**IN THE SUPREME COURT OF MISSISSIPPI**

**NO. 2016-CA-01429**

SAMUEL WILCHER, JR. APPELLANT

VS.

LINCOLN COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS, CITY OF BROOKHAVEN, AND JOHN DOE ENTITY(IES) A, B, C, AND D . APPELLEES

APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY, MISSISSIPPI

# APPELLANT'S PRINCIPAL BRIEF

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## CERTIFICATE OF INTERESTED PERSONS

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

1. The Appellant Samuel Wilcher, Jr. (hereinafter, "Wilcher") is an adult resident citizen of Lincoln County, Mississippi.
2. Wilcher's counsel is Mr. Mark T. Fowler.
3. Defendant/Appellee Lincoln County Board of Supervisors ("Board" or "County") is a governmental entity under the Mississippi Constitution.

4. Defendant/Appellee City of Brookhaven ("City" or "Brookhaven") is a municipality formed under the Constitution and Statutes of the State of Mississippi.
5. The Board is represented by Mr. Robert O. Allen.
6. The City is represented by Mr. Matthew D. Miller.
7. The Hon. David H. Strong, Jr., was the presiding judge for the Circuit Court of Lincoln County, Mississippi.

/s Mark T. Fowler
Attorney of Record to Mr. Wilcher

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## STATEMENT OF THE ISSUES

I. The trial court erred as a matter of law in ruling that *how* a governmental actor carried out certain road construction and maintenance duties was discretionary and therefore entitled to immunity under the Mississippi Tort Claims Act ("MTCA").

II. The trial court erred in ruling that a governmental authority has the "discretion" to create a hazard to the public and then fail to warn of the hazard.

## STATEMENT OF ASSIGNMENT

Often a statement of assignment is easily composed; if the case fails to fall into a category in Rule 16(b), then it should be retained. Most cases will not fall within the terms of Rule 16(d) and may either be retained or assigned at the Court's discretion. This case seems to fall within – to use Justice Douglas's famous term – the "penumbra" of Rule 16(d). Undersigned counsel believed that a public actor's failure to correct, or warn of, roadway dangers caused by the public actor, as within the terms of the Tort Claims Act, was well-settled law. The trial court disagreed.

The Supreme Court may wish to retain the case based on the second issue as stated *supra*. Here, local governmental authorities created an obvious hazard: an incomplete bridge construction or reconstruction project created a ditch or pit in the process of the construction. No warning or barriers were erected to give notice of the bridge construction hazard. Research has not revealed any cases in which the Supreme Court has considered whether the so-called "government-created hazard" doctrine

arises under the Mississippi Tort Claims Act. In other words, one of the issues in this case is whether discretionary function immunity is available to a government actor who creates a danger and then fails to warn of the hazard.

## STATEMENT OF THE CASE

### A. Course of Proceedings

This case was initiated in December of 2015. Wilcher alleged that either the City or Board, or both, were repairing or constructing a bridge on Washington Street in Brookhaven. Mr. Wilcher was traveling on Washington Street on the evening of July 1, 2014. Without barrier or warning signs indicating the absent bridge, Wilcher's vehicle plunged off the street and he sustained damage to his vehicle and injuries to himself. Wilcher alleged that the failure on the part of the City and/or Board to erect appropriate signage was negligent and a violation of Miss. Code Ann. § 63-3-305. [V. 1: C.P. 5-8]

The County answered in April, 2016. The Board admitted the essential events leading to Wilcher's injuries and damages but denied all other allegations. [V. 1: C.P. 31-35] Brookhaven answered in late May, 2016. Like the County, the City also claimed everything from Rule 12 defenses to sovereign immunity, admitted the facts of the incident, and denied the other allegations. [V. 1: C.P. 44-51]

In mid-June, 2016, Brookhaven moved to dismiss the action. [V. 1: C.P. 57-60] The County followed in early August. [V. 1: C.P. 98-100] Wilcher responded to each motion, and only Brookhaven replied. [V. 1: C.P. 69-86; 90-96; 120-29] Following a

hearing on August 22, 2016, the Circuit Court of Lincoln County, Hon. David Strong presiding, entered an order granting both Defendants' motions to dismiss on the basis that the placement of traffic control devices was a discretionary governmental function and therefore not actionable under the Tort Claims Act. [V. 1: C.P. 131-32] A final judgment dismissing the action was entered on September 26, 2016. [V. 1: C.P. 133]

Wilcher timely noticed this appeal on October 4, 2016. [V. 1: C.P. 136]

## B. Facts

As all Parties acknowledged through the pleadings, Wilcher was traveling on Washington Street, within the City of Brookhaven and County of Lincoln, when his vehicle tumbled into a ditch. [V. 1: C.P. 7; 33; 50] Wilcher claimed that there were no signs warning that a bridge on Washington Street was undergoing repair or replacement and that the incomplete construction or reconstruction led to his driving off the street into a ditch.

