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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO. 2016-CA-01384

FANNY HUDSON — APPELLANT-PLAINTIFF

VS.

CITY OF YAZOO CITY, MISSISSIPPI — APPELLEE-DEFENDANT

ON APPEAL FROM THE CIRCUIT COURT OF YAZOO COUNTY, MISSISSIPPI
No. 2015-CI13

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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

1. Estate of Patrauna Hudson and Fanny Hudson, as Administratrix of the Estate of Patrauna Hudson – Appellants/Plaintiffs.

2. David Neil McCarty, Esq., of David Neil McCarty Law Firm, PLLC – Attorney for Appellants/Plaintiffs.

3. Barry Wayne Howard, Esq., of Howard Law Firm, PLLC – Attorney for Appellants/Plaintiffs.

4. Yazoo City, Mississippi – Appellee/Defendant.

5. Steven J. Griffin, Esq., and Robert S. Addison, Esq., of Daniel, Coker, Horton & Bell, P.A. – Attorneys for Appellee/Defendant.

6. Yazoo County, Mississippi, and Supervisor Cobie Collins, in his individual and official capacities – Co-Defendants.

7. Walter W. Dukes, Esq., of Dukes, Dukes, Keating & Faneca, P.A. – Attorney for Co-Defendants.

8. Honorable Jannie M. Lewis – Yazoo County Circuit Court Judge.

Respectfully submitted, this the 31st day of August, 2017.

/s/ *Steven J. Griffin*
Of Counsel for Yazoo City, Mississippi, Appellee

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STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that oral argument is unnecessary because the facts and legal arguments are adequately presented in the Brief of Appellee and the Appellate Record. However, should this Court so require, Appellee is available for oral argument.

I. STATEMENT OF THE ISSUES

A. Whether Plaintiff's failure-to-warn claims are barred by the immunity provided to Yazoo City under Miss. Code Ann. § 11-46-9(1)(v).

B. Whether Plaintiff's claims regarding the maintenance, inspection, and repair of the Seventh Street drainage ditch are barred by the immunity provided to Yazoo City under MISS. CODE ANN. §§ 11-46-9(1)(d) and/or -(g).

C. Whether Plaintiff's claims regarding the 2007 improvements to the Seventh Street ditch are also barred by § 11-46-9(1)(p).

II. STATEMENT OF ASSIGNMENT

This appeal has not yet been assigned as contemplated by MISS. R. APP. P. 28(a)(4). Pursuant to the numerous prior decisions of Mississippi appellate courts analyzing immunity afforded to governmental entities pursuant to MISS. CODE ANN. §§ 11-46-9(1)(d), -(g), -(p), and -(v) and other relevant judicial precedent, the Appellee disagrees with Appellant that this matter involves "a fundamental and urgent issue of broad public importance requiring prompt or ultimate determination by the Supreme Court" pursuant to MISS. R. APP. P. 16(d).

III. STATEMENT OF THE CASE

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

This civil action arises out of a tragic incident on the evening of April 6, 2014, in which 9-year-old Patrauna Hudson (hereinafter "Patrauna") drowned in flash flood waters in a drainage ditch that ran alongside her family's residence at the corner of Seventh Street and Lamar Avenue in Yazoo City. Yazoo City had received a substantial amount of rainfall on the day and evening

leading up to the subject incident. Patrauna, who could not swim, sneaked out of her house against her mother's orders and was unsupervised when she was caught in the flash flood waters of the Seventh Street drainage ditch and swept downstream.

The Estate of Patrauna Hudson[1] filed suit on March 25, 2015, pursuant to the Mississippi Tort Claims Act ("MTCA"), MISS. CODE ANN. § 11-46-1, *et seq*., asserting claims against Yazoo City for failing to warn Patrauna of the dangerous nature of the Seventh Street drainage ditch; failing to adequately maintain, repair, and inspect the Seventh Street drainage ditch; and failing to require that construction of and improvements to the Seventh Street ditch were performed in accordance with existing engineering standards and with approval of the appropriate governmental agency. R.6-26 (¶¶ 29-66). Plaintiff asserted similar claims against Yazoo County and Supervisor Cobie Collins, in his individual and official capacities. *Id*. (¶¶ 67-116).

On March 4, 2016, Yazoo City moved for summary judgment based on the immunity provided to it under the MTCA, specifically pursuant to MISS. CODE ANN. §§ 11-46-1(d), -(g), -(p), and -(v). R.1-210. Plaintiff filed a response (R.211-242), and Yazoo City filed its rebuttal (R.243-267). On August 10, 2016, following oral arguments by the parties, the Circuit Court issued an Order granting summary judgment in favor of Yazoo City as to all claims against it based on MTCA immunity. R.271-274. On August 29, 2016, the Circuit Court issued a Rule 54(b) Final Judgment of Dismissal with Prejudice as to Yazoo City. R.275. On February 17, 2016, Plaintiff filed her Notice of Appeal. (R.277).

1 It is unclear why Fanny Hudson is listed as the plaintiff on appeal.

B. Statement of Relevant Facts

On April 6, 2014, Patrauna Hudson lived at the corner of Seventh Street and Lamar Avenue with her mother, Fannie Hudson (hereinafter "Ms. Hudson"), and several of her younger brothers and sisters. R.Supp.101-102 (F. Hudson Dep., 12:2-13:24). An unusually intense storm system moved through Yazoo City that day, dumping approximately 5.5 inches of rainfall over a short amount of time. R.127, 129-130 (W. Morrison Dep., 65:9-19, 67:8-68:3). At about 8 p.m., after Ms. Hudson had told her children to go to their rooms and get ready for bed, Patrauna sneaked out the back door of the house. R.30-32 (F. Hudson Dep., 93:9-25, 99:24-102:8). When Ms. Hudson went to check on her children shortly thereafter, Patrauna's 8-year-old sister, Patrice (whose clothes were wet), told her that Patrauna had gone out the back door to go swimming. *Id*. According to Patrice, Patrauna had jumped in the water along the ditch by their house and said, "Bye-bye, I'm going swimming. I'm not coming back." R.35 (F. Hudson Dep., 121:1-8). Unfortunately, Patrauna did not know how to swim. R.28 (F. Hudson Dep., 64:11-13). The storm water flowing through the Seventh Street ditch had a fast-moving current at the time, and Patrauna apparently was unable to get out. *Id*., at R.34, 36 (F. Hudson Dep., 117:9-17, 128:12-16) ("... the current, it was pulling me ...); R.46-47 (YCPD Offense Report) A passerby reportedly saw Patrauna in the water in the Seventh Street ditch just before she was swept into one of the parallel, side-by-side culverts under Lee Avenue.2 R.33, 37 (F. Hudson Dep., 106:11-108:10, 129:22-131:20); R.46-47. Patrauna's body was found the following evening by

2 It is unknown exactly where Patrauna entered the Seventh Street ditch, though it is believed that she entered the ditch somewhere between Lamar Avenue and Lee Avenue. R.36 (F. Hudson Dep., 128:6-25). The culvert where Patrauna was last seen (corner of Seventh Street and Lee Avenue) is one block west of her residence (corner of Seventh Street and Lamar Avenue).

community volunteers in a drainage ditch near the Fouche Apartments, about four blocks downstream of where she was last seen. R.46-49.

