entered by County Court Judge Allen B. Couch, Jr., denying the Coyle's *Motion to Transfer to Circuit Court.*[10]
>
> **(7) November 23, 2010:** The Coyles filed their *Defendant/Counter-Plaintiffs' Response to Plaintiff/Counter-Defendant's Motion to Dismiss or in the alternative for Summary Judgment.*[11]
>
> **(8) December 2, 2010:** An *Order Allowing Additional Briefing and Supplementation of the Record* was entered by Judge Couch.[12]

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[6]R. 1.

[7]R. 18

[8]R. 15.

[9]R. 28. This motion is identical to a motion which was filed in DeSoto County Circuit Court civil action number CV2010-0013. R. 330.

[10]R. 34.

[11]R. 37.

[12]R. 63.

(b) ***Circuit Court civil action number CV2010-0013*:** Relevant pleadings (and relevant dates) pertaining to the civil action pending in Circuit Court are as follows, to-wit:

> **(1) January 25, 2010:** A wrongful death action was filed by Dorothy Coyle, Lisa Helen Coyle Souter, and William Glenn Coyle (the Plaintiffs) in the Circuit Court of DeSoto County (civil action number CV2010-0013) against Glen Poppenheimer (the Defendant).[13]
>
> **(2) March 3, 2010:** Poppenheimer filed a *Motion to Dismiss or in the alternative, for Summary Judgment* in DeSoto County Circuit Court civil action number CV2010-0013.[14]
>
> **(3) January 13, 2011:** The *Coyles' Response to Poppenheimer's Motion to Dismiss or in the alternative for Summary Judgment* was erroneously filed in the Circuit Court of DeSoto County (civil action number CV2010-0013). This pleading should have been filed in the County Court of DeSoto County (civil action number CO2010-0059). Thereafter, an identical pleading was filed on or about January 19, 2011, in County Court.[15]
>
> **(4) March 24, 2011:** An *Agreed Order to Transfer to County Court* was entered in the Circuit Court action, transferring the circuit court matter to the County Court, and also consolidating both civil actions as a single civil action in County Court civil action number CO2010-0059.[16]

* * *

2. The Course of the Proceedings.

Glen Poppenheimer, as Plaintiff, filed a *Complaint* on January 14, 2010, as civil action number CO2010-0059CD in the County Court of DeSoto County and named as defendants The Estate of Joe D. Coyle, Deceased, and Mississippi Farm Bureau Casualty

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[13]R. 122-126, 143-147.

[14]R. 188. This motion is identical to a motion which was filed in DeSoto County Court civil action number CO2010-0059. R. 333.

[15]R. 148, 333.

[16]R. 328-337.

Insurance Company.[17] The *Complaint* alleges, *inter alia*, that a pick-up truck being driven by Joe D. Coyle failed to yield the right-of-way and collided with a pick-up truck being driven by Glen Poppenheimer at approximately 3:30 a.m. on January 23, 2007, at the intersection of Malone Road and Windermere Road in DeSoto County.[18] The *Complaint* also alleges that "the direct and proximate" cause of the collision was the negligence of Joe D. Coyle, that Poppenheimer "suffered injuries and damages" as a result of the collision, and that a judgment should be awarded in favor of Poppenheimer and against the Estate of Joe D. Coyle, Deceased.[19] Poppenheimer also sought to recover from his own insurance company, Mississippi Farm Bureau Casualty Insurance Company, for a underinsured/uninsured (or "UM") claim.[20]

The Estate of Joe D. Coyle filed its answer to the complaint on January 25, 2010, and included within the answer the *Counter-Claim of Counter-Plaintiff, Estate of the Estate of Joe D. Coyle*.[21] The counter-claim included as parties the heirs at law of Joe D. Coyle (to-wit: his wife, Dorothy Coyle; his daughter, Lisa Helen Coyle Souder; and his son, William Glenn Coyle) together with the Estate of Joe D. Coyle, Deceased.[22] The counter-claim alleges that Joe D. Coyle died as a result of injuries he sustained in a motor vehicle accident on January 23, 2007, when Coyle's "vehicle was suddenly and violently struck on the

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[17]R. 9, 329.

[18]R. 10.

[19]R. 10-13.

[20]R. 130.

[21]R. 18, 329-330.

[22]R. 22.

driver's side door by [a vehicle driven by Glenn] Poppenheimer, who left his lane of travel while proceeding in a northbound direction on Malone Road."[23] The counter-claim alleges that "the deliberate, intentional wanton or careless and negligent conduct of ... Poppenheimer" and seeks a judgment against Poppenheimer for the damages suffered by Joe D. Coyle, the Estate of Joe D. Coyle, and the family of Joe D. Coyle.[24]

Notably, also on January 25, 2010, a wrongful death action was filed by Dorothy Coyle, Lisa Helen Coyle Souter, and William Glenn Coyle (the Plaintiffs) in the Circuit Court of DeSoto County (civil action number CV2010-0014) against Glen Poppenheimer as the Defendant.[25] The *Complaint* in the Coyle's wrongful death action alleges, *inter alia*, that on January 23, 2007, Poppenheimer's vehicle "left [Poppenheimer's] lane of travel" and struck the vehicle of Joe D. Coyle and that Coyle suffered severe personal injuries in the collision which resulted in Coyle's death on March 6, 2007.[26] The *Complaint* alleges specific acts of negligence and negligence per se and seeks an award of damages against Poppenheimer.[27]

Poppenheimer filed a *Motion to Dismiss or in the alternative, for Summary Judgment* in DeSoto County Court civil action number CO2010-0059 on March 3, 2010.[28] The motion sought an order dismissing the claims brought in the *Counter-Claim of Counter-Plaintiff,*

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[23]R. 22-23. Joe D. Coyle succumbed to his injuries on March 6, 2007. R. 23.

[24]R. 23-26.

[25]R. 122-126, 143-147, 332.

[26]R. 123.

[27]R. 124-126.

[28]R. 28. An identical motion was also filed on March 3, 2010, in DeSoto County Circuit Court civil action number CV2010-0013. R. 118, 330, 331, 333.

Estate of the Estate of Joe D. Coyle and alleged, *inter alia*, that the motor vehicle accident involving Poppenheimer and Joe D. Coyle occurred at a time when Poppenheimer "was acting within the course and scope of his duties as a volunteer firefighter with the Bridgetown Volunteer Fire Department" while "Poppenheimer was driving his personal vehicle to the Bridgetown Volunteer Fire Department station in response to a call" and that "Poppenheimer is protected by the Mississippi Tort Claims Act" because "the plaintiffs did not comply with the Tort Claims Act prior to filing the instant action ...."[29]

The *Defendant/Counter-Plaintiffs' Response to Plaintiff/Counter-Defendant's Motion to Dismiss or in the alternative for Summary Judgment* was filed by the Estate of Joe D. Coyle on November 23, 2010.[30]

An *Order Allowing Additional Briefing and Supplementation of the Record* was entered on December 2, 2010.[31] Thereafter, Glen Poppenheimer filed a *Supplemental Brief in Support of Motion to Dismiss or, in the alternative, for Summary Judgment* on January 18, 2011.[32] The Estate of Joe D. Coyle also filed the *Coyles' Response to Poppenheimer's Motion to Dismiss or in the alternative for Summary Judgment* on January 19, 2011.[33]

* * *

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[29]R. 28-31.

[30]R. 37, 330.

[31]R. 63, 330.

[32]R. 64.

[33]R. 72, 331. The *Coyles' Response to Poppenheimer's Motion to Dismiss or in the alternative for Summary Judgment* had been erroneously been initially filed in DeSoto County Circuit Court civil action number CV2010-0013. R. 331.

3. The Disposition in the Trial Court Below.

An *Order* was entered on March 23, 2010, by DeSoto County Court Judge Allen B. Couch, Jr.[34] In the *Order* the trial judge observed that, at the time of the accident, Poppenheimer "was not traveling to the scene of the fire but rather, to the [Bridgetown Volunteer Fire Department (or "BVFD")] station in his own personal vehicle" and that Poppenheimer's vehicle was not equipped with a siren although Poppenheimer "had his headlights, flashers and a red flashing dashboard light activated."[35] The trial judge stated that "[t]he Court finds the central issue in the instant case to not be the status of Poppenheimer but rather the Bridgetown Volunteer Fire Department" and observed that "according to the Mississippi Insurance Commissioner's website (www.mid.state.ms.us), there are over 10,000 volunteer firemen in the State of Mississippi" which "is hardly a small number or obscure class of employees that were somehow left on the legislature's cutting room floor."[36] The trial judge stated that "[t]he Court finds that the statutes are not so clear and unambiguous so as to find that a volunteer fire department is a governmental entity for purposes of applying the MTCA."[37] The trial judge stated:

> It would appear that the BVFD is an independent contractor to DeSoto County and not a political subdivision or instrumentality of the County. In short, DeSoto County does not exercise control over the method or manner in which the BVFD performs its duties.[38]

The trial judge then ruled:

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[34]R. 130.

[35]R. 130-131.

[36]R. 135.

[37]R. 135.

[38]R. 136.

> A question of law exists as to the application of the Mississippi Tort Claims Act to Volunteer Fire Departments. The Court cannot find as a matter of law that Poppenheimer was entitled to the protections and notice requirements of the MTCA and therefore, his Motion for Summary Judgment on those grounds will be denied. Poppenheimer's argument that no genuine issue of material fact exists regarding the actual collision is not well taken and his Motion for Summary Judgment on this issue will also be denied.[39]

After the entry of the aforesaid *Order* on March 23, 2010, which denied Poppenheimer's motion to dismiss and motion for summary judgment, Poppenheimer petitioned the Mississippi Supreme Court for an interlocutory appeal, and, on May 25, 2011, an *Order* was entered by the Supreme Court granting an interlocutory appeal.[40]

* * *

B. *STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW*

1. Introduction.

An automobile accident occurred on January 23, 2007, at the intersection of Windermere Road and Malone Road in DeSoto County.[41] Joe D. Coyle subsequently died as a result of injuries sustained in the accident, and Glen Poppenheimer also suffered injuries in the accident.[42] Two separate and distinct civil actions were filed as a result of the accident. One was a wrongful death action brought by the wrongful death beneficiaries of Joe D. Coyle (who may be referred to as the "Coyles") which was filed in the Circuit Court of DeSoto County, while the other was an action for damages brought by Glen Poppenheimer in the

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[39]R. 138.

