ESSAY

EXEMPT OR NOT EXEMPT: CLARIFYING THE CONFUSION SURROUNDING THE RELATIONSHIP BETWEEN THE DISCRETIONARY FUNCTION EXEMPTION AND THE PERFORMANCE OF STATUTE EXEMPTION IN THE MISSISSIPPI TORT CLAIMS ACT

Shelly Mott Diaz & Robert A. Weems[•]

After the Mississippi Supreme Court abrogated common law immunity for the state and its political subdivisions, the Legislature enacted the Mississippi Tort Claims Act (MTCA), which waived sovereign immunity for certain torts. Like its federal equivalent, the MTCA contains a list of exceptions, reserving immunity in those situations. In Mississippi, two of those exemptions from the immunity waiver have become muddled and confused over the years, leaving courts conflicted over how to handle them: the discretionary function exemption, which applies even if the governmental actor abused his or her discretion, and the statutory duty exception, which only applies if the governmental actor exhibited "ordinary care" in carrying out the statutory duty. Thanks to a Mississippi Supreme Court case that applied the ordinary care requirement to the discretionary function exemption, the law remains unclear as to how these two provisions interact and how they should be applied. This article attempts to explain how the confusion arose, how Mississippi courts are currently interpreting the precedent on

[•] Shelly Mott Diaz is a 2010 graduate of the University of Mississippi School of Law and is an associate with Daniel, Coker, Horton & Bell, P.A. in Oxford, Mississippi. Professor Robert A. Weems is a Professor of Law at the University of Mississippi School of Law.

this issue, and how MTCA cases should be analyzed in the future to eliminate further confusion.

I. HISTORY AND TEXT OF THE FEDERAL TORT CLAIMS ACT

After a fighter plane crashed into the Empire State Building in 1945 and the government faced lawsuits from the victims' families, the Federal Tort Claims Act (FTCA), which had been pending in Congress for two decades, was finally passed.[1] While the FTCA allows private parties to sue the United States in a federal court for most torts committed by persons acting on the government's behalf, it contains a substantial list of exceptions to that waiver of immunity.[2] Among those exceptions is 28 U.S.C. § 2680(a), which contains two separate clauses:

> The provisions of [the Federal Tort Claims Act] shall not apply to--
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> > (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, *or* based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[3]

The federal courts have long interpreted this subsection as containing two distinct exceptions to the FTCA's waiver of immunity, both of which apply in different contexts and require different analyses.[4] Congress included the first clause "to assure that

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[1] Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (2006); Joe Richman, *The Day a Bomber Hit the Empire State Building*, NAT'L PUB. RADIO, July 28, 2008, http://www.npr.org/templates/story/story.php?storyId=92987873.

[2] *See* 28 U.S.C. § 2680 (2006).

[3] 28 U.S.C. § 2680(a) (emphasis added).

[4] *See, e.g.*, Myers & Myers, Inc. v. U.S. Postal Serv., 527 F.2d 1252, 1261 (2d Cir. 1975) (where plaintiffs claimed Post Office acted unconstitutionally and/or in contravention of its own regulations, the court analyzed separately the discretionary function exception (which did not apply since "a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority") and the "Acts in Execution of a Statute" exception (which did not apply since acting in contravention to a

'the legality of a rule or regulation should [not] be tested through the medium of a damage suit for tort.'"[5] In other words, this provision ensures that a plaintiff cannot attempt to set aside a statute or regulation via a tort action. The second clause creates the well-known discretionary function exception, whose purpose is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort . . . [and] 'protects only governmental actions and decisions based on considerations of public policy.'"[6]

II. ANALOGOUS PROVISIONS IN THE MISSISSIPPI TORT CLAIMS ACT

After two decades of battle between the Mississippi Supreme Court and the Mississippi Legislature over sovereign immunity, the Legislature enacted the current version of the Mississippi Tort Claims Act in 1993, replacing the combination of common law and statutory immunity that had existed up to that point.[7] The provisions of the MTCA are parallel to those of the FTCA. Like § 2680, Mississippi Code Annotated section 11-46-9 was enacted to provide a "shield" from liability to the state and its political subdivisions. It lists a series of situations in which sovereign immunity is not waived, thereby limiting the government's exposure to tort suits. The following two exemptions are Mississippi's version of 28 U.S.C. § 2680(a):