Both prior to and on the date of the subject incident, Ms. Hudson had warned Patrauna of the danger associated with high water and to stay away from drainage ditches, including the Seventh Street ditch that ran alongside their house. R.28-29, 38, 40, 42 (F. Hudson Dep., 64:19-65:6, 155:17-157:15, 163:22-164:2, 179:16-180:22). In fact, not long before Patrauna sneaked out the back door of the house on the evening in question, she had tried to go out the front door to see the flash flood waters, and Ms. Hudson "told her to close the door before I whoop her butt." R.35 (F. Hudson Dep., 122:15-123:5, 171:21-172:11). Ms. Hudson also testified she had checked to make sure the back door was locked at both the turn knob and the deadbolt shortly before Patrauna snuck out of the house. R.33 (F. Hudson Dep., 105:5-13).

Patrauna did not suffer from any mental disabilities that would have prevented her from understanding her mother's warnings about the potential danger associated with drainage ditches and flood waters or her mother's instructions to stay out of the water and away from the ditches that ran alongside their house. R.29 (F. Hudson Dep., 66:10-68:17). Patrauna was a third-grader with average grades who had made the honor roll. R.28 (F. Hudson Dep., 63:1-25). Ms. Hudson testified that she expected Patrauna to obey her and to stay inside and away from the water. R.40 (F. Hudson Dep., 163:22-164:2).

The Seventh Street drainage ditch was constructed in 1944 as part of the Willis Creek Drainage District. R.72-74, 94 (Morrison Dep., 10:24-12:3, 32:1-5). The drainage system was designed to facilitate the flow of storm water runoff from the hills on the east side of town across the flat lands and ultimately to the Yazoo River west of town. R. 72-74, 94 (Morrison Dep.);

R.139-140 (Brent Dep., 19:8-20:14). When the Drainage District dissolved in 1995, its land interests within the city limits were conveyed to Yazoo City, including the drainage easement that runs along Seventh Street. R.71 (Morrison Dep., 9:14-19).

Street Superintendent Danny Miller, Alderman Aubrey Brent, and Mayor McArthur Straughter have all testified that there were no state statutes, ordinances, or regulations which imposed any requirements on Yazoo City regarding the maintenance, repair, or inspection of its drainage ditches and culverts prior to the subject incident. R.51-56 (Miller Dep., 11:24-12:6, 17:18-18:1, 19:25-20:9); R.136-138, 143 (Brent Dep., 14:16-16:5, 47:10-13); R.154-157 (Straughter Dep., 36:21-39:6). Yazoo City also had no official schedules or policies regarding maintenance, inspection, or repairs of its drainage ditches. *Id*. Instead, Yazoo City officials used their judgment and discretion in determining whether, when, how, and to what extent it conducted inspections, maintenance, and other efforts to improve its drainage system, in accordance with available funding and other resources. R.141-143 (Brent Dep., 45:20-47:13); R.159-160 (Straughter Dep., 47:19-48:10). Problems with the city's streets and drainage ditches were handled at the discretion of the street superintendent and his staff whenever they were discovered as crews carried out their day-to-day activities, or whenever they were reported by concerned citizens. R.57-59 (Miller Dep., 26:22-28:10); R.114 (Morrison Dep., 52:4-14); R.142-143 (Brent Dep., 46:11-47:13).

Although certain low-lying areas of Yazoo City have had problems with flash flooding over the years during prolonged high-intensity rain events, efforts to make improvements to the city's drainage infrastructure have been hampered by limited funds and resources. *See* R.141-42 (Brent Dep., 45:20-46:3); R.148-49 (Straughter Dep., 12:21-13:6). City officials must use their

judgment and discretion to address flooding issues and potential solutions on a case-by-case basis and as funding becomes available. *See* (Brent Dep., 46:4-18); R.159-160 (Straughter Dep., 47:19-48:10).

The only significant improvement project involving the Seventh Street drainage ditch between the time Yazoo City acquired the drainage easement in 1995 and the date of the subject drowning incident in April 2014 was a project completed in 2007 where parallel, covered drainage pipes were installed along the ditch from Lee Avenue one block west to Prentiss Avenue. The project was undertaken in response to a complaint by Charles Adams, who reported to city officials that the portion of the ditch that ran alongside his residence was causing erosion onto his property, which was located on the northwest corner of Seventh Street and Lee Avenue. R.150 (Straughter Dep., 16:3-25). Yazoo City did not have adequate funds to pay for the project on its own, but it voted to pay for one-half of the costs if Yazoo County would pay the other half and provide the labor and equipment. R.84-86 (Morrison Dep., 22:22-24:7); R.163 (Board Minutes). The plan was approved by the Board of Aldermen at its regular meeting on February 26, 2007. R.163. Yazoo City's consulting engineer, Wayne Morrison, assisted Yazoo County's road manager with selecting the type of pipes to install, but the county road manager supervised the work. R.86-88 (Morrison Dep., 24:11-18, 26:2-14). Parallel 48-inch and 36-inch pipes were installed to match the size of the culverts which already existed under Lee Avenue and Prentiss Avenue. *Id*., at 82, 86 (Morrison Dep., 20:6-16, 24:19-22). The new pipe was joined with the existing pipe, concrete collars were installed, and the ditch was backfilled. R.90 (Morrison Dep., 28:19-24). Yazoo City did not vote on any other improvements to the Seventh

Street drainage ditch, and no other portion of the ditch was covered at that time. R.151 (Straughter Dep., 21:17-23); R.161-168 (Board Minutes).

Morrison and Mayor Straughter testified that aside from approval by the Yazoo City Board of Aldermen and the Yazoo County Board of Supervisors, approval for the 2007 project was not required from any other entity. R.126 (Morrison Dep., 64:2-6); R.158 (Straughter Dep., 45:18-21). Installing covered drainage pipes along existing drainage ditches is work routinely performed by Yazoo City's and Yazoo County's road departments, and the installation of covered pipes in 2007 did not require the preparation or submission of engineering drawings, written construction plans, or hydraulic studies. R.123 (Morrison Dep., 61:25-64:24). Regardless, Morrison testified that the work on this project, including the methods of construction and materials used, complied with all existing standards of engineering. R.90, 124-26 (Morrison Dep., 28:19-24, 62:14-63:1, 64:7-24). Plaintiff has offered no evidence otherwise.

C. Standard of Review

Mississippi's appellate courts utilize a *de novo* standard when examining a grant or denial of summary judgment. *Fortenberry v. City of Jackson*, 2011 Miss. LEXIS 88 (Miss. Feb. 10, 2011). Review of a governmental entity's entitlement to immunity under the MTCA triggers *de novo* review, since immunity is a question of law. *Id.* Summary judgment is appropriate and encouraged when defendants, like Yazoo City, are entitled to sovereign immunity under the Mississippi Tort Claims Act:

> The Mississippi Legislature has determined that governmental entities and their employees shall be exempt from liability in certain situations as outlined in MISS. CODE ANN. § 11-46-9. This exemption, like that of qualified or absolute immunity, is an entitlement not to stand trial rather than a mere defense to liability and, therefore, should be resolved at the

> earliest possible stage of litigation. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). Therefore, immunity is a question of law and is a proper matter for summary judgment under MISS. R. CIV. P. 56.