[40]R. 367.

[41]R. 130, 132.

[42]R. 132.

County Court of DeSoto County.[43] On March 24, 2011, an *Agreed Order to Transfer to County Court* was entered in the wrongful death action that had been filed in the Circuit Court of DeSoto County, and, pursuant to that order both the Coyles' wrongful death action and Poppenheimer's damages claim were consolidated in civil action number CO2010-0059CD in the County Court of DeSoto County.[44] Thus, the wrongful death claims of the heirs at law of Joe D. Coyle, and the damages claim of Glenn Poppenheimer are now combined into one Gordian knot which resides in the County Court of DeSoto County.

* * *

2. Poppenheimer's claim for damages.

A civil action was commenced in the County Court of DeSoto County (civil action number CO2010-0059) on January 14, 2000, by Glen Poppenheimer, as Plaintiff, which names as Defendants the Estate of Joe D. Coyle and Mississippi Farm Bureau Casualty Insurance Company ("Farm Bureau").[45] The Poppenheimer County Court *Complaint* alleges that at approximately 3:30 a.m. on January 23, 2007, Glen Poppenheimer was involved in a two-car motor vehicle accident at the intersection of Malone Road and Windermere Road in DeSoto County.[46] Specifically, the Poppenheimer County Court *Complaint* alleges:

> 6. Plaintiff/Counter-Defendant [Glen Poppenheimer] was traveling northbound on Malone Road in his Dodge Ram pickup truck when Joe D. Coyle, who was traveling westbound on Windermere Road, failed to yield the right of way, driving his Ford F-150 pickup truck into [Glen Poppenheimer's] path, causing a collision.

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[43]These separate legal actions are discussed under Part II, A (*Statement of the Case*), *supra*.

[44]R. 328-337.

[45]R. 9 (¶¶ 1-3 of the Poppenheimer County Court *Complaint*).

[46]R. 10 (¶ 5 of the Poppenheimer County Court *Complaint*).

7. As a direct and proximate result of the collision with Coyle's vehicle, Plaintiff/Counter-Defendant suffered injuries and damages.[47]

Poppenheimer's County Court *Complaint* further alleges that Joe D. Coyle:

> ... was guilty of one or more of the following acts of negligence:
>
> (a) Failure to maintain proper lookout;
> (b) Failure to maintain proper control of his vehicle;
> (c) Failure to exercise reasonable care in the operation of his vehicle;
> (d) negligently and carelessly failing to stop or slow his vehicle when he saw or with the exercise of reasonable care should have seen that the failure to do so would subject the Plaintiff/Counter-Defendant to an unreasonable risk of harm;
> (e) driving his vehicle carelessly;
> (f) gross negligence and/or reckless indifference;
> (g) failure to yield the right of way; and
> (h) other acts of negligence to be shown at a hearing of this cause.[48]

Poppenheimer's County Court *Complaint* alleges that Poppenheimer suffered physical injuries in the collision, and sustained other damages, "because of [Joe D.] Coyle's negligence."[49]

Poppenheimer's County Court *Complaint* also includes a claim against Mississippi Farm Bureau Casualty Insurance Company (as a Defendant) in which it is alleged that Poppenheimer had maintained an insurance policy issued by Farm Bureau, that the insurance policy "contained uninsured/underinsured motorist coverage," and that:

> Farm Bureau is liable to Plaintiff/Counter-Defendant [Glen Poppenheimer] for [Joe D.] Coyle's negligence and the resulting injuries as aforesaid, pursuant to the terms, conditions and applicable coverages provided to

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[47]R. 10 (¶¶ 6-7 of the Poppenheimer County Court *Complaint*).

[48]R. 10-11 (¶ 10 of the Poppenheimer County Court *Complaint*).

[49]R. 11 (¶ 12 of the Poppenheimer County Court *Complaint*).

> Plaintiff/Counter-Defendant [Glen Poppenheimer] under the relevant automobile insurance policy.[50]

In response to the Poppenheimer County Court *Complaint*, the Estate of Joe D. Coyle filed an *Answer and Counter-Claim of Defendants/Counter-Plaintiffs, Estate of Joe D. Coyle* on January 25, 2010.[51] The allegations and claims set forth in the counter-claim are essentially identical to the allegations and claims set forth in the Coyle's wrongful death *Complaint* filed in DeSoto County Circuit Court (which is discussed *infra*).

* * *

3. The Coyles' wrongful death action.

Joe D. Coyle died on March 6, 2007.[52] He was survived by his wife, a daughter, and a son (Dorothy Coyle, Lisa Helen Coyle Souter, and William Glenn Coyle, respectively), who are the heirs and wrongful death beneficiaries of Joe D. Coyle.[53] A wrongful death action was filed by Dorothy Coyle, Lisa Helen Coyle Souter, and William Glenn Coyle (the "Coyles") as the Plaintiffs in the Circuit Court of DeSoto County (civil action number CV2010-0014 CD) against Glen Poppenheimer as the Defendant.[54] The Coyles' wrongful death complaint alleges, *inter alia*, as follows: that on January 23, 2007, Joe D. Coyle was traveling west on Windermere Road; that Joe D. Coyle came to a complete stop at the

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[50]R. 12 (see ¶¶ 16-19 of the Poppenheimer County Court *Complaint*).

[51]R. 18.

[52]R. 23, 123, 144 (¶ 6 of the *Counter-claim of Counter-Plaintiff, Estate of the Estate of Joe D. Coyle* filed in DeSoto County Court civil action number CO2010-0059, and also see also ¶ 8 of the wrongful death *Complaint* filed by Dorothy Coyle, *et al.*, in DeSoto County Circuit Court civil action number CV2010-0014, which may hereinafter be referred to as the "Coyles' Circuit Court *Complaint*"). See also R. 132.

[53]R. 122-123, 143- 144. (See ¶¶ 1-4 of the Coyle's Circuit Court *Complaint.*)

[54]R. 122, 143.

intersection of Windermere Road and Malone Road; that as Joe D. Coyle then proceeded to cross Malone Road his vehicle "was suddenly and violently struck on the driver's side door by Mr. Poppenheimer, who left his lane of travel while proceeding in a northbound direction on Malone Road."; that Joe D. Coyle suffered and sustained severe injuries as a result of the collision; that Joe D. Coyle was hospitalized for over a month following the collision before Joe D. Coyle subsequently succumbed to his injuries and died on March 6, 2007, "as a direct and proximate result of the traumas suffered in the collision ...."[55]

The Coyles' wrongful death complaint further alleges that Joe D. Coyle's "injuries, hospitalization, pain and suffering and resulting death was the direct result of the negligence of the defendant [Glen Poppenheimer]."[56] Specifically, the wrongful death complaint alleges that Glen Poppenheimer

a. Failed to maintain a proper lookout;
b. Failed to exercise ordinary and reasonable care under the circumstances then and there prevailing;
c. Failed to have his vehicle under proper control;
d. Failed to devote full time and attention to the operation of the vehicle; and
e. Deliberately, recklessly or wantonly drove his vehicle into the opposite lane of traffic.[57]

The Coyles' wrongful death complaint further alleges that Glen Poppenheimer violated MISS. CODE ANN. §63-3-601, §63-3-611, §63-3-1201, and §63-3-1213, and that the negligence *per se* of Poppenheimer's violation the aforesaid statutes "caused [the Coyles] to suffer injury and harm ... for which the [Coyles] are entitled to recover damages ... against

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[55]R. 123, 144 (¶¶ 7-8 of the Coyles' Circuit Court *Complaint*).

[56]R. 123, 144. (See ¶ 8 of the Coyles' Circuit Court *Complaint.*)

[57]R. 124, 145. (See ¶ 9 of the Coyles' Circuit Court *Complaint.*)

[Poppenheimer]."[58] The Coyles' wrongful death complaint seeks damages for, *inter alia*, Joe D. Coyle's lost wages, Joe D. Coyle's loss of future wages, medical expesnes, physical and emotional pain and suffering, loss of consortium, and other losses.[59]

* * *

4. Poppenheimer's summary judgment motion.

Glen Poppenheimer filed a *Motion to Dismiss or in the alternative, for Summary Judgment* on March 3, 2010, in DeSoto County Court civil action number CO2010-0059CD (Poppenheimer's damages claim), and an identical motion was also filed on March 3, 2010, in DeSoto County Circuit Court civil action number CV2010-0013CD (the Coyles' wrongful death action).[60] Again, an *Agreed Order to Transfer to County Court* was entered on March 24, 2011, in the wrongful death action that had been filed in the Circuit Court of DeSoto County, and, pursuant to that order both the Coyles' wrongful death action and Poppenheimer's damages claim were consolidated in the County Court civil action.[61] In Poppenheimer's *Motion to Dismiss or in the alternative, for Summary Judgment* it is alleged that "[a]t the time of the accident, the Plaintiff/Counter-Defendant, Glen Poppenheimer, was acting wit hin the course and scope of his duties as a volunteer firefighter with the Bridgetown Volunteer Fire Department."[62] Poppenheimer's motion alleged that Poppenheimer was "driving his personal vehicle to the Bridgetown Volunteer Fire

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[58]R. 124-126, 146-147. (See ¶¶ 10-12 of the Coyles' Circuit Court *Complaint*.)

[59]R. 125-126, 146-147. (See ¶¶ 12-13 of the Coyles' Circuit Court *Complaint*.)

[60]R. 28-31, 118-121, 330, 333.

[61]R. 328-337.

[62]R. 28, 118 (p. 1 of Poppenheimer's *Motion to Dismiss or in the alternative for Summary Judgment*).