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regulation cannot be acting "in execution of" that regulation)); *see also* Hatahley v. United States, 351 U.S. 173 (1956); Dalehite v. United States, 346 U.S. 15 (1953); Boyce v. United States, 93 F. Supp. 866, 869 (S.D. Iowa 1950) (stating that the word "or" before "based upon the exercise or performance" in 28 U.S.C. § 2680(a) is disjunctive, indicating that the provision contains two distinct exclusions).

[5] *Myers & Myers, Inc.*, 527 F.2d at 1261 (quoting H.R. Rep. No. 1287, 79th Cong., at 6 (1945)).

[6] United States v. Gaubert, 499 U.S. 315, 323 (1991) (quoting United States v. Varig Airlines, 467 U.S. 797, 814 (1984), Berkovitz v. United States, 486 U.S. 531, 537 (1988)).

[7] MISS. CODE ANN. §§ 11-46-1 to -23 (2006); Jim Fraiser, *A Review of the Substantive Provisions of the Mississippi Governmental Immunity Act: Employees' Individual Liability, Exemptions to Waiver of Immunity, Non-Jury Trial, and Limitation of Liability*, 68 MISS. L.J. 703, 718-21 (1999). For a summary of the legislative and judicial history of sovereign immunity in Mississippi, see ROBERT A. WEEMS & ROBERT M. WEEMS, MISSISSIPPI LAW OF TORTS § 16:2 (2d ed. 2008).

> (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:
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> . . .
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> (b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;
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> . . .
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> (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[.][8]

Like the two exemptions in § 2680, subsections (b) and (d) are disjunctive and meant to be distinct provisions analyzed separately.[9] Therefore, based on the language of the statute and the federal courts' interpretation of these exemptions under the FTCA, it would appear that establishing the requirements of any one of the exceptions listed would guarantee a governmental entity immunity in that matter. In other words, should a court encounter a case in which the plaintiff is attempting to attack the validity of a statute, ordinance, or regulation through a tort action, the court should analyze the immunity issue under section 11-46-9(1)(b). On the other hand, if the case involves an act of a governmental agent or employee that the governmental entity alleges was discretionary, the court should apply Mississippi's two-part test to determine if section 11-46-9(1)(d) applies.

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[8] MISS. CODE ANN. § 11-46-9(1)(b), (d) (2006).

[9] *See id.* (using "or" as the conjunction connecting the various exemptions listed); *see also* Fraiser, *supra* note 7, at 743 (citing Hall v. Miss. Dep't of Pub. Safety, No. 96-CA-00832-SCT (Miss. Apr. 9, 1998) (stating that section 11-46-9 "is written in the disjunctive which indicates that subsections (1)(c) and (1)(d) should not be read together, but should be read as alternatives separate and apart from one another")).

III. CONFOUNDING THE TWO EXEMPTIONS: *L.W. V. MCCOMB SEPARATE MUNICIPAL SCHOOL DISTRICT*

Unfortunately, in 1999 the Mississippi Supreme Court encountered a set of facts that led to imposing the "ordinary care" requirement of subsection (b) on the discretionary function exemption of subsection (d), in effect limiting sovereign immunity further and using the ordinary care language as a sword against the government. In *L.W. v. McComb Separate Municipal School District*, student Matthew Garner threatened his fourteen-year-old classmate, J.A., with bodily harm.[10] J.A. told his teacher and requested help, but the teacher did nothing.[11] Later that day in after-school detention, Garner again threatened J.A. in front of a school official, who also failed to react.[12] After leaving detention, Garner struck and sexually assaulted J.A.[13] The lower court held that the School District was immune from suit because the allegations constituted failure to perform a discretionary duty.[14]