Mitchell v. City of Greenville, 846 So. 2d 1028, 1029 (Miss. 2003) (emphasis added).

Rule 56 of the Mississippi Rules of Civil Procedure provides that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact, and that the moving party is entitled to a judgment as a matter of law. MISS. R. CIV. P. 56. Evidence is analyzed in the light most favorable to the non-moving party. *Fortenberry*, 2011 Miss. LEXIS 88. If the moving party's evidence satisfies the initial burden, the adverse party must produce "significant probative evidence demonstrating the existence of a triable issue of fact" in order to survive summary judgment. *Young v. Wendy's Int'l Inc.*, 840 So. 2d 782, 784 (Miss. Ct. App. 2003). Plaintiff's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *See Estate of Hynes v. Ambling Mgmt. Co.*, 66 So. 3d 712 (Miss. Ct. App. 2011). "[B]are assertions are simply not enough to avoid summary judgment." *Id.*

IV. SUMMARY OF THE ARGUMENT

Plaintiff's claims are governed by the Mississippi Tort Claims Act ("MTCA"), MISS. CODE ANN. § 11-46-1, *et seq*. The MTCA provides governmental entities and their employees immunity from claims for money damages for certain conduct performed within the course and scope of their employment. MISS. CODE ANN. § 11-46-9(1). Each of Plaintiff's claims against Yazoo City are barred by one or more of the immunity provisions of the MTCA.

Yazoo City has immunity from Plaintiff's failure-to-warn claim under § 11-46-9(1)(v). It is questionable whether the Seventh Street drainage ditch in and of itself could be considered a dangerous condition, as there are countless open drainage ditches throughout the neighborhoods of Yazoo City and every other municipality that present no danger to those who stay out of them. There also is no evidence whatsoever that Yazoo City officials were aware that Patrauna was playing in or near the Seventh Street ditch on the night of the subject incident and was in danger of being swept away by flash flood waters, much less that there was adequate time to protect her or warn about any such danger. Regardless, it is undisputed that the potential danger associated with the drainage ditch and flash flood waters was open and obvious to anyone exercising due care. Plaintiff testified that she had repeatedly and specifically warned Patrauna of the danger associated with drainage ditches and standing water, in general. In fact, shortly before Patrauna snuck out of the house to go play in the flash flood waters on the night in question, Patrauna's mother had specifically warned Patrauna to not go outside or near the water, or she would "whoop her butt." Plaintiff also locked the back door at the turn knob and deadbolt. Unfortunately, Plaintiff's warnings and extensive efforts to keep Patrauna inside the house were not enough to keep Patrauna from sneaking out to play in the flash flood waters. Because the drainage ditch and flash flooding was open and obvious, and because Plaintiff had specifically warned Patrauna to stay away from the water, Plaintiff's failure to warn claim is barred by the immunity provided to Yazoo City under § 11-46-9(1)(v).

Although Plaintiff attempts to argue that immunity under § 11-46-9(1)(v) is inapplicable due to Patrauna's age (9 years old), Plaintiff's assertion in that regard is misplaced and at odds with controlling judicial precedent. *See Kaigler v. City of Bay St. Louis*, 12 So. 3d 577 (Miss.

App. 2009) (affirming summary judgment based on MTCA immunity where 12-year-old boy fell through false ceiling at city-owned basketball gym because the false ceiling was not in and of itself dangerous, city officials had no notice of the minor's presence in the false ceiling or time to warn, and because the danger associated with the false ceiling was open and obvious); *Skelton v. Twin County Rural Electric Ass'n*, 611 So. 2d 931 (Miss. 1992) (affirming summary judgment for landowner where 9-year-old boy fell from tree onto pipe protruding from ground below after he had been warned not to climb on the tree; the danger was "readily apparent").

Yazoo City also has immunity under §§ 11-46-9(1)(d) and 11-46-9(1)(g) from Plaintiff's claims that it failed to properly maintain, repair, and inspect the Seventh Street ditch and surrounding drainage system. There were no statutes, regulations, or ordinances that imposed any requirements on Yazoo City regarding the maintenance, inspection, and repair of drainage ditches, and city officials had to use their judgment and discretion in conducting those activities, as funding and other resources were available.

Yazoo City also has immunity under § 11-46-9(1)(p) from Plaintiff's claims pertaining to the 2007 improvement project where parallel, covered drainage pipes were installed in the Seventh Street ditch between Lee Avenue and Prentiss Avenue, one block west of Plaintiff's residence. It is undisputed that the plan for the 2007 project was approved prior to construction by both the Yazoo City Board of Aldermen and the Yazoo County Board of Supervisors. City engineer Wayne Morrison has testified that this project, including the methods of construction and materials used, complied with existing standards of engineering. Plaintiff has presented no evidence otherwise.

There are no genuine issues of material fact as to Yazoo City's entitlement to immunity under the MTCA from each of Plaintiff's claims against it. Accordingly, the Circuit Court's order granting summary judgment in favor of Yazoo City should be affirmed.

V. ARGUMENT

The MTCA is the exclusive remedy for claims against governmental entities for injuries arising from their allegedly tortious acts or omissions. *Miss Dep't of Transp. v. Cargile*, 847 So. 2d 258, 267 (Miss. 2003). The MTCA recognizes the long-standing principal that the immunity of the state and its political subdivisions is and always has been the law in Mississippi, but it waives that immunity for claims for money damages arising out of torts committed by governmental entities and their employees in the course and scope of their employment. MISS. CODE ANN. § 11-46-3, -5. Given that waiver of immunity, the Legislature has reclaimed immunity for roughly two dozen categories of conduct enumerated in MISS. CODE ANN. § 11-46-9. As discussed below, each of Plaintiff's claims against Yazoo City are barred by one or more of these exemptions, and summary judgment in Yazoo City's favor should be affirmed.

A. Plaintiff's failure-to-warn claim is barred by the immunity provided to Yazoo City under MISS. CODE ANN. § 11-46-9(1)(v).

Plaintiff claims the drainage ditch and culverts that ran along Seventh Street near Patrauna's home constituted a dangerous condition of which Yazoo City had knowledge, and that it failed to warn Patrauna about the dangerous condition. R.29-30 (Complaint, ¶¶ 29-34).

If this case were not against a governmental entity, Plaintiff's claim in that regard would be considered under general premises liability law in Mississippi. But because the MTCA grants immunity to governmental entities under certain circumstances, the Court must first determine

whether the immunity provided to Yazoo City under MISS. CODE ANN. § 11-46-9(1)(v) bars Plaintiff's claim. *See Kaigler v. City of Bay St. Louis*, 12 So. 3d 577, 580-581 (Miss. Ct. App. 2009). This immunity provision states:

> (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:
>
> (v) Arising out of an injury caused by a dangerous condition on property of the governmental entity that was not caused by the negligent or other wrongful conduct of an employee of the governmental entity or of which the governmental entity did not have notice, either actual or constructive, and adequate opportunity to protect or warn against; provided, however, that a governmental entity shall not be liable for the failure to warn of a dangerous condition which is obvious to one exercising due care.