Department station in response to a call," that Poppenheimer "had his red lights illuminated and working," and that Poppenheimer "was traveling at a speed of approximately 40 miles per hour on Malone Road when Joe D. Coyle suddenly pulled out in front of him, causing the accident."[63]

Most notably, Glen Poppenheimer alleged that he "is protected by the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, et sec" [sic] and alleged "[s]ince the [Coyles] did not comply with the Tort Claims Act prior to filing the instant action, and filed it beyond the one (1) year statute of limitations provided therein, the Court should dismiss this case, with prejudice."[64] As authority for the motion, Poppenheimer cited the following: MISS. CODE ANN. §11-46-5(2); MISS. CODE ANN. §11-46-9(1)(c); MISS. CODE ANN. § 11-46-11; *Maldonado v. Kelly*, 768 So.2d 906, 909 (¶ 6) (Miss. 2000); and, *Jackson v. Hodge*, 911 So.2d 625, 627 (¶ 9) (Miss. App. 2005).[65]

In the motion, Poppenheimer argued:

> The claims against Poppenheimer are clearly arising out of his alleged acts or omissions while he was engaged in the performance of duties relating to fire protection. It is undisputed that Poppenheimer was acting in this capacity at the time of the accident. Thus, pursuant to Miss. Code Ann. §11-46-9(1)(c), Poppenheimer cannot be liable for mere negligence. At best, the [Coyles] are alleging that Poppenheimer violated certain rules of the road, which have been held to not be actionable under the Tort Claims Act. *Jackson*, 911 So.2d at 627.[66]

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[63]R. 28, 118 (p. 1 of Poppenheimer's *Motion to Dismiss or in the alternative for Summary Judgment*).

[64]R. 28, 118 (p. 1 of Poppenheimer's *Motion to Dismiss or in the alternative for Summary Judgment*).

[65]R. 29, 119 (p. 1 of Poppenheimer's *Motion to Dismiss or in the alternative for Summary Judgment*).

[66]R. 120 (p. 3 of Poppenheimer's *Motion to Dismiss or in the alternative for Summary Judgment*).

The statute (*i.e.*,MISS. CODE ANN. §11-46-9(1)(c)) cited by Poppenheimer in his motion states, in pertinent part, as follows, to-wit:

> (1) ***A governmental entity*** and its ***employees*** acting within the course and scope of their ***employment*** or duties shall not be liable for any claim:
>
> ...
>
> (c) Arising out of any act or omission of an ***employee*** of a ***governmental entity*** engaged in the performance or execution of duties or activities relating to police or ***fire protection*** unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at he time of injury;
>
> ....

MISS. CODE ANN. §11-46-9(1)(c) (emphasis added).

Thus, the central question squarely presented in *Motion to Dismiss or in the alternative for Summary Judgment* was whether Glen Poppenheimer was, in fact, an "employee" of a "governmental entity" at the time of the motor vehicle accident with Joe D. Coyle. The trial court, in its *Order* entered on March 23, 2011, denying Poppenheimer's motion, framed the issue this way:

> The collision occurred on January 23, 2007. Coyle died on March 6, 2007. Clearly, if the MTCA is applicable, the suit was not filed within the applicable deadline.
>
> Having reviewed the issues presented by the parties on this subject, the Court finds that only one unanswered question is relevant; that is, "Is the BVFD a governmental entity?"[67]

* * *

5. Poppenheimer's testimony.

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[67]R. 132.

Glen Poppenheimer gave sworn deposition testimony on April 9, 2010.[68] Poppenheimer testified that he had worked for the Shelby County (Tenn.) Fire Department ("SCFD") for 26 years before retiring on March 30, 2002.[69] He served as a "driver" with the SCFD, driving a "regular engine pumper."[70] Poppenheimer testified his job as a driver was to "get everybody to the scene in a safe manner the most efficient way."[71] Poppenheimer testified he has ADHD.[72] After retiring from the SCFD, Poppenheimer "started real estate investing" explaining that he was "buying properties" and "was fixing them up and either renting them or selling them."[73] Poppenheimer also worked as a limousine driver for Marlowe's restaurant near Graceland, picking patrons up at their hotels, driving them to Marlowe's and then returning them to their hotel.[74]

After retiring from the SCFD, Poppenheimer became a volunteer with the Bridgetown Volunteer Fire Department ("BVFD") in 2006.[75] Poppenheimer received no

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[68]R. 176. A complete transcript of the *Deposition of Glen Poppenheimer* is found in the Record at R. 176-286. The transcript was attached as "Exhibit A" to the *Coyles' Response to Poppenheimer's Motion to Dismiss or in the alternative for Summary Judgment* which is found in the Record at R. 148-175. The transcript of the *Deposition of Glen Poppenheimer* may be referred to herein as "Poppenheimer depo." followed by the appropriate page number.

[69]R. 190 (Poppenheimer depo., p. 15).

[70]R. 191 (Poppenheimer depo., p. 16).

[71]R. 192 (Poppenheimer depo., p. 17).

[72]R. 195 (Poppenheimer depo., p. 20).

[73]R. 196-197 (Poppenheimer depo., p. 21-22).

[74]R. 199 (Poppenheimer depo., p. 24).

[75]R. 211 (Poppenheimer depo., p. 36).

compensation ("Absolutely nothing.") from BVFD or from DeSoto County.[76] BVFD provided Poppenheimer with "turnout gear, my firefighting equipment, and I guess a uniform shirt and pants and tie."[77] Also provided was "the red dash light or my windshield light ...," which is "a narrow light that sticks to the windshield."[78] The light is "four to six inches wide" and "about 18 inches long" and "it sticks to the inside of the windshield with suction cups."[79] Poppenheimer testified that his vehicle was not equipped with a siren or noise maker and testified that "[t]he State of Mississippi won't allow a POV [privately owned vehicle] to run with a siren."[80] Poppenheimer was driving a 1998 Dodge pick-up truck at the time of the accident.[81] His house was approximately three miles from the fire station and approximately "two and a half" miles from the accident site.[82]

Poppenheimer testified that BVFD "receive[s] our funding from the citizens that pay annual fire dues as well as the county and the state."[83] Poppenheimer testified it "is my understanding" that worker's compensation is available for firefighters injured while fighting a fire.[84] Poppenheimer was already certified as a firefighter and did not go through training

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[76]R. 211-212 (Poppenheimer depo., p. 36-37).

[77]R. 212 (Poppenheimer depo., p. .37).

[78]R. 213 (Poppenheimer depo., p. 38).

[79]R. 214 (Poppenheimer depo., p. 39).

[80]R. 243 (Poppenheimer depo., p. 68).

[81]R. 214 (Poppenheimer depo., p. 39).

[82]R. 215 (Poppenheimer depo., p. 40).

[83]R, 217 (Poppenheimer depo., p. 42).

[84]R. 219-220 (Poppenheimer depo., pp. 44-45).

when he began volunteering with BVFD, but training is "offered by DeSoto County."[85]

Poppenheimer testified:

> Q Has anyone provided you any training about what you are supposed to do if you are responding to a fire as far as driving, lights?
>
> A. Just to – other than, you know, to obey, you know, the law, the law as it is now I mean.
>
> Q, If you are aware of it, is there any law that you are allowed to drive over –
>
> A. No, ma'am.
>
> Q. – the speed limit?[86]

Poppenheimer also testified:

> Well, [Bridgetown Volunteer Fire Department] Chief [Jerry] Sides is – just speaks to everyone about safety and, you know, that everyone understands that – you know, how they're supposed to – you know, not to exceed and, you know, just do your regular – whatever the law states as far as a regular vehicle would be.[87]

Poppenheimer testified that he has participated in "defensive driving" training "sponsored by DeSoto County" and Poppenheimer holds an "EMS driver's license where I can drive an ambulance and I went through training for that. It's not a personal vehicle. It was actually for an ambulance driving situation."[88]

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[85]R. 220 (Poppenheimer depo., p. 45).

[86]R. 221 (Poppenheimer depo., p. 46).

[87]R. 222 (Poppenheimer depo., p. 47).

[88]R. 223 (Poppenheimer depo., p. 48).

Poppenheimer testified that he was at home on January 23, 2007, and received "a mutual aid call in the Love community."[89] "Mutual aid is when one department calls for help to assist another department."[90] Poppenheimer testified that "it was a report of a fire," that the report was received "around 3:15" in the morning, that he'd been asleep but was awakened by his pager which was supplied to him by BVFD.[91]

Poppenheimer testified he was in his Dodge truck on Malone Road going to the fire station and "I guess in sight of the fire station when the accident occurred."[92] Poppenheimer testified that hee was traveling "Forty miles an hour," that it was dark and he "had my headlights on and my flashers as well as my red flashing dash light or windshield light."[93] Immediately prior to the accident, Poppenheimer was traveling north on Malone Road, while Joe D. Coyle was driving west on Windermere.[94]

Poppenheimer testified that "There's a slight incline to the intersection right there," but further testified that "to my knowledge" nothing would have obstructed Coyle's view of Poppenheimer's vehicle.[95] Poppenheimer testified he was "150 yards, 200 yards" away when he first observed Coyle's vehicle, which was "Sitting still."[96] Poppenheimer testified he was

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[89]R. 224 (Poppenheimer depo., p. 49).

[90]R. 224 (Poppenheimer depo., p. 49).

[91]R. 224-226 (Poppenheimer depo., pp. 49-51).

[92]R. 227 (Poppenheimer depo., p. 52).

[93]R. 227-228 (Poppenheimer depo., pp. 52-53).

[94]R. 229-230 (Poppenheimer depo., pp. 54-55).

[95]R. 230-231 (Poppenheimer depo., pp. 55-56).

[96]R. 231 (Poppenheimer depo., p. 56).

traveling 40 miles per hour.[97] Poppenheimer testified that the first time he noticed that Coyle's vehicle had started to move forward was 'right before impact.'[98] Poppenheimer's truck struck the driver's side of Coyle's vehicle.[99]

> ... I had to make a split second decision to determine whether he was going to see me and how he was going to react. I knew I was going to have to either go around the front of him or around to the back of him. It all happened so fast. He was right – he was right there, and I knew if he saw me and stopped, then I could safely go around him, or if he sped up, I could have gone around behind him. But, there again, it all happened so fast. I chose to take the first point and go around the front of him, and, obviously, he sped up at the same time. That's when we made impact.[100]

Poppenheimer testified that in his memory the accident occurred with the vehicles being in both the northbound and southbound lanes of Malone Road.[101] Poppenheimer testified "I never thought anything in the world about him not seeing me or running the – you know, coming out of the intersection."[102] Poppenheimer testified that prior to the impact he observed that other volunteers at the fire station "had already pulled the [fire] truck out" and "were sitting there waiting for me," and testified "I saw them when I was coming up the road."[103] The fire station is about a half mile from the accident site.[104]

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[97]R. 231 (Poppenheimer depo., p. 56).

