

*****JULY 2018***
UPDATES
TO THE
BENCHBOOK
FOR THE
MISSISSIPPI
COUNTY COURT
JUDGES**

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***** Please note that the *Benchbook* will be revised for
New Judges Orientation in December 2018. *****

Benchbook for

Mississippi

County Court

Judges

2018



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FOREWORD

The *Benchbook for Mississippi County Court Judges* is drafted in such a way as to easily facilitate the addition of new material, changes in the law, and make corrections as needed.

To search for a word, phrase, or particular chapter within the *Benchbook* document, please press down the “Ctrl/Control” button and then press the “F” button, and a “Find” box will open. Simply type the word, phrase, or particular chapter’s name, such as “burden of proof” or “Chapter 16,” in the blank and press “Enter.” Click “Next” to move through the document. To return to the front of the *Benchbook* to conduct another search, please press the “Home” button.

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Judicial Sanctions Ordered by the Mississippi Supreme Court			
Sanction	Court Judge	Conduct Warranting Sanctions	Citation
Removal, fine, & court costs	Justice	Judge physically and verbally assaulted a mentally disabled individual.	<i>MCJP v. Weisenberger</i> , 201 So. 3d 444 (Miss. 2016).
Removal, fine, & court costs	Justice	Judge lent prestige of office to assist a friend; deprived drug-court participant of right to counsel of her choosing; kept drug-court participants in program longer than statutorily permitted; improperly enrolled participants from other jurisdictions in drug court; and deprived drug-court participants of their due process rights.	<i>MCJP v. Thompson</i> , 169 So. 3d 857 (Miss. 2015).
Removal, fine, & court costs	Youth	Judge deliberately and unlawfully incarcerated eleven citizens without affording them due process.	<i>MCJP v. Darby</i> , 143 So. 3d 564 (Miss. 2014).
Removal & court costs	Chancery	Judge pled guilty to the felony of obstruction of justice in federal court. (Judge had resigned from office at the time of the opinion).	<i>MCJP v. Walker</i> , 172 So. 3d 1165 (Miss. 2015).
Removal & court costs	Circuit	Judge pled guilty to felonies in federal court. (Judge had resigned from office at the time of the opinion).	<i>MCJP v. DeLaughter</i> , 29 So. 3d 750 (Miss. 2010).
Removal & court costs	County	Judge recused himself from a case and then continued to issue orders in the case; once a judge recuses himself/herself from a case, the judge can not take further action in the case; there was prior judicial misconduct on the part of the judge. (Judge had resigned from office at the time of the opinion).	<i>MCJP v. Osborne</i> , 16 So. 3d 16 (Miss. 2009).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Removal	Justice	Judge used his position to have charges against the judge's son dismissed. <i>MCJP v. Brown</i> , 918 So. 2d 1247 (Miss. 2005).
Removal	Justice	Judge engaged in numerous ex parte communications with litigants and allegedly made sexual advances toward several females. <i>MCJP v. Lewis</i> , 913 So. 2d 266 (Miss. 2005).
Removal	Justice	Judge accepted payments of fines payable to justice court; improperly dismissed charges; misused contempt powers (24 counts of judicial misconduct). <i>MCJP v. Willard</i> , 788 So. 2d 736 (Miss. 2001).
Removal	Chancery	Judge became involved in legal proceedings to which he would ultimately be acting as the judge. <i>MCJP v. Jenkins</i> , 725 So. 2d 162 (Miss. 1998).
Removal	Justice	Judge had 25 counts of personal and professional misconduct including ex parte communications, exhibiting a hostile demeanor towards people, failure to properly perform his duties, and claims of sexual harassment. <i>MCJP v. Spencer</i> , 725 So. 2d 171 (Miss. 1998).