MISS. CODE ANN. 11-46-9(1)(v) (emphasis added). Thus, for Plaintiff to defeat Yazoo City's immunity under this provision, it must prove: (1) a dangerous condition, (2) on the governmental entity's property, (3) which the governmental entity caused by negligence or wrongful conduct, or of which it had actual or constructive notice and adequate time to protect from or warn against, and (4) the condition was not open and obvious to one exercising due care. *Kaigler*, 12 So. 3d at 581.

Although the Mississippi Supreme Court has abolished the "open and obvious" defense as a complete bar on recovery in premises liability actions against *private* entities, "the open and obvious defense is an absolute bar to recovery in a case brought under the MTCA for the failure to warn of a dangerous condition." *Kaigler*, 12 So. 3d at 581, citing *Howard v. City of Biloxi*, 943 So. 2d 751, 756 (Miss. Ct. App. 2006).

In a case instructive to the present action, summary judgment was affirmed in favor of a municipality where a 12-year-old boy playing basketball at a city-owned gym climbed into a false ceiling to retrieve a ball and then fell more than ten feet onto a concrete floor after the ceiling tiles gave way, causing serious injuries. *Kaigler*, 12 So. 3d at 579. The court noted that the false ceiling, in and of itself, was not a dangerous condition when the minor was standing on the floor. *Id*., at 581. There also was no evidence the municipality had actual or constructive notice that the minor had climbed into the false ceiling and was in danger of falling to the floor, or that there was adequate time to protect or warn against this danger. *Id*. Furthermore, the court held that "the danger of falling through the ceiling tiles was open and obvious to anyone exercising due care" – including the 12-year-old plaintiff – and the fact that some of the tiles were missing or broken further supported the fact that the danger of falling through the ceiling was an open and obvious danger which prevented the plaintiff from overcoming the city's entitlement to immunity under §11-46-9(1)(v). *Id*.

Like the plaintiff in *Kaigler*, Plaintiff in this case cannot overcome Yazoo City's entitlement to immunity under § 11-46-9(1)(v). First, the Seventh Street drainage ditch cannot be considered a dangerous condition in and of itself, as there are countless similar open ditches in neighborhoods across Yazoo City and every other municipality across this state which pose no danger to persons who stay out of them when filled with storm water. A drainage ditch is no more dangerous than a city street, which likewise poses no danger to people who stay away from them when moving vehicles are present. Plaintiff produced an affidavit and written report from proposed engineering expert Jill Butler, who opines that installing covered drainage pipes one block downstream from Plaintiff's residence in 2007 (seven years prior to the subject incident)

increased the flood height upstream by approximately two inches and the velocity of flood water at the culvert inlet by 0.35 feet per second.[3] However, neither Butler nor Plaintiff has explained how this slight increase in flood level and flood water velocity caused the portion of the ditch that ran alongside Plaintiff's residence to become "dangerous." Further, although Plaintiff presented affidavit testimony that that the smaller of the two parallel culverts that ran along the Seventh Street ditch allegedly was blocked when a passerby attempted to pass a ball through it at some point after Patrauna disappeared, it is unknown when or how the alleged blockage in that culvert occurred. There is no evidence whatsoever that any blockage existed prior to the storm that hit Yazoo City on the night in question or that Yazoo City officials had knowledge of any such blockage.[4] In fact, street superintendent Danny Miller testified he was unaware of any such obstruction that night, and city crews did not have to remove any obstructions thereafter. R.62. Plaintiff's assertion in her Brief that this was a "City-caused flood" is without merit. This was a record-setting rain storm that can be described as nothing more than an Act of God.

Additionally, as was the case in *Kaigler*, Plaintiff has presented no evidence whatsoever that Yazoo City officials were aware that Patrauna was playing in or near the Seventh Street

3 Butler's expert report indicates her hydraulic analysis revealed that the 2007 project increased flood height from 99.53 feet (99 feet, 6.36 inches) to 99.71 feet (99 feet, 8.52 inches). It also shows the velocity of water at the head of the culvert increased from 4.70 feet per second to 5.05 feet per second.
4 Plaintiff testified she was unaware of any obstructions to water flow at the time of the subject incident. R.43 (F. Hudson Dep., 195:12-196:4). She did notice the force of the fast-moving current as she walked along the ditch. R.34 (F. Hudson Dep., 117:8-17). Although Ms. Hudson recalls seeing grass, bottles, and other small items in the ditch several days before this incident, none of these things affected the flow of storm water along the ditch or through the parallel 48-inch and 36-inch culverts that ran between Lee Avenue and Prentiss Avenue. R.60-62 (Miller Dep., 31:14-33:20); R.117-18 (Morrison Dep., 55:18-56:1).

ditch on the night of the subject incident and was in danger of being swept away by flash flood waters, much less that there was adequate time to protect her or warn about any such danger.[5]

However, regardless of whether the open drainage ditch that ran alongside Plaintiff's residence could be considered a "dangerous condition," it is undisputed that the potential danger associated with the drainage ditch and flash flood waters was open and obvious to anyone exercising due care. Although Plaintiff argues in her Brief that the dangerous condition was not just the storm water runoff that filled the ditches and pooled in her yard, but also the fast-moving current of the flash flood waters, Ms. Hudson testified that she had specifically and repeatedly warned Patrauna – who did not know how to swim – to stay away from water altogether:

> Q: How often did you have to remind Patrauna to not go near the water?
>
> A: It was like twice I told her. **I told her the danger about water. I said don't ever go near – if you see a ditch full of water, don't go near it or anything**, and then I said don't run, you know, too much water inside the bathtub because **you could drown from that**, so I you know, I talked about the safety about water.
>
> * * *
>
> Q: **So on April 2, 2014, you had instructed Patrauna not to play in the ditch?**
>
> A: **Yes.**
>
> * * *
>
> Q: **And you had warned your children about the ditch before this incident occurred, right?**
>
> A: **Yes.**

5 The torrential rains that night caused flash-flooding in multiple areas of Yazoo City. R.127 (Morrison Dep., 65:9-13).

Q: **And as a parent, did you expect them to obey you and do what you told them to do?**

A: **Yes.**

* * *

Q: **Had you ever told Patrauna to stay out of ditches when it was filled with water?**

A: **Yes. I did tell her, yes.**

Q: Did you tell her the day that this incident happened or on a prior occasion?

A: It was prior to the occasion and the incident.

Q: Was it in relation to that particular ditch or another ditch around Yazoo City?

A: **Any ditch, you know, any ditch. I was talking about any ditch that, got water up in it.**

R.28-29, 39-40, 42 (F. Hudson Dep., 64:22-65:6; 157:11-15; 163:23-164:2; 180:10-22).