[98]R. 237 (Poppenheimer depo., p. 62).

[99]R. 238 (Poppenheimer depo., p. 63).

[100]R. 241 (Poppenheimer depo., p. 66).

[101]R. 241 (Poppenheimer depo., p. 66).

[102]R. 245 (Poppenheimer depo., p. 70).

[103]R. 248 (Poppenheimer depo., p. 73).

[104]R. 252 (Poppenheimer depo., p. 77).

6. The Disposition in the Trial Court Below.

Again, in the *Order* entered on March 23, 2010, dismissing Poppenheimer's motion, the trial judge (*i.e.*, DeSoto County Court Judge Allen B. Couch, Jr.) observed that, at the time of the accident, Poppenheimer "was not traveling to the scene of the fire but rather, to the [Bridgetown Volunteer Fire Department (or "BVFD")] station in his own personal vehicle" and that Poppenheimer's vehicle was not equipped with a siren although Poppenheimer "had his headlights, flashers and a red flashing dashboard light activated."[105] The trial judge stated that "[t]he Court finds the central issue in the instant case to not be the status of Poppenheimer but rather the Bridgetown Volunteer Fire Department" and observed that "according to the Mississippi Insurance Commissioner's website (www.mid.state.ms.us), there are over 10,000 volunteer firemen in the State of Mississippi" which "is hardly a small number or obscure class of employees that were somehow left on the legislature's cutting room floor."[106] The *Order* stated that "[t]he Court finds that the statutes are not so clear and unambiguous so as to find that a volunteer fire department is a governmental entity for purposes of applying the MTCA."[107] The trial judge stated:

> It would appear that the BVFD is an independent contractor to DeSoto County and not a political subdivision or instrumentality of the County. In short, DeSoto County does not exercise control over the method or manner in which the BVFD performs its duties.[108]

The trial judge then ruled:

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[105]R. 130-131.

[106]R. 135.

[107]R. 135.

[108]R. 136.

> A question of law exists as to the application of the Mississippi Tort Claims Act to Volunteer Fire Departments. The Court cannot find as a matter of law that Poppenheimer was entitled to the protections and notice requirements of the MTCA and therefore, his Motion for Summary Judgment on those grounds will be denied. Poppenheimer's argument that no genuine issue of material fact exists regarding the actual collision is not well taken and his Motion for Summary Judgment on this issue will also be denied.[109]

After the entry of the aforesaid *Order* on March 23, 2010, denying Poppenheimer's motion to dismiss and motion for summary judgment, Poppenheimer petitioned the Mississippi Supreme Court for an interlocutory appeal, and, on May 25, 2011, an *Order* was entered by the Supreme Court granting an interlocutory appeal.[110]

* * * * * *

[109]R. 138.

[110]R. 367.

III. SUMMARY OF THE ARGUMENT

The *Brief of the Appellant, Glenn Poppenheimer* previously filed herein states that there are two issues presented for review.[111] To re-state these issues in a neutral fashion, the issues presented are:

Issue 1: Does the Bridgetown Volunteer Fire Department ("BVFD") and its employees receive the protection of the Mississippi Tort Claims Act ("MTCA")?

Issue 2: Did the County Court of DeSoto County err by failing to dismiss the claims of the Estate of Joe D. Coyle?

The trial court stated it could not find, as a matter of law, that Glen Poppenheimer was entitled to the protections and notice requirements of the Mississippi Tort Claims Act ("MTCA") and, therefore, the trial court denied the motion for summary judgment. Poppenheimer argues that the trial court erred, and supports his argument by claiming: (1) that the MTCA applies to firefighters, citing MISS. CODE ANN. §11-46-9(1)(c); (2) that the Bridgetown Volunteer Fire Department ("BVFD") meets the statutory definition of a "governmental entity" found at MISS. CODE ANN. §11-46-1(g) because the BVFD "is a quintessential body politic" under MISS. CODE ANN. §11-46-1(i); and, (3) that, alternatively, the BVFD is an "instrumentality" of DeSoto County. The Coyles assert that Poppenheimer's argument is without merit, and that the ruling of the trial court should be affirmed.

There is a Mississippi statute (to-wit: MISS. CODE ANN. §95-9-1) which provides an exemption from civil liability for volunteer firefighters, but specifically excluded by Section 95-9-1 are instances "[w]here the ... volunteer negligently operates a motor vehicle ...." Because the Coyles allege Poppenheimer's negligence in driving his vehicle caused the death

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[111]See *Brief of the Appellant, Glenn Poppenheimer*, p. 1.

of Joe D. Coyle, Section 95-9-1 provides no protection to Poppenheimer. Poppenheimer desperately wants to fit within the MTCA so that the notice requirements of the MTCA may be applied and Poppenheimer can have the Coyles' claim dismissed for lack of notice.

The trial court never discussed MISS. CODE ANN. §95-9-1, because the trial court focused its inquiry almost exclusively on whether the BVFD is a "governmental entity." The trial court observed that the "over 10,000 volunteer firemen in the State of Mississippi" are "hardly a small number or obscure class of employees that were somehow left on the legislature's cutting room floor." If the BVFD is a "governmental entity" then all of those "over 10,000 volunteer firemen" are employees of a governmental entity. The simple existence of MISS. CODE ANN. §95-9-1 clearly demonstrates that volunteer firefighters have not somehow been overlooked by the legislature.

The question of whether an organization is a "governmental entity" or is a private institution has arisen in several cases involving health care providers, and these cases are instructive. The continuity, control, and management of the BVFD are not "under the power of the public through public agents who are responsibly accountable to the government." Thus, the BVFD simply is not a "governmental entity" under established principals of Mississippi law but is an "independent contractor" as foun d by the trial court, and Poppenheimer is not entitled to the protection of the MTCA.

Poppenheimer claims that the Mississippi Tort Claims Board recognizes the Bridgetown Volunteer Fire Department as a governmental entity. This claim is simply wrong. In Attorney General's Opinion Number 96-0806 it is explained that "the Board has concluded that a volunteer fire department would not be included within the definition of 'political subdivision."

The BVFD is also not an "instrumentality" of DeSoto County as claimed by Poppenheimer. The trial court specifically noted that DeSoto County does not have "any supervisory control ... over the BVFD in its day-to-day operations," therefore, far from being an "instrumentality" of DeSoto County, the trial court found the BVFD is merely an "independent contractor."

Poppenheimer argues that "[t]he Estate failed to produce any evidence ... that Mr. Poppenheimer was negligent in any way," and argues the trial court should have granted summary judgment. The trial court ruled that "in regards to an 'intersection collision'" the issue of negligence is a question of fact to be resolved by a jury, and held "there is a question of fact to be resolved as it relates to Poppenheimer's operation of his vehicle as he approached the intersection." Poppenheimer testified:

> Q. Now, at that point when you first saw [Joe D. Coyle's] vehicle do you know approximately how fast you were going at that point?
>
> A. Forty. ***My speed didn't change any.***

Also, in what appears to be an admission of carelessness and inattention, Poppenheimer testified: "I never thought anything in the world about him not seeing me or running the – you know, coming out of the intersection." Poppenheimer also admitted that his attention was not directed toward Joe D. Coyles' vehicle, but was directed down the road to the fire station. The trial court ruled that "Poppenheimer's argument that no genuine issue of material fact exists regarding the actual collision is not well taken and his motion for Summary Judgment on this issue will also be denied." This decision was correct and should be affirmed.

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IV. ARGUMENT

A. *INTRODUCTION AND STANDARD OF REVIEW*

The *Brief of the Appellant, Glenn Poppenheimer* previously filed herein states that there are two issues presented for review.[112] To re-state these issues in a neutral fashion, the issues presented are:

> Issue 1: Does the Bridgetown Volunteer Fire Department ("BVFD") and its employees receive the protection of the Mississippi Tort Claims Act ("MTCA")?
>
> Issue 2: Did the County Court of DeSoto County err by failing to dismiss the claims of the Estate of Joe D. Coyle?

This interlocutory appeals follows the trial court's denial of Glen Poppenheimer's *Motion to Dismiss or in the alternative for Summary Judgment*. Mississippi appellate courts apply a *de novo* standard of review in cases where a trial court has granted or denied summary judgment. See, *e.g.*, *Arcadia Farms Partnership v. Audubon Ins. Co.*, No. 2009–CT–00903–SCT, 77 So.3d 100, 104 (¶ 16) (Miss. 2012) ("We review a trial court's grant of summary judgment de novo."), and *Automobile Ins. Co. of Hartford v. Lipscomb*, No. 2010–IA–00149–SCT, 75 So.3d 557 (¶ 6) (Miss. 2001) ("This Court reviews a trial court's grant or denial of a motion for summary judgment under a de novo standard."). The Mississippi Supreme Court has often observed:

> Summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue 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(c). The evidence must be considered in the light most favorable to the party against whom the motion is made. *In re Estate of Laughter*, 23 So.3d at 1060 (Miss.2009) (quoting Bullock, 872 So.2d at 660).

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[112]See *Brief of the Appellant, Glenn Poppenheimer*, p. 1.

Sweet v. TCI MS, Inc., No. 2009-CA-01260-SCT, 47 So.3d 89, 91 (¶ 9) (Miss. 2010). The moving party (in this case, Glen Poppenheimer) "bears the burden of demonstrating there is no genuine issue of material fact." *University of Mississippi Medical Center v. Easterling*, No. 2004-IA-02360-SCT, 928 So.2d 815, 817 (¶ 8) (Miss. 2006). Furthermore, the Mississippi Supreme Court has held that "summary judgment should be granted with great caution." *Palmer v. Anderson Infirmary Benevolent Association*, 656 So.2d 790, 794 (Miss. 1995). The Court has also plainly stated that "[s]ummary judgment is no substitute for trial regarding disputed issues of fact." *Barner v. Gorman*, 605 So.2d 805, 808 (Miss. 1992).