As was reported in the Brookhaven newspaper, the *Daily Leader*, on July 3, 2014, "The construction on the bridge at South Washington Street had resulted in an approximately three-foot drop-off that leads into a large ditch. . . . The bridge construction is a joint city and county effort to improve driving conditions in the city by replacing old culverts." The report concludes: "Barriers have been placed on the road since Wilcher's accident." [V. 1: C.P. 80-81; Exhibit A to Wilcher's Response]

The County admitted that Wilcher was traveling on Washington Street, but claimed that instead of slipping into the yard-high drop-off, he had collided with the "south end of the Washington Street Bridge . . .." [V. 1: C.P. 98] In its motion to dismiss, the County further admitted that the *Daily Leader* reporter essentially had the facts right: "[T]he City . . . and . . . County had entered into an interlocal agreement to repair the bridge . . . by removing [the] bridge in its entirety and replacing it . . .. On the day of the accident, [the contractor responsible for the construction] had removed the old bridge, inserted the culvert pipes, and was in the process of covering the culvert pipes at the end of the day. There was a drop off [and the contractor] placed a homemade barricade across the south end of the road warning the public that the bridge construction was not completed."

While the Parties' motions and responses contain a variety of "facts" outside the pleadings, all agree that Wilcher drove off the street into an area that was part of the construction or reconstruction of the bridge and crashed. For the purposes of this appeal, the trial court's ruling makes it clear that the court did not consider facts outside the pleadings in ruling that, as a matter of law, the City and County were immune under the "discretionary function" provision of the MTCA.

The trial court's order granting dismissal under Rule 12 simply remarks that "Wilcher was travelling (sic) South on Washington Street . . . and crashed his vehicle into a pit, allegedly caused by workers who were repairing the bridge . . . Wilcher contends that the pit was a dangerous condition caused by the repair work, and that

the city and county failed to warn of said dangerous condition." The trial court then ruled that "Section 63-3-305, by its plain language, makes it clear that placement and maintenance of traffic control devices, by local authorities, is not mandated, but rather a discretionary function, as the statute clearly grants authority to local authorities "as they deem necessary." Consequently, according to the trial court, under the MTCA the City and County were immune from suit. [V. 1: C.P. 131-32]

The City's motion was based on cases having been decided in 2012 and earlier. [V. 1: C.P. 58-60] The County cited no cases under the MTCA and only cites a statute that uses the phrase "as [local authorities] deem necessary to indicate and to carry out the provisions [of traffic control law] or to regulate, warn, or guide traffic."

As explained *infra*, Wilcher relies on the latest evolution of the so-called "discretionary function" law in support of his contention that the trial court erred in granting the dismissal. Wilcher agrees with the City and County that they could choose any one of a number of traffic control devices as set out in Mississippi law and the Manual on Uniform Traffic Control Devices to warn or guide traffic. In other words, *how* the City and County carried out its duties under the law was certainly a matter of informed choice, or "discretion." Utterly failing to carry out the function mandated by law was not within the City and County's discretion.

## SUMMARY OF THE ARGUMENT

The trial court erred in dismissing the case on the pleadings because Wilcher sufficiently pleaded the existence of ministerial duties on the part of the City and County. Under the circumstances of the case, the City and County had discretion in how they carried out a duty to emplace signage on bridge construction. The City and County did not have "discretion" in carrying out the ministerial duty of marking the construction hazard to warn motorists of the danger.

The trial court also erred in applying immunities under the MTCA where the City and County had negligently created the hazard to motorists. The City and County enjoy discretion in maintaining roads and bridges but are not afforded immunity when their negligence creates the danger. In this case, the City and County left a bridge that was under construction with a large pit into which Wilcher drove. No immunities are available under the MTCA when a state actor's negligence creates the danger.

## ARGUMENT

### I. The statute that applies to this case provides no discretion to local governments to evade their legislative mandate that roadways under their control require traffic control devices that "shall conform to the state manual and specifications."

#### *Standard of Review*

A reviewing court assesses a trial court's grant of a Rule 12(b)(6) motion *de novo*. As reiterated many times by Mississippi's appellate courts, a Rule 12 motion to dismiss a case on the pleadings raises a purely legal issue. All well-pleaded factual

"allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Arona v. Smith*, 749 So.2d 63, 65 ¶ 6 (Miss. 1999), *quoting T.M. v. Noblitt*, 650 So.2d 1340, 1342, (Miss. 1995).

***Errors made by the trial court***

The City and County contended that their failure to erect any warning signs alerting the traveling public that the bridge was "out" or impassable was not actionable by a constituent because they were immune from suit under the MTCA. Section 11-46-9(1)(d) provides that sovereign immunity is not waived where the act or omission is "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused . . .."