In fact, shortly before Patrauna snuck out of the house to go play in the flash flood waters on the date in question, Patrauna's mother had specifically warned Patrauna to not go outside or near the water, or she would be disciplined:

Q. Did you tell Detective Tillman that you had been warning your children about the water all day?

A. Yes.

Q. Did you tell Detective Tillman that Patrauna had tried to get into the water earlier that day before the incident occurred?

A. No. I told Detective Tillman, I said **Patrauna had opened the door because she was fascinated about the water, and she said, "Ooh-wee, look at all of that water," and I told her to close the door before I whoop her butt.**

****

Q: How were they being disobedient?

A: Because, like I said, when – **because Patrauna had opened the front door, and I told her not to open the front door, and she was looking at the water, and I made her close the front door**, and so they started playing around, and I made them go – put them to bed.

Q: And you said earlier that if she didn't close that door, you were going to have to whip her butt.

A: Yes, I was, and **I scorned her, and I said, 'if you don't close that door, I said I'm going to whoop – I said it another way now, but it wasn't butt, it was the 'a-s-s' word.' I told her that.**

R.35, 41 (F. Hudson Dep., 122:19-123:5, 171:21-172:11). Ms. Hudson also testified that after she had scolded Patrauna about staying inside the house away from the flash flood waters outside and had sent Patrauna to her room, she also checked to make sure the back door was locked at the both the turn knob and at the deadbolt. R.33 (F. Hudson Dep., 105:5-13). Unfortunately, Ms. Hudson's warnings and efforts to keep Patrauna inside did not stop her from sneaking out.

Plaintiff does not appear to dispute that the potential danger associated with drainage ditches or storm water runoff was open and obvious; she simply argues that the fast-moving current of the flash flood waters was not. In support of her argument, she cites to *Natchez-Adams Sch. Dist. v. Bruce*, 168 So. 3d 1181 (Miss. App. 2015), where a protruding conduit that caused the plaintiff to trip and fall appeared to blend in with the color of the sidewalk, making it a tripping hazard that was not open and obvious. Plaintiff's argument is clearly unavailing here.

Any purported distinction as to Plaintiff's knowledge of the *various ways* storm water runoff could be dangerous – through expert testimony or otherwise – is irrelevant. It is

undisputed that Plaintiff recognized the potential danger associated with drainage ditches and standing water, generally, and that she had specifically and repeatedly warned Patrauna regarding the same. Ms. Hudson had also sternly warned Patrauna on the date in question to stay inside the house and away from the flash flood waters caused by the torrential rains coming down outside. The flash flood waters were not "invisible," as Plaintiff oddly asserts in her Brief. Ms. Hudson had also locked the back door near Patrauna's bedroom. The repeated warnings provided to Patrauna by her mother, as well as her mother's extensive efforts to keep her inside the house and away from the flash flood waters, demonstrate that the potential danger associated with drainage ditches and storm water runoff was open and obvious to both Patrauna and her mother.

There is no evidence that Patrauna was incapable of understanding her mother's repeated warnings about the dangers associated with the drainage ditch and standing water, in general, or her mother's stern warnings on the night of the subject incident to stay inside and away from the flash flood waters outside. Patrauna was a third-grader with average grades who had made the honor roll. R.28 (F. Hudson Dep., 63:1-25, 66:10-68:17). Additionally, Ms. Hudson testified that she expected Patrauna to obey her. *Id*., at R.40 (F. Hudson Dep., 163:23-164:2).

Just as the *Kaigler* court found that the danger of falling through a false ceiling would have been open and obvious to anyone exercising due care, including the 12-year-old plaintiff in that case, the potential danger associated with the Seventh Street ditch and flash flood waters flowing through the same was open and obvious to anyone exercising due care here.

Plaintiff, ignoring the plain language of § 11-46-9(1)(v), incorrectly asserts in her Brief that the Circuit Court, by granting summary judgment on Plaintiff's failure-to-warn claim based

on the open and obvious nature of the drainage ditch and flash flood waters, "employed language long ago cast aside by the Supreme Court" in *Tharp v. Bunge Corp*., 641 So. 2d (Miss. 1994). As noted *supra*, "**the open and obvious defense is an absolute bar to recovery in a case brought under the MTCA for the failure to warn of a dangerous condition**." *Kaigler*, 12 So. 3d at 581, citing *Howard*, 943 So. 2d 751.

Plaintiff further attempts to argue that the "open and obvious" defense is inapplicable here because Patrauna was 9-years-old at the time of the subject incident, and that youth between the ages of 7 and 14 are presumed to be incapable of negligence unless there is evidence of the child having "exceptional capacity." However, Plaintiff's assertion is misplaced and at odds with controlling judicial precedent.

In *Kaigler*, a 12-year-old boy fell and was injured after climbing into a false ceiling at a city-owned basketball gym to retrieve a ball. *Kaigler*, 12 So. 3d at 580-81. The appellate court held that "the danger of falling through the ceiling tiles was open and obvious to anyone exercising due care" – including the 12-year-old plaintiff – and the fact that some of the tiles were missing or broken further supported the fact that the danger of failing through the ceiling was an open and obvious danger that prevented the plaintiff from overcoming the city's immunity under § 11-46-9(1)(v). The boy's age and intelligence were irrelevant to the court's determination that the condition was open and obvious and that MTCA immunity applied.

Plaintiff's Brief fails to address the controlling precedent established by *Kaigler*, which was cited by the Circuit Court in its Order granting summary judgment. Plaintiff has failed to cite even one MTCA case to support her argument that Patrauna's age somehow defeats Yazoo

City's entitlement to immunity under the MTCA. Yazoo City has conducted its own exhaustive search and has likewise found no such authority.

Also instructive here is *Skelton v. Twin County Rural Electric Ass'n*, 611 So. 2d 931 (Miss. 1992), where the Mississippi Supreme Court affirmed summary judgment in favor of a landowner where a 9-year-old boy visiting the premises slipped and fell from a pecan tree onto an unguarded pipe protruding from the ground after the boy had previously been warned to stay off the tree. The court noted the well-established precedent that "the attractive nuisance doctrine does not apply to obvious, natural dangers," and that "**an occupant may assume that a child's guardians will have warned the child about readily apparent dangers**." *Id*., at 938, citing *McGill v. City of Laurel*, 173 So. 2d 892, 898 (Miss. 1965); *Gordon v. C.H.C Corp.*, 236 So. 2d 733, 735 (Miss. 1970). The court rejected the plaintiff's argument that the minor's age imposed a higher duty on the defendants to show that he had "exceptional capacity" to understand and appreciate the danger of climbing trees, given the uncontroverted evidence that the minor had been warned not to climb the trees, knew not to climb the trees, and did so anyway knowing he would be reprimanded. *Id*., at 938. "Borrowing from the reasoning of attractive nuisance cases, Skelton should have understood that he could hurt himself climbing trees." *Id*. Thus, the Mississippi Supreme Court found summary judgment appropriate.

The same reasoning applies to the present action. Like the 9-year-old boy in *Skelton* who failed to heed prior warnings about the dangers of playing on the tree, Patrauna refused to heed her mother's repeated warnings to stay inside and away from the flash flood waters outside her residence.