The Mississippi Supreme Court determined that the school officials' conduct was discretionary since it "'require[d] the official to use her own judgment and discretion in the performance thereof.'"[15] However, the Court went on to say that "merely finding that the conduct at issue in the instant case was discretionary does not fully resolve the matter as the School suggests."[16] Citing section 11-46-9(1)(b), the Court reasoned that the teachers were under a statutory obligation to perform the discretionary duty in question, so they were required to use ordinary care in order to benefit from the exemption from liability found in subsection (d).[17]

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[10] 754 So. 2d 1136, 1137 (Miss. 1999).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 1141 (quoting T.M. *ex rel.* E.N.M. v. Noblitt, 650 So. 2d 1340, 1343 (Miss. 1995)).

[16] *Id.*

[17] *Id.* at 1141-42 ("Therefore, the statutorily imposed obligation to 'hold the pupils to strict account', a ministerial dictate, trumps the discretionary exception, regardless of the amount of discretion school personnel may exercise in carrying out this statutory

Subsequent cases imposed the duty of ordinary care upon discretionary acts for the subsection (d) exemption to apply.[18] Realizing its error, the Court took the opportunity to clarify the distinction between the discretionary function exemption and the statutory duty exemption that requires ordinary care to be applicable.[19] In *Collins v. Tallahatchie County*, Plaintiff Essie Collins had called the police to report that her estranged husband was threatening to kill her.[20] She swore out an affidavit the next day, as instructed, but the police never arrested her husband.[21] Three days later, the husband shot Essie twice and then killed himself.[22]

Because the parties assumed in their briefs that the police must have performed their discretionary function with ordinary care for the subsection (d) exemption to apply, the Court clarified the issue, stating, "Miss. Code Ann. § 11-46-9(1)(d) exempts governmental entities from liability of a discretionary function or duty 'whether or not the discretion be abused'. Therefore, ordinary care standard is not applicable to Miss. Code Ann. § 11-46-9(1)(d)."[23] However, the Court did not overrule the *L.W.* decision, but instead attempted to distinguish that case, saying that it found merely "in *L.W.* that the school's conduct was of a

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obligation."). In his 2007 law journal article on this topic, Jim Fraiser offers the following opinion of this decision by the Mississippi Supreme Court:

> Subsequently finding this interpretation too conservative, Mississippi's appellate courts allowed bad facts to create bad law by borrowing an "ordinary care" requirement from another exemption (exemption (b), commonly known as "the compliance with statutes and ordinances exemption"), and adding it to the discretionary mix. Now, in addition to exercising judgment, a governmental employee was also required to exercise ordinary care for the exemption to immunize his or her negligent acts or omissions. This was an absurd approach, since the legislature's obvious intent in creating this exemption was to immunize discretionary acts regardless of negligence (the lack of ordinary care) or whether the discretion was abused.

Jim Fraiser, *Recent Developments in Mississippi Tort Claims Act Law Pertaining to Notice of Claim and Exemptions to Immunity Issues: Substantial/Strict Compliance, Discretionary Acts, Police Protection and Dangerous Conditions*, 76 MISS. L.J. 973, 987-88 (2007).

[18] *See, e.g.*, Brewer v. Burdette, 768 So. 2d 920 (Miss. 2000).

[19] Collins v. Tallahatchie County, 876 So. 2d 284, 289 (Miss. 2004).

[20] *Id.* at 286.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 289.

discretionary *nature*" but "never found that the school officials were *performing* a discretionary *function*."[24] This hair-splitting distinction provided little guidance to lower courts, seemingly indicating only that, discretionary or not, if the government official is "performing a function *required by statute*," it falls under subsection (b) and "clearly carries an ordinary care standard."[25]

In the meantime, the Court adopted a two-prong test developed by the United States Supreme Court to determine whether the alleged governmental conduct is discretionary, in which the Court asks: "'(1) whether the activity involved an element of choice or judgment; and if so, (2) whether the choice or judgment in supervision involves social, economic or political policy alternatives.'"[26] Once the ordinary care requirement was supposedly abrogated, this two-part analysis provided a middle ground so that courts could hold the government immune when policy issues were implicated in the conduct complained of, yet hold them liable when the decision involved a judgment call that did not require social, economic, or political policy considerations.[27] However, the resulting application of this precedent in subsequent decisions has demonstrated a continued misunderstanding as to how this law should be applied to determine

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[24] *Id.* (citing L.W. v. McComb Separate Mun. Sch. Dist., 754 So. 2d 1136, 1139-43 (Miss. 1999)).