Also, in this civil action, Glen Poppenheimer is claiming protection under the Mississippi Tort Claims Act (which is codified as MISS. CODE ANN. §11-46-1, *et seq.*, and which may also be referred to herein as "MTCA"), and appellate review of the application of the MTCA is also *de novo*. See, *e.g.*, *Price v. Clark*, No. 2007-CA-01671-SCT, 21 So.3d 509, 517 (¶ 10) (Miss. 2009) ("... this Court reviews the application of the MTCA de novo."), and *Lee v. Memorial Hosp. at Gulfport*, No. 2007-CA-01762-SCT, 999 So.2d 1263, 1266 (¶ 8) (Miss. 2008) ("This Court reviews the application of the Mississippi Tort Claims Act ("MTCA") de novo.").

* * *

B. *GLEN POPPENHEIMER IS NOT PROTECTED BY THE MISSISSIPPI TORT CLAIMS ACT*

The trial court held:

> A question exists as to the application of the Mississippi Tort Claims Act to Volunteer Fire Departments. The Court cannot find as a matter of law that [Glen] Poppenheimer was entitled to the protections and notice requirements of the MTCA and therefore, his Motion for Summary Judgment on those grounds will be denied.[113]

Glen Poppenheimer, however, argues in the *Brief of the Appellant, Glenn Poppenheimer*, that:

> The Bridgetown Volunteer Fire Department is a political subdivision as the term is defined in MISS. CODE ANN. §11-46-1(i). Mr. Poppenheimer is its employee and was acting within the course and scope of his employment at the time of the underlying collision. Accordingly, Mr. Poppenheimer receives the protections and benefits set forth in the Mississippi Tort Claims Act.[114]

The statute referenced by Poppenheimer, MISS. CODE ANN. §11-46-1(i), states:

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[113]R. 138. Notably, the trial court's order also stated:

> As no statute or case confers the status of "governmental entity" upon a volunteer fire department and the statute defining political subdivisions of the State of Mississippi is silent on the issue, this Court declines to act as a legislative body by bestowing that title upon the BVFD. To paraphrase (and I use the term liberally) then Hinds County Circuit and now Federal District Court Judge Graves from the *Miller* case, "I'm putting it on the record. I don't know if a Volunteer Fire Department is a government entity. I don't know Supreme Court. Please tell me!" As the parties have already indicated that the non-prevailing party intends to ask for leave to file an interlocutory appeal with the Mississippi Supreme Court, it is this Court's desire that the Supreme Court approve their request and provide guidance to the trial courts on this issue; an issue that, despite the existence of over 10,000 volunteer firemen in this State, has managed to escape judicial scrutiny.

R. 136-137. See *Miller v. Meeks*, No. 1999-CA-00210-SCT, 762 So.2d 302, 304 (¶ 2) (Miss. 2000).

[114]See *Brief of the Appellant, Glenn Poppenheimer*, p. 9.

> "Political subdivision" means any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including but not limited to, any county, municipality, school district, community hospital as defined in Section 41-13-10, Mississippi Code of 1972, airport authority or other instrumentality thereof, whether or not such body or instrumentality thereof has the authority to levy taxes or to sue or be sued in its own name.

Poppenheimer supports his argument by claiming: (1) that "[t]he Mississippi Tort Claims Act applies, by its very terms, to firefighters," citing MISS. CODE ANN. §11-46-9(1)(c); (2) that the Bridgetown Volunteer Fire Department ("BVFD") meets the statutory definition of a "governmental entity" found at MISS. CODE ANN. §11-46-1(g) (which states that a "'Governmental entity' means and includes the state and its political subdivisions ....") because the BVFD "is a quintessential body politic" under MISS. CODE ANN. §11-46-1(i) which provides "fire protection" and that "fire protection" is "a governmental function"; and, (3) that, alternatively, the BVFD is an "instrumentality" of DeSoto County (which "... is without question a political subdivision ..."). The Coyles respectfully state to this Court that Poppenheimer's argument is without merit, and that the ruling of the trial court should be affirmed.

* * *

1. Does Mississippi Law Exempt Firefighters Engaged in the Performance of Their Duties from Liability for Negligence?

Glen Poppenheimer argues that 'Mississippi law exempts firefighters engaged in the performance of their duties from liability for negligence.'[115] Poppenheimer is correct, but Poppenheimer points to the wrong statutory exemption. Poppenheimer desperately wants to find a way to fit himself within the Mississippi Tort Claims Act ("MTCA") so that the

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[115]See *Brief of the Appellant, Glenn Poppenheimer*, p. 9.

notice requirements of MISS. CODE ANN. §11-46-11 (rev. 2002) may be applied and Poppenheimer can have the Coyles' claim against him dismissed for lack of notice, but all the while Poppenheimer ignores MISS. CODE ANN. §95-9-1, *et seq.* (statutes which are together captioned *Liability Exemption for Volunteers and Sports Officials*).[116] MISS. CODE ANN. §95-9-1 states, in pertinent part, as follows:

> (3) A qualified volunteer who renders assistance to a participant in, or a recipient, consumer or user of the services or benefits of a volunteer activity ***shall not be liable for any civil damages*** for any personal injury or property damage caused to a person as a result of any acts or omissions committed in good faith ***except***:
>
> (a) Where the qualified volunteer engages in acts or omissions which are intentional, willful, wanton, reckless or grossly negligent; or
>
> (b) ***Where the qualified volunteer negligently operates a motor vehicle***, aircraft, boat or other powered mode of conveyance.

(Emphasis added.) Notably, Section 95-9-1(1) provides the following definitions:

> (a) "Qualified volunteer" means any person who freely provides services ... without any compensation or charge to any volunteer agency in connection with a volunteer activity. For purposes of this chapter, reimbursement of actual expenses, including travel expenses, necessarily incurred in the discharge of a member's duties, insurance coverage and workers' compensation coverage of volunteers, ***shall not be considered monetary compensation***.
>
> (b) "Volunteer agency" means any department, institution, community volunteer organization ... . ***Volunteer agency shall also include any volunteer firefighter association*** which is eligible to be designated as a nonprofit corporation under 501(c)(3) by the United States Internal Revenue Service.
>
> (c) "***Volunteer activity***" ***means any activity*** within the scope of any project, program or other activity regularly sponsored by a volunteer agency with the

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[116]These statutes have been referred to as Mississippi's "Good Samaritan" law. These statutes, which were raised by the Coyles in the trial court (see R. 171-174), are not discussed, mentioned, or even listed in the *Brief of the Appellant, Glenn Poppenheimer* (see p. vi).

> intent to effect a charitable purpose, or other public benefit ***including***, but not limited to, ***fire protection***, rescue services, the enhancement of the cultural, civic, religious, educational, scientific or economic resources of the community or equine activity as provided in Sections 95-11-1 et seq.

(Emphasis added.) Thus, MISS. CODE ANN. §95-9-1 provides that a "Qualified volunteer" providing "services" for a "Volunteer agency" which is engaged in "Volunteer activity" (which specifically includes "any volunteer firefighter association" and which specifically includes "fire protection") "shall not be liable for any civil damages" except "[w]here the qualified volunteer negligently operates a motor vehicle ...."

Section 95-9-1 provides all of the protection from civil liability that any Mississippi volunteer firefighter could need, except for instances where the "volunteer negligently operates a motor vehicle." Notably, in the case *sub judice*, the Coyles' claims against Poppenheimer arise from Poppenheimer's alleged negligent operation of a motor vehicle. Poppenheimer can find no refuge in Section 95-9-1, and this obviously explains why Poppenheimer's brief fails to discuss, mention, or even list Section 95-9-1, as well as why Poppenheimer desperately desires the protections of the MTCA and the notice requirements of MISS. CODE ANN. §11-46-11. Notably, the trial court never discussed MISS. CODE ANN. §95-9-1, because the trial court focused its inquiry almost exclusively on the question of whether the BVFD is a "governmental entity" (to-wit: "... the Court finds that only one unanswered question is relevant; that is, 'Is the BVFD a governmental entity?'").[117] The Coyles, however, believe that the very existence of MISS. CODE ANN. §95-9-1 (and the language pertaining to "volunteer firefighter association[s]" and "fire protection" contained therein) must be taken into account when determining whether the MTCA applies to a

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[117]R. 132.

volunteer fire department or a volunteer firefighter (such as the BVFD and Glen Poppenheimer in the case *sub judice*). The trial court observed that the "over 10,000 volunteer firemen in the State of Mississippi" are "hardly a small number or obscure class of employees that were somehow left on the legislature's cutting room floor."[118] The simple existence of MISS. CODE ANN. §95-9-1 clearly demonstrates that volunteer firefighters have not somehow been overlooked by the legislature.[119]

Interestingly, Section 95-9-1 was discussed in an Attorney General's Opinion ("A.G. Op.") issued April 16, 1991, to Pearl River County Administrator Gary Beech which provided responses to specific questions raised by Mr. Beech concerning the relationship between a county and volunteer firefighters, including this question: "Who is responsible for workmen's compensation?"[120] This A.G. Op. stated:

> While volunteer firemen certainly provide an invaluable service to the public, ***they are not employees of the county***. Although the county does, in our opinion, have discretionary authority to assist with the cost of coverage, it is the responsibility of the volunteer organization to acquire worker's compensation insurance if required by law or otherwise desired.[121]

Mr. Beech also raised this question: "Are all volunteer fire members covered under the Good Samaritan Act? If so, what coverage?" The Attorney General responded:

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[118]R. 135.