Removal	Justice	Judge entered order without authority; improperly handled DUI case; accepted money without authority; executed judgment without authority; engaged in ticket fixing; engaged in ex parte communications, & obstructed the judicial process. <i>MCJP v. Dodds</i> , 680 So. 2d 180 (Miss. 1996).
Removal	Justice	Judge became socially involved with person who appeared in her court as a defendant; knew the defendant was a fugitive from another state & participated in fugitive's criminal case after extradition. <i>MCJP v. Milling</i> , 651 So. 2d 531 (Miss. 1995).
Removal	Justice	Judge engaged in ticket fixing; failed to sentence criminals in accordance with statute; dismissed misdemeanor cases not in accordance with statute; & interfered with rotation of cases assigned to other judges in an attempt to influence other judges. <i>MCJP v. Chinn</i> , 611 So. 2d 849 (Miss. 1992).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Removal	Justice	Judge allowed clerks & other officials to dismiss traffic tickets without an adjudication; failed to timely sign dockets; & dismissed traffic tickets in exchange for information on other criminal activity. <i>MCJP v. Hopkins</i> , 590 So. 2d 857 (Miss. 1991).
Removal	Justice	Judge adjudicated approximately 28 DUI convictions & 552 routine traffic convictions without reporting them to Commissioner of Public Safety. <i>In re Quick</i> , 553 So. 2d 522 (Miss. 1989).
Removal	Justice	Judge used criminal process to collect fees & fines; failed to properly account for the fines; converted the fines to his own use. <i>MCJP v. Coleman</i> , 553 So. 2d 513 (Miss. 1989).
Removal	Justice	Judge engaged in ticket fixing; summarily adjudicated criminal defendants as not guilty on basis of ex parte communications or other un-docketed reasons; submitted improperly changed court abstracts to Department of Public Safety; used official influence to seek favorable consideration by judges of other courts for tickets issued to individual defendants; & used justice court personnel & supplies to carry out this course of conduct. <i>In re Hearn</i> , 542 So. 2d 901 (Miss. 1989).
Removal	County	Judge failed to keep records & make reports; imposed excessive fines; & utilized prisoners for personal & county work. <i>In re Collins</i> , 524 So. 2d 553 (Miss. 1988).
Removal	Justice	Judge converted money which came into his hands by virtue of office to his own use & falsified court records to cover his misconduct. <i>In re Stewart</i> , 490 So. 2d 882 (Miss. 1986).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Removal	Justice	Judge received & collected criminal fines, penalties, costs & assessments on behalf of county & failed to report & pay sums over to county. <i>In re Garner</i> , 466 So. 2d 884 (Miss. 1985) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Removal	Justice	Judge converted money from civil litigants for his own use. <i>In re Brown</i> , 458 So. 2d 681 (Miss. 1984).
Removal	Justice	Judge committed perjury; failed to remedy deficiency in regard to issuance of garnishments; & failed to refund garnishment costs which had been deposited but as to which no garnishment had been issued. <i>In re Anderson</i> , 451 So. 2d 232 (Miss. 1984).
Removal	Justice	Judge charged traffic violators a greater sum as a fine than that officially reported. <i>In re Anderson</i> , 412 So. 2d 743 (Miss. 1982).
Suspension without pay, public reprimand, fine & court costs	Justice	Judge committed judicial misconduct by sentencing a defendant to the work center after the defendant had appealed his conviction to a higher court and had then paid his court fine. <i>MCJP v. Sheffield</i> , 235 So. 3d 30 (Miss. 2017).
Suspension without pay, public reprimand, fine & court costs	Justice	Judge improperly stated to the defendant that the judge may have to use his gun on the defendant due to the defendant's habit of placing his hands in his pockets. Judge also made disparaging comments about the defendant's mother's parenting skills. <i>MCJP v. Vess</i> , 227 So. 3d 952 (Miss. 2017).