[25] *Id.*

[26] Doe v. State *ex rel.* Miss. Dep't of Corr., 859 So. 2d 350, 356 (Miss. 2003) (quoting Bridges v. Pearl River Valley Water Supply Dist., 793 So. 2d 584, 588 (Miss. 2001)); *see also* United States v. Gaubert, 499 U.S. 315, 322 (1991).

[27] Fraiser provides the following example to demonstrate the line between discretion, which would require immunity, and mere judgment calls, which would not:

> In other words, the decision by a bus driver to allow a claimant to exit a school bus at a particular intersection does not implicate policy, and is merely a judgment call, and thus not immunized by this exemption. However, a school board's decision to allow children to de-board buses during thunderstorms, at busy intersections, during nuclear attacks, etc., is a policy decision which may not be second guessed, even where ordinary care is not utilized by the board. Thus, if the board has decided that children may be let off at all intersections, then the driver's decision to do so is immunized as discretionary-i.e., as involving judgment-plus-policy considerations.

Fraiser, *supra* note 17, at 989.

whether a governmental act falls under the exemption of subsection (b) or (d).[28]

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[28] The federal courts have also taken note of this confusion. In *Dozier v. Hinds County*, the Southern District of Mississippi described the evolution of this problem of interpretation as follows:

> For years the supreme court interpreted § 11-46-9(1)(d) in such a fashion, despite the plain language of the statute which contains no such duty. Section 11-46-9(1)(d) reads:
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> > (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*.
>
> (emphasis added). The plain language of the statute indicates that even if a governmental entity abuses its discretion when performing a discretionary function or duty, it is immune from liability. Because of the plain language of the statute, reading a duty of ordinary care into the statute came under substantial criticism. *See* Robert F. Walker, Comment, *Mississippi Tort Claims Act: Is Discretionary Immunity Useless?,* 71 MISS. L.J. 695 (Winter 2001). In the words of Mr. Walker,
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> > . . . The supreme court now requires that governmental entities demonstrate the same level of ordinary care when carrying out discretionary functions as required by the MTCA [Mississippi Tort Claims Act] when carrying out statutory duties. This new requirement appears to contradict the express language of the MTCA.
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> > . . . [T]he Mississippi Supreme Court has essentially eliminated the discretionary immunity provision of the MTCA. This immunity is practically worthless since the government must still exercise ordinary care in its performance of discretionary functions. In other words, in order to receive the immunity, the governmental entity must refrain from acting negligently in the first place.
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> *Id*. at 696 & 706-07 (footnotes omitted).
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> Recognizing this error, on July 1, 2004, Justice Dickinson of the Supreme Court of Mississippi authored an opinion, *Collins v. Tallahatchie County*, in which the supreme court rejected its earlier precedent and expressly stated that § 11-49-9(1)(d) does not impose a duty of ordinary care.

354 F. Supp. 2d 707, 713-14 (S.D. Miss. 2005) (quoting Robert F. Walker, Comment, *Mississippi Tort Claims Act: Is Discretionary Immunity Useless?*, 71 MISS. L.J. 695, 696, 706-07 (2001)) (citations omitted).