[119]Poppenheimer, in his brief, states that "[a]t least one other jurisdiction has applied sovereign immunity to a volunteer firefighter on his way to a fire," and cites *National R.R. Passenger Corp. v. Catlett Volunteer Fire Co., Inc.*, 241 Va. 402, 404 S.E.2d 216 (Va., 1991). However, the Virginia court was merely interpreting a statute which specifically stated that if a "fire-fighting company" entered into a contract with a county "the fire-fighting company shall be deemed to be an instrumentality of the contracting county and as such exempt from suit for damages done incident to fighting fires therein." This case has no relevancy whatsoever to the issues presented in the case *sub judice*.

[120]1991 WL 577518 (Miss.A.G.).

[121]1991 WL 577518 (Miss.A.G.) (emphasis added).

> Generally, volunteer fire members are protected under the "Good Samaritan" law, Miss. Code Ann. §§ 95-9-1 et seq., as amended. However, it is important to understand that to qualify under this law the volunteer must be a person who "freely provides [fire-fighting] services ... without any compensation [excluding actual expenses, including travel] or charge ..." Miss. Code Ann. § 95-9-1(a). Furthermore, even a qualified volunteer is not immune from every act. For example, members are not protected from liability while acting outside the scope of the volunteer activity and ***they are not immune from liability for acts or omissions arising out of the negligent operation of a motor vehicle***, aircraft, boat or other powered mode of conveyance.. Miss. Code Ann. § 95-9-5 and § 95-9-1(3).[122]

Other Attorney General's Opinions have also touched upon the status of volunteer firefighter and volunteer fire departments. For example, in an A.G. Op. issued June 12, 1987, to Eugene B. Gifford, Jr., it is stated "... no formal action is required of the county with respect to the assignment of an operational area for a volunteer fire department, same being a discretionary matter left to the volunteer organization."[123] Also, in A.G. Op. No. 95-0381 issued July 19, 1995, to Jeffrey Hollimon, it is stated: "Volunteer firefighters provide an invaluable service to the public, however, they are not employees of the county."[124]

Again, in this case the claims against Poppenheimer involve "the negligent operation of a motor vehicle" and, thereby fall outside of the protection of Section 95-9-1; therefore, Glen Poppenheimer desperately wants to find a way to fit himself within the MTCA so that the notice requirements of MISS. CODE ANN. §11-46-11 may be applied and Poppenheimer

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[122]1991 WL 577518 (Miss.A.G.) (emphasis added).

[123]1987 WL 121745 (Miss.A.G.).

[124]1995 WL 461708. Compare the situation of volunteer firefighters, who work for a volunteer organization which is not controlled by a governmental entity with the situation of volunteers at a public hospital, which clearly is controlled by a governmental agency. See, *e.g.*, A.G. Op. No. 2002-0144, issued March 29, 2002, to A. Wallace Conerly, M.D. ("It is our opinion that an unpaid volunteer acting on behalf of the University Hospital is afforded coverage under the Tort Claims Act."). 2002 WL 1057891 (Miss.A.G.)

can have the Coyles' claim against him dismissed for lack of notice. Toward this end, Poppenheimer, in his brief, notes that MISS. CODE ANN. §11-46-9(1)(c) provides:

> (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
> ...
> (c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury; ....[125]

Under the statute, "employees" of a Mississippi "governmental entity" may include firefighters who are "engaged in the performance or execution of duties or activities relating to ... fire protection ...." Again, the trial court had this statute in mind when the trial court stated in its *Order*: "This Court finds the central issue in the instant case to not be the status of Poppenheimer but rather the Bridgetown Volunteer Fire Department."[126] In other words, the trial court said the central issue is whether the BVFD a governmental entity. And, again, the trial court also noted that "there are over 10,000 volunteer firemen in the State of Mississippi" which is "hardly a small number or obscure class of employees that were somehow left on the legislature's cutting room floor."[127] It would follow that if the BVFD is a "governmental entity" then all of those "over 10,000 volunteer firemen" are employees of a governmental entity.

Poppenheimer, in his brief, argues that the BVFD is a "governmental entity" because it is "a quintessential body politic," yet Poppenheimer cites only a single case – *Urban Renewal Agency of City of Aberdeen v. Tackett*, 255 So.2d 904, 905 (Miss. 1971) (citing 11

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[125]This statute is cited in the *Brief of the Appellant, Glenn Poppenheimer* (see p. 9).

[126]R. 135.

[127]R. 135.

C.J.S. Body, 380 (1938)) – to support his argument that the BVFD is a "body politic" which makes it a "governmental entity." Notably, the agency involved in *Urban Renewal Agency of City of Aberdeen v. Tackett* was, itself, created by an existing municipality acting pursuant to a state statute – thus, there was no question that the agency was so connected with the municipality ("... it is a large part of the municipality or a strong arm thereof ...") as to come within rule immunizing municipalities from punitive damages. Unlike the situation in *Urban Renewal Agency of City of Aberdeen v. Tackett*, the BVFD was not created by DeSoto County and simply is not "a large part of [DeSoto County] or a strong arm thereof," and is not a "governmental entity."

The question of whether an organization is a "governmental entity" or is a private institution has arisen in several cases involving health care providers, and these cases should be instructive for the case *sub judice*. In this context, the Mississippi Supreme Court has stated:

> In *Brister v. Leflore County*, 156 Miss. 240, 125 So. 816, 817 (1930), this Court dealt with the issue of "whether a hospital corporation is a public or private corporation...." Amidst that discussion, this Court laid out the following principles:
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> ...
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> ... The "ultimate test" for determining whether a hospital corporation is public or private involves whether "its continuity, and its control and management, [are] under the power of the public through public agents who are responsibly accountable to the government? ... [T]he arrangement [must] be such that the *majority control* shall remain in the *public through responsible public agents or managers* ...."

Bolivar Leflore Medical Alliance, LLP v. Williams, No. 2005-IA-00640-SCT, 938 So.2d 1222, 1227-28 (¶ 15) (Miss. 2006) (emphasis in original). In the case *sub judice*, the

"continuity," "control," and "management" of the BVFD ***are not*** "under the power of the public through public agents who are responsibly accountable to the government."

The BVFD simply is not a "governmental entity" under established principals of Mississippi law. The trial court specifically found that there was no "supervisory control of [DeSoto] County over the BVFD" and that "[t]he BVFD is responsible for providing training and equipment to its volunteers, not agents of the County."[128] The trial court also stated:

> It would appear that the BVFD is an independent contractor to DeSoto County and not a subdivision or instrumentality of the County. In short, DeSoto County does not exercise control over the method or manner in which the BVFD performs its duties.[129]

The trial court's finding in this case that the BVFD is an independent contractor is analogous to the conclusion reached by the Mississippi Supreme Court in *Rolison v. City of Meridian*, No. 94-CA-00990, 691 So.2d 440 (Miss. 1997), wherein the plaintiff, a participant at a softball game who was injured by a thrown bat, had brought suit against the City of Meridian and also against the Meridian Umpire Association ("MUA"), an unincorporated association which contracted with the city to provide umpires for softball games. The city exercised no control over the umpires, special training for the umpires was provided by MUA, and the umpires were in charge of the games and discipline. The city did nothing except pay the MUA to provide competent umpires to officiate at softball games. The case presented the question of whether the MUA was an independent contractor, or whether the relationship between the MUA and the city was that of employer and employee. The Supreme Court applied its ruling in *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143

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[128]R. 136.

[129]R. 136.

(Miss.1994), and held that the relationship between the MUA and the city was that of an independent contractor and not employer and employee. In *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143 (Miss.1994), the Supreme Court cited *Texas Co. v. Mills*, 171 Miss. 231, 156 So. 866 (1934), where it was stated:

> "An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." *Rest. Agency*, § 2, pars. 2 and 3, p. 11.

Texas Co., 156 So. at 869. Again, well established principals of Mississippi law indicate that the BVFD is not a "governmental entity," as claimed by Poppenheimer, but is, instead, an "independent contractor" as found by the trial court, and, therefore, Poppenheimer's status as a volunteer with the BVFD does not make him an "employee" of a Mississippi "governmental entity" who is entitled to the protection of the MTCA.

* * *

2. The Mississippi Tort Claims Board Has Not Recognized the Bridgetown Volunteer Fire Department as a "Governmental Entity."

Poppenheimer, in his brief, states:

> Also included [in the Record] are Certificate of Liability Insurance for varying coverage periods, including one that covers January 27, 2007, or the date of the underlying accident (R. at 349). On its face, the certificate shows coverage was issued for Bridgetown Volunteer Fire Department from June 2006 to June 2007. (R. at 349). Accordingly, the Tort Claims Board reviewed and approved the Bridgetown Volunteer Fire Department insurance coverage for the time period of the collision. The review and approve function is one the Board performs *only* for governmental entities as defined by the Act.
>
> In short, the Mississippi Tort Claims Board, creating by the Mississippi legislature for the purpose of overseeing coverage of governmental entities, MISS. CODE ANN. §11-46-20(1), recognizes the Bridgetown Volunteer Fire Department as a governmental entity. Moreover,

> it does so while acting under direct legislative oversight. MISS. CODE ANN. §11-46-18; See also 1994 MISS. LAWS Ch. 568 (H.B. 659).[130]

This claim by Poppenheimer is simply wrong. In Attorney General's Opinion Number 96-0806, issued January 24, 1997, to John T. Lamar, Jr., the Attorney General noted that the Tate County Board of Supervisors had received a letter from the Mississippi Tort Claims Board instructing that all political subdivisions of the state must submit a liability coverage plan to the Tort Claims Board pursuant to MISS. CODE ANN. §11-46-17.[131] The Attorney General's Opinion then stated:

> As noted in the letter you received from the Tort Claims Board dated October 28, 1993, ***the Board has concluded that a volunteer fire department would not be included within the definition of "political subdivision***." The Board went on to determine that coverage is nevertheless required of volunteer fire departments because of the Act's expansive definition of "employee" and the Board's view that there exists a risk that a county could ultimately be held liable by a court of competent jurisdiction for the torts of a volunteer fire department providing services to that county.[132]

Thus, contrary to Poppenheimer's claim, the truth is that the Mississippi Tort Claims Board "has concluded that a volunteer fire department would not be included within the definition of 'political subdivision,'" but, nevertheless, the Mississippi Tort Claims Board has (out of the proverbial "abundance of caution") sought to eliminate any "risk that a county could ultimately be held liable by a court of competent jurisdiction for the torts of a volunteer fire department providing services to that county."