Plaintiff's reliance on *Steele v. Holiday Inns, Inc.*, 626 So. 2d 593 (Miss. 1993) is misplaced. In *Steele*, a 13-year-old boy drowned in a hotel swimming pool. In addition to the fact that the plaintiff's claims were not governed by the MTCA, there was no evidence anyone had warned the minor to stay out of the pool and no evidence as to how he had drowned. This case, on the other hand, is subject to the MTCA's immunity provisions, and it is undisputed that Patruana's mother had repeatedly warned her about the dangers of drainage ditches and standing water, in general – going so far as to threaten to "whoop her butt" if she did not stay inside and away from the flash flood waters caused by the torrential rains on the night in question.

Furthermore, even if immunity under § 11-46-9(1)(v) did not apply – which it clearly does – Plaintiff's failure-to-warn claim fails as a matter of law because any such failure to warn by Yazoo City was not the proximate cause of Patrauna's injuries. "Cause in fact requires proof that, but for the alleged negligent act or omission, the injury would not have occurred." *Davis v. Christian Bhd. Homes of Jackson, Miss., Inc.*, 957 So. 2d 390, 406 (Miss. App. 2007). Thus, to survive summary judgment on the issue of causation, there must be evidence that had Yazoo City provided the warnings Plaintiff claims it had a duty to provide, Patrauna would not have drowned. *Id.*

There is no dispute that any additional warnings provided by Yazoo City regarding the potential danger associated with drainage ditches would have been futile. As discussed *supra*, Patrauna's mother repeatedly warned her to stay away from the drainage ditch and away from standing water, in general. On the night in question, Ms. Hudson scolded Patrauna when she attempted to go out the front door of the house to see the flash flood waters, sent Patrauna to her room, and locked the back door near Patrauna's bedroom. Ms. Hudson testified that Patrauna

then snuck out the back door without her knowledge and despite her repeated warnings to stay inside and away from the water. There is no evidence whatsoever that any additional warnings by Yazoo City would have resulted in a different outcome.

For all of the foregoing reasons, there are no genuine issues of material fact as to Plaintiff's failure-to-warn claim against Yazoo City, and summary judgment in Yazoo City's favor should be affirmed.

B. Plaintiff's claims regarding the maintenance, inspection, and repair of the Seventh Street drainage ditch are barred by the immunity provided to Yazoo City under MISS. CODE ANN. §§ 11-46-9(1)(d) and -(g)

Plaintiff's Complaint also asserts claims against Yazoo City for failing to properly maintain, inspect, and repair the Seventh Street drainage ditch, culverts, and area drainage system. R.11-16 (Complaint, ¶¶ 35-65).

The Circuit Court properly held that the maintenance, inspection, and repair of drainage ditches and culverts are all discretionary functions for which Yazoo City enjoys immunity under the MTCA. MISS. CODE ANN. § 11-46-9(1)(d). The MTCA's discretionary function immunity provision states as follows:

> (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:
>
> (d) **Based 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.

Id. (emphasis added).

If the duty or activity which forms the basis of the suit "is not imposed by law and depends upon the judgment or choice of the government entity or its employee, then the duty or activity is discretionary." *Boroujerdi v. City of Starkville*, 158 So. 3d 1106, 1110 (Miss. 2015); *Brantley v. City of Horn Lake*, 152 So. 3d 1106, 1112 (Miss. 2014). On the other hand, a ministerial function or duty is one "positively imposed by law and required to be performed at a specific time and place, removing an officer's or entity's choice or judgment." *Pratt v. Gulfport-Biloxi Reg'l Airport Auth.*, 97 So. 3d 68, 72 (Miss. 2012).

Pursuant to the Mississippi Supreme Court's recent decision in *Brantley*, courts no longer consider whether the function or act involves a social, economic, or political policy consideration – though the maintenance, inspection, and repair of city drainage ditches certainly involve both economic and political policy. *Brantley*, 152 So. 3d at 1112. If the broad function at issue involves an element of choice or judgment, then it is discretionary, and "all acts performed in furtherance of a discretionary function or duty are themselves entitled to immunity." *Id.*, 152 So. 3d at 1113. However, "a plaintiff may defeat sovereign immunity, even when a governmental entity's act furthered a discretionary function or duty, when the plaintiff proves that the act also furthered a more narrow function or duty which is made ministerial by another specific statute, ordinance, or regulation promulgated pursuant to lawful authority." *Id*. at 1115.

The maintenance, inspection, and repair of municipal drainage ditches and channels are discretionary functions as a matter of law. Municipalities, such as Yazoo City, are authorized – but not required – under state statute to construct and maintain drainage ditches if they choose to do so. *See* MISS. CODE ANN. § 21-19-13. Importantly, for this case, the applicable statute does

not impose any requirements on municipalities regarding the maintenance, repair, or inspection of drainage infrastructure. Section 21-19-13 states as follows:

> (1) The governing authorities of municipalities **shall have the power to establish, alter and change the channels of streams or other water courses**, and to bridge the same, whenever so to do will promote the health, comfort and convenience of the inhabitants of such municipality.
>
> (2) The governing authorities of any municipality shall also **have the power and authority to incur costs and pay necessary expenses in providing labor, materials and supplies to clean or clear drainage ditches, creeks or channels**, whether on public or private property, and to incur costs and pay necessary expenses in providing labor, materials and supplies in order to prevent erosion where such erosion has been caused or will be caused by such drainage ditches, creeks or channels. **This paragraph shall not impose any obligation or duty upon the municipality** and shall not create any additional rights for the benefit of any owner of public or private property.

MISS. CODE ANN. § 21-19-13 (emphasis added). Accordingly, under this statute, the broad functions of constructing, altering, cleaning, clearing, maintaining, and repairing of drainage ditches are all discretionary in nature.

Local ordinance likewise authorizes – but does not require – Yazoo City to construct, maintain and repair drainage channels and culverts; to determine materials to be used; and whether to cover drainage ditches and channels:

> Said council **shall have power** by ordinance:
>
> (14) To establish, erect and keep in repair all bridges, culverts, sewers, walks and pavements, and prescribe the material to be used, the manner of constructing and the use of same; and establish, alter or change the channel of watercourses and drains, and wall them up and cover them over, or place them underground.

R.171-172 (Yazoo City Ord., § 14(14)). There are also ordinance provisions which require private individuals to obtain approval from the City before constructing or maintaining "culverts,

drainage pipes, or drains" in a street, drainage ditch, or drainage structure, but these ordinances likewise impose no duties or requirements on the City regarding the maintenance, repair, and inspection of its drainage ditches and culverts. R.175 (Yazoo City Ord. §§ 18-13, 18-14).