IV. THE MISSISSIPPI APPELLATE COURTS' CURRENT ANALYSIS OF THIS ISSUE

Despite the Court's intent to dispel the perceived interplay between subsection (b) and subsection (d), the confusion continues. In just the past year, the Mississippi Court of Appeals has more than once included a needless discussion of the illusory ordinary care requirement when analyzing a discretionary function, focusing its discussion on whether a statutory duty existed instead of whether the alleged conduct was ministerial or discretionary. For example, in *Kaigler v. City of Bay St. Louis*, a twelve-year-old boy fell through a false ceiling while attempting to retrieve a basketball in the City gym.[29] The child's mother sued the City and the Gym for negligence.[30] The court acknowledged Kaigler's argument that *L.W.* imposes a duty of ordinary care upon the City and the Gym in order to claim immunity.[31] However, the court distinguished *Kaigler* from *L.W.*, pointing out that Kaigler did not name a statute that imposed a duty on the defendants but not addressing the fact that conduct under a statutory duty may in fact be discretionary, in which case the ordinary care requirement would not apply.[32]

A few months later, the Court of Appeals handed down an opinion regarding immunity in a case in which a school bus driver took a truant high school student to his house and left her there with his nephew.[33] A.B. claimed that while she was there, the nephew sexually assaulted her multiple times.[34] She sued the School District claiming that it "was negligent in its failure to use ordinary care" by not following its policies regarding absent students, not adopting better policies to notify parents when students were absent, and hiring the bus driver in question, among other things.[35] The circuit court held that the duties implicated were all discretionary and therefore fell under

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[29] 12 So. 3d 577, 579 (Miss. Ct. App. 2009).
[30] *Id.*
[31] *Id.* at 582.
[32] *Id.*
[33] A.B. v. Stone County Sch. Dist., 14 So. 3d 794, 795-96 (Miss. Ct. App. 2009).
[34] *Id.* at 796.
[35] *Id.*

the exemption of section 11-46-9(1)(d).[36] Although the Court of Appeals acknowledged that *Collins* clearly stated there is no ordinary care requirement for discretionary functions, the court still approached the analysis as if *any* function that arises out of a statutory duty must meet the ordinary care requirement.[37] The court then found it necessary to distinguish *A.B.* from *L.W.*, holding that since L.W. was threatened during class, the teacher's failure to act constituted failure to perform a statutory duty, while A.B.'s harm that occurred off-campus could not implicate such a duty.[38] The court ultimately concluded:

> Because we find no violation of a statutory duty on the part of the school district, the ordinary-care standard in section 11-46-9(1)(b) does not apply. Therefore, the school district is afforded discretionary immunity on all of A.B.'s claims except the school district's clear violation of the compulsory attendance laws.[39]

In *Strange v. Itawamba County School District*, a student suffered serious injuries when he fell from the back of a pickup truck while riding to football practice.[40] The court in this case correctly stated that there is no "'third step' in the determination of whether an act is discretionary—whether the act was conducted using ordinary care," citing *Collins*.[41] However, the court still found it necessary to distinguish the facts of this case from those in *L.W.* to demonstrate that there is no ordinary care requirement.[42]

In January of this year, the Mississippi Supreme Court heard a case in which a high school football player died during practice, allegedly of a heat stroke, and his wrongful death beneficiaries sued the school district for negligence.[43] The Court determined that the school district's actions were discretionary and reversed the lower court's denial of summary judgment.[44]

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[36] *Id.*
[37] *Id.* at 797-98.
[38] *Id.* at 798-99.
[39] *Id.* at 800.
[40] 9 So. 3d 1187, 1188 (Miss. Ct. App. 2009).
[41] *Id.* at 1191-92.
[42] *Id.* at 1192-93.
[43] Covington County Sch. Dist. v. Magee, 29 So. 3d 1, 2-3 (Miss. 2010).
[44] *Id.* at 8.

Before doing so, however, the Court mentioned that, if the school district's conduct had been ministerial, it would be "protected from liability only if ordinary care is exercised in performing or failing to perform the statutory duty or regulation."[45] While it is true that the school district would only be liable if it were proven to be negligent, the language the Court used here suggests an interplay between subsection (d) and subsection (b) that does not (or should not) exist.