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[130]See *Brief of the Appellant, Glenn Poppenheimer*, p. 16 (emphasis in original).

[131]1997 WL 47308 (Miss.A.G.).

[132]1997 WL 47308 (Miss.A.G.) (emphasis added).

3. The Bridgetown Volunteer Fire Department is not an Instrumentality of a Political Subdivision – it is an Independent Contractor.

Poppenheimer, in his brief, argues that the "Bridgetown Volunteer Fire Department is an instrumentality of DeSoto County because it is responsible for providing certain governmental services within certain designated areas."[133] This statement is utterly fallacious. First, as noted in an A.G. Op. issued June 12, 1987, to Eugene B. Gifford, Jr., "... no formal action is required of the county with respect to the assignment of an operational area for a volunteer fire department, same being a discretionary matter left to the volunteer organization."[134]

Next, the quotation from *Bolivar Leflore Medical Alliance, LLP v. Williams*, No. 2005-IA-00640-SCT, 938 So.2d 1222 (Miss. 2006), set forth in Poppenheimer's brief is taken out-of-context.[135] The trial court stated that "[i]t would appear that the BVFD is an independent contractor to DeSoto County and not a subdivision or instrumentality of the County."[136] Again, in the Mississippi Supreme Court's decision in *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143 (Miss.1994), the Court cited *Texas Co. v. Mills*, 171 Miss. 231, 156 So. 866 (1934), where it was stated:

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[133]See *Brief of the Appellant, Glenn Poppenheimer*, p. 17.

[134]1987 WL 121745 (Miss.A.G.).

[135]Poppenheimer, citing *Bolivar Leflore Medical Alliance, LLP v. Williams*, No. 2005-IA-00640-SCT, 938 So.2d 1222, 1228 (¶ 16.) (Miss. 2006), states in his brief:

> An "in strumentality" of a political subdivision such as DeSoto County, within the meaning of the Tort Claims Act, is an entity that "serves as an intermediary or agent through which one ore more functions of a controlling force are carried out; a part, organ, or subsidiary branch esp. of a governing body."

[136]R. 136.

> "An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." *Rest. Agency*, § 2, pars. 2 and 3, p. 11.

Texas Co., 156 So. at 869. The trial court specifically noted that DeSoto County does not have "any supervisory control ... over the BVFD in its day-to-day operations."[137] Thus, far from being an "instrumentality" of DeSoto County as claimed by Poppenheimer, the BVFD is, instead, an "independent contractor" as found by the trial court.

* * *

C. *THE COUNTY COURT DID NOT ERR BY FAILING TO DISMISS THE CLAIMS OF THE ESTATE DUE TO ITS FAILURE TO PROVE ANY ACTS OF NEGLIGENCE ON THE PART OF MR. POPPENHEIMER*

The trial court, in its *Order* denying Glen Poppenheimer's motion, ruled that "[b]ased on the evidence currently before the Court, there is a question of fact to be resolved as it relates to Poppenheimer's operation of his vehicle as he approached the intersection."[138] Poppenheimer, in his brief, argues that "[t]he Estate failed to produce any evidence which would tend to suggest that Mr. Poppenheimer was negligent in any way," and argues "the County Court should have granted summary judgment in favor of Mr. Poppenheimer."[139] The trial court, in its *Order* denying Poppenheimer's motion, cited *Richardson v. Adams*, 223 So.2d 536 (Miss. 1969), and *Shaw v. Phillips*, 193 So.2d 717 (Miss. 1967), for the proposition that "in regards to an 'intersection collision'" the issue of negligence is a question of fact to be resolved by a jury, and held "there is a question of fact to be resolved

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[137]R. 136.

[138]R. 138.

[139]See *Brief of the Appellant, Glenn Poppenheimer*, p. 24.

as it relates to Poppenheimer's operation of his vehicle as he approached the intersection."[140] The trial court ruled that "Poppenheimer's argument that no genuine issue of material fact exists regarding the actual collision is not well taken and his motion for Summary Judgment on this issue will also be denied."[141]

As has been previously discussed, *supra*, since Poppenheimer's motion sought summary judgment, if a genuine issue of material fact exists which must be resolved by a finder-of-fact, then summary judgment is not appropriate.[142] In this case Poppenheimer testified that, when responding to a fire call as a volunteer firefighter, he was required "to obey ... the law, the law as it is now I mean."[143] Poppenheimer also testified that, when responding to a fire call as a volunteer firefighter, it was his responsibility while driving his vehicle to do "whatever the law states as far as a regular vehicle would be."[144] In what

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[140]R. 137-138.

[141]R. 138.

[142]Notably, even in cases where the ultimate decision will be made by the trial judge acting as the finder-of-fact in lieu of a jury (such as a MTCA case), summary judgment is not appropriate in cases where there may be conflicting evidence, because:

> [During the "full evidentiary hearing" of] a bench trial, as opposed to deposition testimony, affidavits, files and reports, there will likely be witnesses subject to extensive examination and cross-examination, and the learned trial judge, as the trier of fact, will then have the benefit of more than the cold words on paper via deposition testimony, affidavits, investigative files and reports.

Johnson v. City of Cleveland, No. 2001-CA-01687-SCT, 846 So.2d 1031, 1036 (¶ 15) (Miss. 2003). During a "full evidentiary hearing" the "trial judge will instead have the opportunity of not only hearing the sworn testimony of the witnesses but also observing their demeanor." *Johnson*, 846 So.2d at 1036 (¶ 15).

[143]R. 221 (Poppenheimer depo., p. 46).

[144]R. 222 (Poppenheimer depo., p. 47).

actually appears to be an admission of carelessness and inattention, Poppenheimer testified: "I never thought anything in the world about him not seeing me or running the – you know, coming out of the intersection."[145] Poppenheimer also admitted that his attention was not directed toward Joe D. Coyle's vehicle, but was, instead, directed further down the road to the fire station approximately a half-mile away because Poppenheimer testified that prior to the collision he was observing other volunteers at the fire station who "had already pulled the [fire] truck out" and "were sitting there waiting for me."[146] Again, the Coyles would assert this is an admission of carelessness and inattention on the part of Poppenheimer.

Notably, the Coyles' claims against Poppenheimer include allegations that Poppenheimer:

a. Failed to maintain a proper lookout;

b. Failed to exercise ordinary and reasonable care under the circumstances then and there prevailing;

c. Failed to have his vehicle under proper control;

d. Failed to devote full time and attention to the operation of the vehicle; and

e. Deliberately, recklessly or wantonly drove his vehicle into the opposite lane of traffic.[147]

The Coyles' claims against Poppenheimer also include claims of negligence *per se* against Poppenheimer and alleged Poppenheimer had violated MISS. CODE ANN. §63-3-601 (*Vehicles to be driven on right half of the roadway; exceptions*), §63-3-611 *(Overtaking and*

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[145]R. 245 (Poppenheimer depo., p. 70).

[146]R. 248 (Poppenheimer depo., p. 73).

[147]R. 23 (the Coyles' *Answer and Counter-Claim of Defendant/Counter-Plaintiff, Estate of Joe D. Coyle*) and R. 124 (the Coyles' Circuit Court *Complaint*).

passing vehicles on left side of roadway), §63-3-1201 (*Reckless driving*), §63-3-1213 (*Careless driving*).[148]

Poppenheimer, in his brief, argues that "[t]he County Court's decision is ultimately based upon the oft maligned and somewhat discredited Miss. Code Ann. §63-3-505 which, *inter alia*, requires a motorist to decrease speed when approaching and crossing an intersection."[149] This assertion by Poppenheimer is false. Again, what the trial court actually ruled is that "[b]ased on the evidence currently before the Court, there is a question of fact to be resolved as it relates to Poppenheimer's operation of his vehicle as he approached the intersection."[150] The *Richardson* case, which was cited in the trial court's *Order* and which is criticized by Poppenheimer in his brief, involved a collision at an intersection and the trial court in *Richardson* refused to grant a peremptory instruction in favor of the plaintiff. The plaintiff argued on appeal that the defendant had admitted failing to decrease her speed and, thereby, admitted violating the statute and was, therefore, negligent as a matter of law.[151] The Supreme Court ruled that the instruction was properly refused, but also noted that "[i]n this case, [the defendant] was traveling at a speed less than the maximum as she approached the intersection and whether her failure to further reduce her speed under the prevailing circumstances was negligence was a question of fact for the jury to determine." *Richardson*, 223 So.2d at 538. Notably, the Mississippi Court of Appeals cited the *Richardson* case in

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[148]R. 20-21 (the Coyles' *Answer and Counter-Claim of Defendant/Counter-Plaintiff, Estate of Joe D. Coyle*) and R. 124-125 (the Coyles' Circuit Court *Complaint*).

[149]See *Brief of the Appellant, Glenn Poppenheimer*, p. 25.

[150]R. 138.

[151]The statute involved in *Richardson* was Section 8176(b), Mississippi Code 1942 Annotated (Supp. 1968), which, in its present iteration, is codified as MISS. CODE ANN. §63-3-505 (1972).

Clark v. Clark, No. 2002-CA-01454-COA,863 So.2d 1027, 1031-32 (¶ 20) (Miss.App.,2004), for the proposition of "whether person was negligent in her failure to further reduce speed when approaching an intersection was a question of fact for the jury."

In his sworn deposition testimony, Poppenheimer testified:

> Q. Now, at that point when you first saw [Joe D. Coyle's] vehicle do you know approximately how fast you were going at that point?
>
> A. Forty. ***My speed didn't change any.***[152]

Poppenheimer's entire argument, presented in his brief, relating to "the oft maligned and somewhat discredited Miss. Code Ann. §63-3-505" is spurious, at best. As discussed, *supra*, the Coyles' allege Poppenheimer was negligent because, *inter alia*, he "[f]ailed to exercise ordinary and reasonable care under the circumstances then and there prevailing."[153] Under well-established Mississippi law, ""whether [a] person was negligent in [failing] to further reduce speed when approaching an intersection [is] a question of fact for the jury." *Clark*, 863 So.2d at 1031-32 (¶ 20). Poppenheimer has admitted he saw Joe D. Coyle's vehicle and Poppenheimer has admitted that his "speed didn't change any." The Mississippi Supreme Court has stated:

> Just because a person may be driving on a through highway with the lawful right-of-way to proceed through an intersection with another road where there are located stop signs, does not mean that person may approach and enter the intersection with impunity and without exercising caution.