Judicial Sanctions Ordered by the Mississippi Supreme Court			
Suspension without pay, public reprimand, fine & court costs	Chancery	Judge improperly signed ex parte orders and contributed to the mismanagement of a ward's estate.	<i>MCJP v. Shoemaker</i> , 191 So. 3d 1211 (Miss. 2016).
Suspension without pay, public reprimand, fine & court costs	Chancery	Judge abused contempt powers and illegally incarcerated litigant who had appealed and paid a supersedeas bond to stay payment of court's judgment.	<i>MCJP v. Littlejohn</i> , 172 So. 3d 1157 (Miss. 2015).
Suspension without pay, public reprimand, fine & court costs	County	Judge had presided over several cases involving six minor siblings where the judge had issued a no-contact order between the father and the children; subsequently, the judge recused himself from all proceedings involving the parties; although the judge had recused himself from the proceedings and based on ex parte communications, he issued bench warrants for the arrests of the parents for contempt of court for violation of the no-contact order and ordered them held without bond.	<i>MCJP v. Skinner</i> , 119 So. 3d 294 (Miss. 2013).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Suspension without pay, public reprimand, fine & court costs	Justice	<p>Judge communicated with the sheriff's office during a criminal investigation at a time when there was no case pending before him; signed an order where there was no case pending before him and engaged in ex parte communications concerning the matter; non-adjudicated a minor in violation of Mississippi Code Annotated § 63-11-30(3), at the request of the minor and her father; engaged in ex parte communications with the minor and her father; failed to give notice to prosecuting authorities; and interfered in a case that was assigned to another justice court judge; reduced a defendant's bond which had been set by another justice court judge; dismissed eleven (11) cases of no proof of insurance in a four (4) month period after the respective defendants supplied proof of insurance that was obtained after the fact; improperly involved himself in a domestic civil matter; engaged in improper ex parte communications with a litigant involved in the domestic dispute; and improperly attempted to aid the litigant by asking an officer to assist the litigant.</p>
Suspension without pay, public reprimand, fine & court costs	Justice	<p>Judge executed a felony arrest warrant based on an affidavit submitted by the judge's own client.</p>
Suspension without pay, public reprimand, fine & court costs	Justice	<p>Judge engaged in "ticket-fixing" and had ex parte communications.</p>
Suspension without pay, public reprimand, fine & court costs	County	<p>Judge engaged in ex parte communications; misused his contempt power; failed to properly notice hearings; granted relief not requested; and issued a search warrant without legal authority.</p>
		<p><i>MCJP v. Thompson</i>, 80 So. 3d 86 (Miss. 2012).</p>
		<p><i>MCJP v. Bustin</i>, 71 So. 3d 598 (Miss. 2011).</p>
		<p><i>MCJP v. McKenzie</i>, 63 So. 3d 1219 (Miss. 2011).</p>
		<p><i>MCJP v. Patton</i>, 57 So. 3d 626 (Miss. 2011).</p>