Mississippi courts have consistently held that, in general, the construction and maintenance of drainage ditches and culverts are discretionary functions for which there is immunity under the MTCA. *See Fisher v. Lauderdale County*, 7 So. 3d 968, 971 (Miss. Ct. App. 2009) (summary judgment affirmed where county's decisions regarding the installation, sizing, and maintenance of culverts were entitled to discretionary function immunity); *Barr v. Hancock County*, 950 So. 2d 254, 258 (Miss. Ct. App. 2007) (summary judgment affirmed where the county's decision regarding method used to install new culvert was discretionary function, and lack of guide posts were irrelevant to plaintiff's injury); *Mohundro v. Alcorn County*, 675 So. 2d 848, 853 (Miss. 1996) (county's decision to replace a bridge with a culvert on a county road involved discretionary function to which immunity applied). Plaintiff's Brief fails to cite any case law whatsoever to the contrary.[6]

Because there are no statutes, ordinances, or regulations which impose any affirmative duty on Yazoo City to maintain, repair or inspect its drainage ditches, Yazoo City officials must use their judgment and discretion in determining whether, when, how, and to what extent these activities are conducted, in accordance with available funding and other resources. R.142 (Brent

6 Plaintiff's passing reference to the concurring opinion in *Crum v. City of Corinth*, 183 So. 3d 847 (Miss. 2016) is misplaced and inapplicable. In *Crum*, the majority held that certain duties associated with the operation of a municipal sewage system were made ministerial by state statute – which is not the case here. The concurrence argued that *Brantley* should be overturned and that the court should revert to the former public policy function test, under which the concurring justice would find that the act of bush-hogging a drainage ditch (which led to the inadvertent removal of a manhole cover and ultimately the sewage system backing up) does not implicate any political, economic, or social policy that would entitle it to discretionary function immunity. *Id*., at 854-55.

Dep., 46:19-47:1); R.159-160 (Straughter Dep., 47:19-48:10). There were no official schedules or policies regarding the maintenance, inspection, or repairs of drainage ditches in Yazoo City at the time of the subject incident. R.51-56 (Miller Dep., 11:24-12:6, 17:18-18:1, 19:25-20:9); R.154 (Straughter Dep., 36:21-39:6). Instead, problems with streets and drainage ditches were handled at the discretion of the street superintendent and his staff whenever they were discovered as crews carried out their day-to-day activities or whenever they were reported by concerned citizens. R.56-68 (Miller Dep., 26:22-28:10); R.114 (Morrison Dep., 52:4-14). These are clearly discretionary functions for which Yazoo City has immunity under § 11-46-9(1)(d).

Plaintiff attempts to argue that several advisory opinions issued by the Mississippi Attorney General's Office – which all deal with inquiries about whether a municipality may conduct repairs and maintenance on private property to address erosion problems caused by water draining from city streets – establish that there is a duty "to maintain the streets to ensure that unsafe conditions or health hazards on adjacent property through erosion or flooding are not created." R.Supp.278-287. However, none of these advisory opinions reference any statute, ordinance, or regulation, which would render any such duty ministerial under the MTCA framework. To the contrary, these opinions merely discuss whether municipalities have authority to perform such repair work on private property. Plaintiff likewise has failed to cite any authority to support the argument that an opinion from the Attorney General's office, which contains no reference to any statute, ordinance, or regulation, somehow creates a ministerial duty requiring a municipality to act.

Plaintiff further argues in her Brief that even if the maintenance, inspection, and repair of drainage ditches are considered discretionary functions – which they are – certain local

ordinances create more narrow ministerial duties within these broader functions once the City decides to undertake those activities. Plaintiff's argument in that regard also is incorrect.

Plaintiff also cites several provisions contained in Section 11.5 of the Yazoo City Code of Ordinances and the Yazoo County Flood Prevention Ordinance for the proposition that the City had a ministerial duty to obtain a development permit from itself and for the city engineer to obtain his own authorization before commencing the 2007 project on Seventh Street where parallel, covered drain pipes were installed between Lee Avenue and Prentiss Avenue. Plaintiff's assertion in that regard is clearly incorrect. The provisions cited by Plaintiff require developers to obtain from the City (or from the County, if applicable) a development permit before conducting construction activities within areas designated as a special flood hazard area and specify how to obtain such a permit from the City.[7] R.Supp.4:26-53. None of these ordinance provisions in Section 11.5 contain any requirements regarding the City's maintenance, inspection, or repair of its own drainage ditches, nor do they require the City to obtain a development permit from itself to perform maintenance work on its own ditches. The fact that these ordinance provisions do not impose any such permit requirements on the City is evidenced by the provisions contained in Section 11.5-40, which authorizes the City to notify violators of their failure to comply and to impose various penalties against them. R.Supp.4:26-53. The flood damage prevention ordinance adopted by Yazoo County, which is essentially identical to Section

7 **Error! Main Document Only.**The version of Section 11.5 attached to Plaintiff's Response to Yazoo City's Motion for Summary Judgment and cited in Plaintiff's Brief as R.Supp.2:221-277 is an old version that was repealed and replaced by a new version adopted in October 2011. The new version was attached to Yazoo City's rebuttal memorandum and is contained in the record at R.Supp.4:26-53.

11.5 of the Yazoo City Code of Ordinances, likewise imposes no such requirements on the City regarding the maintenance, inspection, or repair of its own drainage ditches.

Plaintiff also cites Section 18-7 of the Yazoo City Code of Ordinances for the proposition that the city engineer should have submitted a plan regarding the 2007 project to himself for approval before the project commenced. In reality, this ordinance (a) prohibits private developers from excavating any city street without first obtaining a permit from the city, and (b) prohibits work on or under the surface of a right-of-way of any dedicated street without first obtaining the approval of the city engineer. R.Supp.2:251. Section 18-7 likewise contains no requirements regarding the City's maintenance, inspection, or repair of its own drainage ditches.

None of the ordinance provisions cited by Plaintiff impose any ministerial duties whatsoever on the City regarding the maintenance, inspection, or repair of drainage ditches that were "required to be performed at a specific time and place, removing an officer's or entity's choice or judgment." *See Pratt*, 97 So. 3d at 72. Plaintiff cannot defeat summary judgment simply by submitting an affidavit from a proposed expert that contains conclusory, unsubstantiated, and patently false allegations regarding the purported application of or violation of municipal ordinances. *See, e.g., Adams v. Cinemark United States*, 831 So. 2d 1156, 1161 (Miss. 2002).

The discretionary nature of drainage ditch maintenance and repair is obvious given the countless number of open ditches found across Yazoo City and other municipalities. Although certain low-lying areas of Yazoo City have had problems with flash flooding over the years during prolonged high-intensity rain events,[8] efforts to make improvements to the city's drainage

8 R.74-75, 93-94 (Morrison Dep., 12:20-13:15, 31:22-32:14) (noting problems with flash flooding during

infrastructure have been hampered by limited funds and resources. R.141-142 (Brent Dep., 45:20-46:3); R.157-158 (Straughter Dep., 12:21-13:6). Over the years, Yazoo City has funded the covering or widening of certain ditches in low-lying parts of town. R.78-80, 84, 120 (Morrison Dep., 16:24-18:3, 22:11-21, 58:14-23). However, installing drainage pipes and covering a ditch is not cheap; the materials used in the 2007 project to install covered pipes along just one block of the Seventh Street ditch cost nearly $19,000, which does not include labor costs. R.176-178 (Project Invoices). The cost of covering all the open ditches across Yazoo City would be astronomical – money which the city simply does not have. R.153-159 (Brent Dep., 49:7-50:12). Another potential solution to lessen the risk of flash flooding would be the construction of strategically-placed retention ponds to divert storm water runoff; however, that also would require significant additional funding and the displacement of multiple current landowners. R.94 (Morrison Dep., 32:15-24).