Thompson ex rel. Thompson v. Lee County School Dist., No. 2003-CT-02395-SCT, 925 So.2d 57, 71 (¶ 21) (Miss.,2006). Thus, the trial court was eminently correct when it stated

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[152]R. 231 (Poppenheimer depo., p. 56) (emphasis added).

[153]R. 23 (the Coyles' *Answer and Counter-Claim of Defendant/Counter-Plaintiff, Estate of Joe D. Coyle*) and R. 124 (the Coyles' Circuit Court *Complaint*).

in its *Order* denying Poppenheimer's motion: "Based on the evidence currently before the Court, there is a question of fact to be resolved as it relates to Poppenheimer's operation of his vehicle as he approached the intersection."[154]

Here it should also be pointed out that Mississippi has adopted the doctrine of comparative negligence:

> Our law sets forth the premise that there may be more than one proximate cause to a negligent act. [Citations omitted.] The defendant may be negligent, but so too may be the plaintiff. Thus, our comparative law applies. ... [I]f the defendant and the plaintiff were both at fault in causing or attributing to the harm, then damages can be determined through the comparative negligence of both. Theoretically, if a plaintiff is ninety-nine (99%) percent negligent and the defendant is only one (1%) percent negligent, the plaintiff is still entitled to recover the one percent (1%) attributable to the negligence of the defendant. ....

Tharp v. Bunge Corp., 641 So.2d 20, 24 (Miss.,1994). See also *Smith v. Waggoners Trucking Corp.*, No. 2009–CA–01876–COA, 69 So.3d 773, 780 (¶ 34) (Miss.App.,2011) ("Thus, a plaintiff, ... although likely highly negligent herself, may still recover from a defendant whose negligence contributed to her injuries."); *Meka v. Grant Plumbing & Air Conditioning Co.*, No. 2009–CA–01921–COA, 67 So.3d 18, 23 (¶ 15) (Miss.App.,2011) (citing *Burton by Bradford v. Barnett*, 615 So.2d 580, 582 (Miss.,1993)); *Burton by Bradford v. Barnett* , 615 So.2d 58 0, 582 (Miss.,1993) ("Where negligence by both parties is concurrent and contributes to injury, recovery is not barred under such doctrine, but plaintiff's damages are diminished proportionately, even to the extent that negligence on the part of the plaintiff was ninety percent (90%) and on the part of the defendant was ten percent

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[154]R. 138.

(10%), the plaintiff would be entitled to recover theoretically that ten percent."); and, MISS. CODE ANN. §11-7-15 (1972).[155]

Assuming, *arguendo*, that Joe D. Coyle was ninety-nine (99%) percent negligent in causing the collision (which the Coyles specifically deny), the Coyles would still be "entitled to recover the one percent (1%) attributable to the negligence of [Glen Poppenheimer]." See *Tharp*, 641 So.2d at 24. Therefore, the trial court's holding that "there is a question of fact to be resolved as it relates to Poppenheimer's operation of his vehicle as he approached the intersection" was correct, and the trial court correctly denied Poppenheimer's summary judgment motion.

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[155]Miss. Code Ann. §11-7-15 (*Contributory negligence no bar to recovery of damages; jury may reduce damages*) states:

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

V. CONCLUSION

The important question to be answered in this interlocutory appeal is whether the Bridgetown Volunteer Fire Department is a "governmental entity" within the definitions provided by MISS. CODE ANN. §11-46-1.[156] If a volunteer fire department (such as the BVFD in this case) is a "governmental entity" within the provisions of the Mississippi Tort Claims Act, then the protections of the MTCA may extend to Glen Poppenheimer, as well as to every other volunteer firefighter in the State of Mississippi (a number that is "over 10,000" according to the trial court's research). Thus, if this Court finds in this appeal that a volunteer fire department is a "governmental entity," the ruling will, at a stroke, expand and extend the protections of the MTCA to Mississippi's 10,000 volunteer firemen.

The Coyle's believe that such an expansion of the protections of the MTCA is best left for action by the legislature, instead of by judicial pronouncement. Furthermore, such an expansion of the MTCA is completely unnecessary because MISS. CODE ANN. §95-9-1, *et seq.* (statutes which are together captioned *Liability Exemption for Volunteers and Sports Officials*), provide all of the protection from civil liability any volunteer firefighter could need – except for instances involving the negligent operation of a motor vehicle. The Coyles directed the trial court's attention to these statutes (which have been referred to as Mississippi's "Good Samaritan" law), but because Poppenheimer had raised the question of whether the MTCA applied, the trial court was obligated to address that question.[157]

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[156]In its order denying Poppenheimer's summary judgment motion, the trial court stated: "... the Court finds that only one unanswered question is relevant; that is 'Is the BVFD a governmental entity'?" R. 132.

[157]MISS. CODE ANN. §95-9-1, *et seq.*, were cited to the trial court in the *Coyles' Response to Poppenheimer's Motion to Dismiss or in the alternative for Summary Judgment.* R. 95-98.

The trial court stated it could not find, as a matter of law, that Glen Poppenheimer was entitled to the protections and notice requirements of the MTCA, and, therefore, the trial court denied the motion for summary judgment. The trial court found that DeSoto County had no "supervisory control ... over the BVFD in its day-to-day operations," and that the BVFD was "an independent contractor ... and not a subdivision or instrumentality of the County."[158] The trial court's ruling is eminently correct, because the continuity, control, and management of the BVFD are not "under the power of the public through public agents who are responsibly accountable to the government."[159] Thus, under established principals of Mississippi law, the BVFD simply is not a "governmental entity" but is an "independent contractor" as found by the trial court. Poppenheimer is not entitled to the protection of the MTCA, and the trial court's order denying his summary judgment motion should be affirmed.

Furthermore, the trial court correctly ruled that Poppenheimer's summary judgment motion was not well-taken because there is a genuine issue of material fact "regarding the actual collision." Poppenheimer has testified that he saw Joe D. Coyle's vehicle as Poppenheimer approached the intersection, but Poppenheimer testified he never reduced his speed, and, in what appears to be an admission of carelessness and inattention, Poppenheimer testified: "I never thought anything in the world about him not seeing me or running the -- you know, coming out of the intersection."[160] Poppenheimer also admitted that his attention

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[158]R. 136.

[159]*Bolivar Leflore Medical Alliance, LLP v. Williams*, No. 2005-IA-00640-SCT, 938 So.2d 1222, 1227-28 (¶ 15) (Miss. 2006).

[160]R. 231, 245 (Poppenheimer depo., pp. 56, 70).

was not directed toward Joe D. Coyle's vehicle, but was directed down the road to the fire station.[161] Again, the Mississippi Supreme Court has stated:

> Just because a person may be driving on a through highway with the lawful right-of-way to proceed through an intersection with another road where there are located stop signs, does not mean that person may approach and enter the intersection with impunity and without exercising caution.

Thompson ex rel. Thompson v. Lee County School Dist., No. 2003-CT-02395-SCT, 925 So.2d 57, 71 (¶ 21) (Miss.,2006). Thus, the trial court's ruling that "[b]ased on the evidence ... there is a question of fact to be resolved as it relates to Poppenheimer's operation of his vehicle as he approached the intersection" was correct, and this Court should affirm the order of the trial court which dismissed Poppenheimer's motion for summary judgment.[162]

RESPECTFULLY SUBMITTED, this, the 9TH day of MARCH, 2012.

ESTATE OF JOE D. COYLE, Deceased,
Defendant-Appellee

By: _____
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[161]R. 248 (Poppenheimer depo., p. 73).

[162]R. 138.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have this date served a true and correct copy of the above and foregoing *Brief of the Appellee, Estate of Joe D. Coyle, Deceased* upon the following named persons by placing same in the regular United States Mail, postage prepaid, addressed as stated:

Trial Judge:

Honorable Allen B. Couch, Jr.
DeSoto County Court Judge
2535 Hwy. 51, South, Room 200
Hernando, Mississippi 38632-2132

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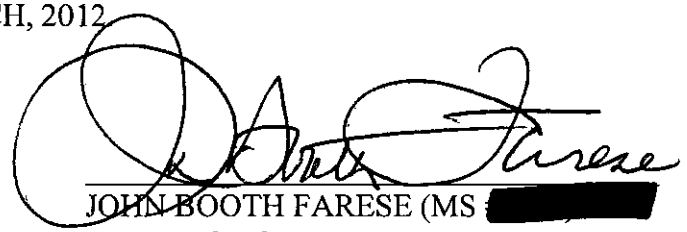
This the 9th day of MARCH, 2012.



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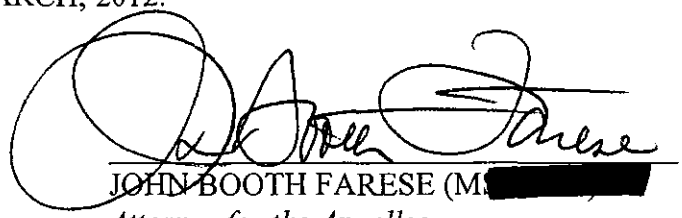
CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I have, this date, placed the original of the above and foregoing *Brief of the Appellee, Estate of Joe D. Coyle, Deceased* together with three (3) copies of same (pursuant to M.R.A.P. Rule 31(c)), and a CD-ROM containing an electronic copy of the brief stored in Adobe Portable Document Format (PDF) (pursuant to M.R.A.P. Rule 28(m)), in the regular United States Mail, postage pre-paid, addressed to:

Honorable Kathy Gillis
Office of the Clerk
Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205-0249

THIS, this 9TH day of MARCH, 2012.



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