As established in  this subsection requires a two-step analysis. First a court "must consider the broadest function involved in order to make a baseline determination of whether the overarching function is discretionary or ministerial." As here, this will usually entail examining the relevant legislative enactment: "Local authorities . . . *shall place and maintain such traffic control devices* upon highways . . . as they may deem necessary to indicate and to carry out the provisions of this chapter or provisions of local traffic ordinances or to regulate, warn, or guide traffic. All such traffic-control devices hereafter erected *shall conform to the state manual* and specifications. [¶] Local authorities in exercising those functions referred to in the

preceding paragraph *shall be subject to the direction and control of the state highway commission*." Miss. Code Ann. § 63-3-305 (emphasis supplied).

The "broadest function" is well stated in the statute's title: "Placing and maintaining of traffic-control devices upon highways under local jurisdiction." The statute uses the mandatory term "shall" twice to emphasize that local authorities must "place and maintain" traffic control devices in conformity with the "state manual," the Uniform Manual of Traffic Control Devices. However, the City and County contended – and the trial court agreed – that the phrase "as they may deem necessary" meant that the City and County were at liberty to place or not place traffic control devices, even where it was conspicuously obvious that a warning was necessary.

It is true that the Supreme Court has held that an analogous statute, Miss. Code Ann. § 63-3-303, "leaves no doubt that claims advanced on the use and placement of traffic-control devices are cloaked with immunity." The Court found that "[Section 63-3-303] allows MDOT, in its discretion, to determine the appropriate type, number, and location of traffic-control devices, making it immune . . . under Section 11-46-9(1)(d)." *Alabama Great Southern R.R. v. Jobes*, 156 So.3d 871, 882, ¶ 29 (Miss. 2015). he Supreme Court so held only after specifically stating that Ms. Jobes failed to allege any narrower duty that might have rendered the function ministerial.[1]

[1] Generally, cities and counties enjoy discretion in maintaining roadways. See, Miss. Code Ann. § 21-37-4 ("governing authorities of any municipality, in their discretion, may grade, gravel, shell, overlay, repair and maintain gravel, shell, asphalt or concrete road . . .."); Miss. Code Ann. § 19-3-41 ("boards of supervisors shall have within their respective counties full jurisdiction over roads . . ..").

The Court was referring to the second step required under the discretionary function test. That step requires courts, after determining the broadest function, to then "examine any narrower duty associated with the activity at issue to determine whether a statute, regulation, or other binding directive renders that particular duty a ministerial one, notwithstanding that it may have been performed within the scope of a broader discretionary function." *Brantley*, 152 So.3d at 1114-15, ¶ 26.

Unlike Ms. Jobes, Wilcher has pled a "narrower duty." The City and County have, for Rule 12 purposes, admitted that no sign was placed on the street or bridge to warn of the bridge's impassability. Wilcher's complaint alleges that the City and County "failed to warn [Wilcher] with signs conforming to the state manual and specifications, as required by [Mississippi statute] of the necessarily dangerous condition of a missing bridge that was closed and under construction . . .." [V. 1: C.P. 8] The necessary implication is that the UMTCD provides for the erection of appropriate warnings when a bridge is out.

As expressly stated in 37 Miss. Code. R. § 1-7601-00100-102, "Signs and signals will be warranted, erected, and maintained in accordance with the guidelines established in the current edition of the Manual on Uniform Traffic Control Devices adopted by the Transportation Commission." Again, as Section 63-3-305 states, "Local authorities in exercising [responsibilities for traffic control devices] shall be

subject to the direction and control of the state highway commission." As pleaded by Wilcher, the City and County failed to perform a ministerial function required by the statute, the administrative code, and the MUTCD. For Rule 12 purposes, courts are required to consider these allegations as true. Hence, the City and County have admitted to having failed in their duty.

In his response to the motions to dismiss on the pleadings, Wilcher provided copies of the Manual's provisions for indicating to the traveling public that a bridge is impassable. He also directed the City, County, and trial court to the federal government's website containing the MUTCD. [V. 1: C.P. 72, 73, 86] In this procedural context – reviewing a dismissal on the pleadings – the statute's phrase, "as they may deem necessary," refers to a choice among options as dictated by the Department of Transportation in its Uniform Manual.

As the Supreme Court has had to restate several times recently, it is governmental *functions* that are ministerial or discretionary, not *acts* engaged in to effect the governmental function. "The test for determining whether discretionary-function immunity attaches is not whether a political subdivision has discretion in deciding *how* to perform its duties; the test is whether a political subdivision has discretion in deciding *whether* to perform its [functions]." *Smith v. Leake County School Dist.*, No. 2015-CA-01056-SCT, ¶ 25 (Miss. 2016)(en banc).