Regardless, even if Plaintiff could demonstrate that additional measures could have been taken to make the Seventh Street ditch more safe prior to the incident in question – such as installing covered drainage pipes down the full length of the ditch running alongside their residence – it is well established that these types of decisions regarding maintenance and improvements to drainage ditches are discretionary functions entitled to immunity under Section 11-46-9(1)(d), "**whether or not the discretion be abused**."

Further, to the extent Plaintiff suggests Yazoo City should have allocated or solicited additional funding and other resources to use toward improvements or maintenance to its

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isolated, 7-inch rain event, but no problems at all when receiving 16 inches of rain spread out over the span of six weeks).

drainage system, including the Seventh Street drainage ditch, any such claim is likewise barred by § 11-46-9(1)(g), which states:

> (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:
>
> (g) Arising out of the **exercise of discretion in determining whether or not to seek or provide the resources necessary for** the purchase of equipment, **the construction or maintenance of facilities, the hiring of personnel and, in general, the provision of adequate governmental services**.

MISS. CODE ANN. § 11-46-9(1)(g). *See Schepens v. City of Long Beach*, 924 So. 2d 620, 624 (Miss. Ct. App. 2006) (city had immunity under subsection (g) from plaintiff's claim that it was negligent for failing to acquire road grading equipment to adequately maintain the dilapidated road next to plaintiff's residence).

For all of the foregoing reasons, there are no genuine issues of material fact as to Yazoo City's entitlement to discretionary function immunity from Plaintiff's claims regarding the maintenance, inspection, and repair of the Seventh Street drainage ditch, and Plaintiff's claims in that regard should be dismissed as a matter of law.

C. Plaintiff's claims regarding the 2007 improvements to the Seventh Street ditch are also barred by § 11-46-9(1)(p)

Because Yazoo City has immunity from Plaintiff's claims pertaining to the 2007 Seventh Street ditch improvement project under § 11-46-9(1)(d), Plaintiff's claims in that regard are barred regardless of whether the Court finds that the immunity set forth in § 11-46-9(1)(p) is also applicable here. *See Willing v. Estate of Benz*, 958 So. 2d 1240, 1255 (Miss. App. 2007) (holding that "where any of the immunities enumerated in [S]ection 11-46-9(1) apply, the

government is completely immune from any claims arising from the act or omission complained of."). However, out of an abundance of caution, this Defendant has also asserted its entitlement to immunity from Plaintiff's claims in that regard under § 11-46-9(1)(p).

For immunity to apply under § 11-46-9(1)(p), the following three elements are required: (1) the existence of a plan or design, (2) that the plan or design was approved prior to construction, and (3) the plan or design was in conformity with the engineering standards that were in effect at the time it was prepared. *Hankins v. City of Cleveland*, 90 So. 3d 88, 93 (Miss. Ct. App. 2011).

It is undisputed that the conversion of open drainage ditches to closed drainage ditches with covered drainage pipes was a common practice for the Yazoo City and Yazoo County road departments, and the methods used in this type of project were well established. R.132-135 (Morrison Dep., 61:25-64:24). No formal drawings or written plans were necessary or required for the 2007 project to cover the Seventh Street ditch between Lee Avenue and Prentiss Avenue, and a written plan or design was not required under the language of § 11-46-9(1)(p). *Id*. It is further undisputed that the plan for the 2007 project was approved prior to construction by both the Yazoo City Board of Aldermen and the Yazoo County Board of Supervisors. Parallel 36-inch and 48-inch drainage pipes sized to match the already-existing culverts under Lee Avenue and Prentiss Avenue were joined with the existing culverts, concrete collars were installed, and the ditch was backfilled. Finally, city engineer Wayne Morrison has testified that this project, including the methods of construction and materials used, complied with existing standards of engineering. R.90, 133-135 (Morrison Dep., 28:19-24, 62:14-63:1, 64:7-24).

Plaintiff argues the City failed to obtain a development permit (from itself) for the project, failed to submit a written plan to the city engineer (who himself was involved in the project), failed to prepare a hydraulic analysis, and failed to obtain an engineer's certification

prior to commencing work on the project. Not only was Yazoo City not required by statute, ordinance, or regulation to do any of those things before commencing work on this project, none of those alleged deficiencies address the ultimate issue of whether or not the ditch improvement project actually complied with existing engineering standards, as contemplated by the language of § 11-46-9(1)(p). Plaintiff's proposed engineering expert, Jill Butler, failed to offer any opinions whatsoever as to whether the project itself complied with existing engineering standards. Butler only states that if the City had conducted a hydraulic analysis, it "would have revealed increases in flood heights and velocities caused by the culvert, and the community might have decided to leave the ditch open." R.Supp.2:75-76 (Butler Aff., ¶ VII). However, Butler's separate expert report indicates that her own hydraulic analysis revealed that the 2007 project increased flood height upstream by only two inches and increased the water velocity at the head of the culvert by only 0.35 feet per second. Even if her findings are true, she does not state whether such a small difference in flood height and water velocity violated existing engineering standards. City engineer Wayne Morrison has opined that it does not. The only other opinions in Butler's affidavit pertain to suggestions as to how the City could have better maintained the ditch after the 2007 project (such as keeping grass mowed on a regular basis, keeping the ditch free of litter and debris, affixing a grate to the culvert inlet (which would actually increase risk of blockage by debris), and ways it could have warned the public of potential risks associated with the ditch. These clearly are not standards of engineering pertaining to the installation of covered drainage pipes. Butler's testimony fails to create any genuine issues of material fact which would overcome the City's immunity under § 11-46-9(1)(p).

For all of the foregoing reasons, there are no genuine issues of material fact as to Yazoo City's entitlement to immunity from Plaintiff's claims regarding the 2007 improvements made to

the Seventh Street drainage ditch and other parts of its drainage system, and Plaintiff's claims in that regard should be dismissed as a matter of law.

VI. CONCLUSION

Premised upon the foregoing legal precedent and analysis, as well as for such other reasons as may appear to the Court on review of the record on appeal, Yazoo City respectfully requests that this Court affirm the Order entered by the Circuit Court of Yazoo County, Mississippi, granting summary judgment as to each of Plaintiff's claims against it.

RESPECTFULLY SUBMITTED, this the 31st day of August, 2017.

YAZOO CITY, MISSISSIPPI – APPELLEE / DEFENDANT

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CERTIFICATE OF SERVICE

I, STEVEN J. GRIFFIN, hereby certify that on this day, I mailed via US Mail, postage pre-paid, a true and correct copy of *Brief of Appellee* to the following:

Hon. Jannie M. Lewis
Yazoo County Circuit Court
P.O. Box 149
Lexington, MS 39095

Additionally, I hereby certify that I electronically filed this pleading with the Clerk of the Court using the MEC filing system, which sent notification to the following:

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THIS the 31st day of August, 2017.

/s/ Steven J. Griffin
STEVEN J. GRIFFIN