V. HOW THESE CASES SHOULD BE HANDLED

Though the Mississippi courts are moving in the right direction in their analysis of immunity under section 11-46-9(b) and (d), the Mississippi Supreme Court could eliminate the remaining confusion by expressly overruling *L.W. v. McComb Separate Municipal School District* and outlining a clear process of analysis for these cases.

The first step in this clearer analysis would be to make clear that section 11-46-9(1)(b) has no applicability to a case where plaintiff is contending that a governmental entity employee was negligent in the execution or performance of a statute, ordinance or regulation. This exemption, in the clearest of terms, applies to cases where the governmental employee has "exercis[ed] ordinary care."[46] It is only in this situation that the thrust of the plaintiff's action is to "test the legality of a rule or regulation through the medium of a damage suit for tort."[47] These are rare cases; people who want to challenge the validity of a statute, ordinance or regulation rarely do so by bringing a tort action. It is believed that none of the numerous cases in which the Supreme Court or the Court of Appeals has discussed section 11-46-11(1)(b) have been this kind of case, which is to say that this exemption should never have been mentioned, ex-

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[45] *Id.* at 5 (citing Lang v. Bay St. Louis/Waveland Sch. Dist., 764 So. 2d 1234, 1240 (Miss. 1999)).

[46] MISS. CODE ANN. § 11-46-9(b) (2006).

[47] Myers & Myers, Inc. v. U.S. Postal Serv., 527 F.2d 1252, 1261 (2d Cir. 1975) (quoting H.R. Rep. No. 1287, 79th Cong., at 6 (1945)).

cept perhaps to observe that it had no applicability to the action before the court.

Once section 11-46-9(1)(b) is out of the way, the question of whether the governmental entity is immune pursuant to section 11-46-9(1)(d) can be addressed. As explained above, this depends upon whether both parts of the two-part test are satisfied.[48] As for the first part, whether the action of the governmental employee involved an element of choice or judgment, the decision may depend upon whether there was a statute, ordinance, or regulation that clearly defined the required action. If so, then the first part of the test would be answered in the negative and the action would be ministerial, and there would be no immunity under subsection (d). If there was no clear statute, ordinance, regulation, or policy, so that the action was within the governmental employee's judgment, the second question would have to be answered: whether the choice "involve[d] social, economic or political policy alternatives."[49] If the answer to this question is in the affirmative, then the "Discretionary Act" exemption would apply and the governmental entity would be immune from suit. If the answer is in the negative, the action would be ministerial, this exemption would not be applicable, and the governmental entity would not be immune from liability under this exemption.

If section 11-46-9(1)(d) did not provide immunity to the governmental entity, either because the act did not involve an element of choice or judgment, or because the choice or judgment did not involve social, economic or political policy alternatives, and if no other exemption applied, the plaintiff would still have to prove that the governmental employee's conduct was negligent, i.e., that a reasonable prudent person would not have done what the employee did under the same circumstances.

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[48] Doe v. State *ex rel.* Miss. Dept. of Corr., 859 So. 2d 350, 356 (Miss. 2003) ("(1) whether the activity involved an element of choice or judgment; and if so, (2) whether the choice or judgment in supervision involves social, economic or political policy alternatives." (quoting Bridges v. Pearl River Valley Water Supply Dist., 793 So. 2d 584, 588 (Miss. 2001))).

[49] *Id.*

VI. CONCLUSION

The State of Mississippi and its political subdivisions depend on the systematic and consistent application of the Mississippi Tort Claims Act to operate efficiently and exercise appropriate discretion to promote the State's welfare without fear of inordinate liability. The current application of the law, however, has led to a great deal of confusion and uncertainty as to when and for what legal reason a governmental entity may be liable for its actions. Though the Mississippi appellate courts seem to be arriving at results consistent with Miss. Code Ann. section 11-46-9 as it should be read, the reasoning still involves a conflation of subsections (b) and (d) and leaves unclear guidance for the lower courts in deciding these cases. It is submitted that a clarification of this issue along the lines suggested in this article would greatly improve the proper and efficient administration of justice in all matters involving claims of negligence against governmental entities.