In a recent case, the Supreme Court considered whether an administrative manual – similar to the MUTCD – may create ministerial duties similar to those

alleged in this case. In *Mississippi Trans. Comm'n v. Adams,* 197 So.3d 406 (Miss. 2016), the Court was confronted with a wrongful death case in which it was alleged that the Department of Transportation had failed to conform with several provisions of the "Red Book" – a reference to the Department's *Mississippi Standard Specifications for Road and Bridge Construction*. The Court held that "the function here presents 'the converse' principle that *Brantley* discussed: placement and maintenance of traffic-control devices is discretionary, *unless* narrower duties encompassed in that function – such as placing and maintaining edge lines – have been 'rendered . . . ministerial through statute or regulation.'" *Id.* at 413, ¶ 19.

The statutes relating to the Department and to local authorities are substantially identical save for the reference to differing governing authorities. The so-called "Red Book" and the MUTCD are similar adoptions of rules regulating the placement of traffic control and warning signs and other devices. The Court in this case should reach the same result as in *Adams*: Wilcher has pleaded sufficient "narrower duties" that render the broad discretion relating to traffic control devices merely ministerial.

## II. A government actor has no "discretion" to create a hazard to the traveling public and then fail to warn of the danger's existence.

The Tort Claims Act states a defense for a government authority where the claim "[a]ris[es] out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did

not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care . . .." Miss. Code Ann. § 11-46-9(1)(v).

The statute does not appear to provide a private cause of action for the converse circumstances where the state actor itself creates the danger. Under the circumstances of this case, Wilcher asks the question what sense it makes for a government actor to create the hazard and then claim immunity because signage may be "discretionary?"

This case has two aspects: the various statutes, administrative code sections, and MUTCD that provide for warning the public, and the negligent creation by the City and County of a hazard. Where a case against the state actor involves the state actor's own negligence in creating the hazard, then only Section 11-46-5(1) applies: "Notwithstanding the immunity granted in Section 11-46-3, *or the provisions of any other law to the contrary*, the immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived . . .." (emphasis supplied).

Wilcher asks the Court to recognize that it makes absolutely no sense to contend that a government authority is immune from its own negligence in creating a hazard. Governments have no "discretion" to create dangers to the public. In his

complaint, Wilcher claimed that the City and County were negligent for their failure "to adequately warn [Wilcher] with signs conforming to the state manual . . . that a bridge on Washington Street was closed and under construction . . .." This is, and sounds like, a "failure to warn" case. But the complaint also states that the City and County were in the act of repairing or constructing the bridge. The City and County created the danger, negligently, and also failed to warn of the hazard, negligently.

This case, then, is like *City of Natchez v. Jackson*, 941 So.2d 865 (Miss.App. 2006). In that case, Natchez had placed a coal grate in a sidewalk and, later, attempted to cover the obsolete grate with concrete. The City knew of the hazard it created because of numerous reported incidents. The Court of Appeals concluded that "the undisputed evidence here was that the hole was caused by the affirmative act of the City of Natchez. The city placed the coal grate in the middle of the sidewalk on Main Street. The steel grate was full of holes. Even though the city tried to cover the holes up, it left at least one hole exposed. Thus, it was a question for the trier of fact as to whether the city was negligent." *Id.* at 869, ¶ 8.

Similarly, in *City of Jackson v. Internal Engine Parts Grp., Inc.*, 903 So.2d 60, 64, ¶ 10 (Miss. 2005), the Court reviewed the evidence and concluded that "[t]he City of Jackson, by its negligent failure to inspect and maintain [the City's] drainage ditch, created a separate dangerous condition; i.e. an obstructed drainage ditch through which water could not properly flow, which proximately caused or contributed to the flooding of Engine Parts' building." As the basic waiver statute says, if the

government authority's negligent acts create the danger from which damages flow, then there are no immunities applicable. Miss. Code Ann. § 11-46-5.

## III. Conclusion

The Court should reverse the dismissal granted by the trial court and remand the case for discovery and, if necessary, a trial on the merits.

Respectfully submitted,

SAMUEL WILCHER, JR.

By: /s Mark T. Fowler

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## CERTIFICATE OF FILING AND SERVICE

The undersigned counsel to the Appellant Samuel Wilcher hereby certifies that on the date and time recorded by the MEC system the above and foregoing Appellant's Principal brief has been filed with the Clerk of the Court through the MEC system, and notice of such filing has been sent to all MEC registrants having entered an appearance in the above-styled case. In addition, a true and correct paper copy has been served upon the trial court via United States mail with first-class postage prepaid: Hon. David Strong, P.O. Drawer 1387, McComb, Mississippi 39649.

/s Mark T. Fowler
MEC Registrant