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Suspension without pay, public reprimand, fine & court costs	Justice	Judge touched a deputy clerk in an inappropriate manner and had in the past made inappropriate remarks. <i>MCJP v. Brown</i> , 37 So. 3d 14 (Miss. 2010).
Suspension without pay, public reprimand, fine & court costs	Justice & Municipal	Judge, with deputies, went to the home of the complainant to inquire about missing sections of a fence that had been removed from a cemetery; judge subsequently ordered the complainant to return the fences or face prosecution; despite the fact that no charges were ever pending concerning the pieces of fence, the judge informed the complainant that a warrant had been issued for her arrest. <i>MCJP v. Carr</i> , 990 So. 2d 763 (Miss. 2008) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	Judge failed to properly adjudicate criminal matters assigned to him; engaged in ticket-fixing; and dismissed criminal charges against multiple defendants in exchange for simultaneous payments to a “drug fund” established and maintained by the police chief. <i>MCJP v. Smith</i> , 109 So. 3d 95 (Miss. 2013).
Suspension without pay, public reprimand & court costs	Justice	Judge improperly attempted to contact a judge in another jurisdiction concerning a pending criminal matter involving a friend’s family member. <i>MCJP v. Dearman</i> , 73 So. 3d 1140 (Miss. 2011).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Suspension without pay, public reprimand & court costs	Justice	<p>Judge interfered with the prosecution of a case against a defendant who was charged with a crime against the judge's relative; interfered with the defendant's attempt to post bond; disrupted a Board of Supervisors' meeting to complain about the sheriff's actions relating to the defendant's bond, which caused a disturbance and an interruption of the Board of Supervisors' business; interfered with the defendant's attempts to hire legal counsel by discouraging attorneys from representing the defendant, thereby attempting to deny the defendant his constitutional right to counsel and to a fair criminal proceeding; and stated on the record in a proceeding in circuit court "my advice to them [a victim of a crime] would be do not use the court, handle it themselves."</p> <p>Judge was also accused of willful misconduct for "passing to the file" DUI charges based on written motions filed by the county prosecutor; these actions were allegedly in violation of Mississippi Code § 63-11-39 and § 99-15-26.</p> <p>However, the Mississippi Supreme Court found no sanctionable conduct and dismissed that count against the judge with prejudice.</p>
		<i>MCJP v. McGee</i> , 71 So. 3d 578 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	<p>Judge refused to sign a search warrant referencing an acquaintance's computer; ordered that the acquaintance's handcuffs and shackles be removed during her initial appearance; on a second charge against the acquaintance, the judge engaged in ex parte communications with the acquaintance's husband; attempted to have the acquaintance released from jail; and became emotionally upset when the acquaintance was brought before the judge.</p>
		<i>MCJP v. Cowart</i> , 71 So. 3d 590 (Miss. 2011).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Suspension without pay, public reprimand & court costs	Justice	Judge sua sponte reduced bonds and charges without proper motion; conditioned the reduction on church attendance; exceeded her authority by altering bonds after a defendant had been released on bond or had waived preliminary hearing, or after a preliminary hearing had been conducted; permitted others to create the impression that they were in a special position to influence her as a judge; initiated and invited ex parte communications; and presided at her nephew's initial appearance. <i>MCJP v. Dearman</i> , 66 So. 3d 113 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	Judge had ex parte communications with a defendant and a police officer and improperly reduced a court fine. <i>MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Suspension without pay, public reprimand & court costs	Justice	Judge waited to rule on certain criminal cases pending the outcome of an unrelated case in chancery court; obtained ex parte information by attending the chancery court proceeding; engaged in ex parte communications; held a defendant without bond for a non-capital offense; improperly reduced a defendant's bond; refused to reduce a defendant's bond based on ex parte information concerning threats made against the judge; and allowed testimony about the alleged threats during the defendant's hearing. <i>MCJP v. Anderson</i> , 32 So. 3d 1180 (Miss. 2010).
Suspension without pay, public reprimand & court costs	Justice	Judge had a conflict of interest in a case and did not properly recuse himself from the proceedings; judge, who had been on the bench approximately 29 years, "had a fundamental lack of understanding of legal principles in connection with the recusal process." <i>MCJP v. Hartzog</i> , 32 So. 3d 1188 (Miss. 2010).
Suspension without pay, public reprimand & court costs	Justice	Judge engaged in ex parte communications with a party and ruled in that party's favor; continued cases without a motion being made to do so by either party; dismissed a DUI case without allowing the prosecutor to call a witness; attempted to get cases assigned to another judge dismissed, among other instances of judicial misconduct. <i>MCJP v. Bradford</i> , 18 So. 3d 251 (Miss. 2009).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Suspension without pay, public reprimand & court costs	Justice	Judge engaged in ex parte communications with a party concerning a pending matter; offered legal advice to the party; & used his influence as a judge to advance the private interests of others. <i>MCJP v. Fowlkes</i> , 967 So. 2d 12 (Miss. 2007).
Suspension without pay, public reprimand & court costs	Justice	Judge did not allow a defendant in a trespass proceeding to present any evidence on his behalf; sua sponte issued a warrant for the re-arrest of a defendant who had posted bond set by the judge; sua sponte revoked a defendant's probation without following proper procedures; after finding a defendant not guilty of DUI 1 st , ordered the defendant not to drive for 2 years; improperly issued arrest warrants; improperly set aside court orders issued by another judge; and improperly amended a charge against a defendant. <i>MCJP v. Roberts</i> , 952 So. 2d 934 (Miss. 2007).
Suspension without pay, public reprimand & court costs	Justice	Judge interfered with a criminal prosecution by having the sheriff contact the arresting officer to have him not attend court on the trial date so that a DUI charge could be dismissed for failure to prosecute; such action was deemed the "epitome of judicial misconduct exhibiting moral turpitude." <i>MCJP v. Sanford</i> , 941 So. 2d 209 (Miss. 2006).
Suspension without pay, public reprimand & court costs	Justice	Judge repeatedly engaged in ex parte communications and set aside judgments. <i>MCJP v. Britton</i> , 936 So. 2d 898 (Miss. 2006).
Suspension without pay, public reprimand & court costs	Justice	Judge engaged in ex parte communications, remanded charges, and presided over a case where there was a conflict of interest. <i>MCJP v. Cowart</i> , 936 So. 2d 343 (Miss. 2005).
Suspension without pay, public reprimand & court costs	Justice	Judge failed to render timely decisions; failure to give notice to parties of court orders. <i>MCJP v. McPhail</i> , 874 So. 2d 441 (Miss. 2004).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Suspension, public reprimand & court costs	Municipal	Judge “passed” numerous traffic tickets to the files without requiring the defendants to appear in court. <i>MCJP v. Gordon</i> , 955 So. 2d 300 (Miss. 2007).
Suspension, fine & public reprimand	Justice	Judge became involved in dispute between friend/distant relative & third party; wrote insufficient funds check; & failed to file reports of campaign contributions or expenditures as required by law. <i>MCJP v. Franklin</i> , 704 So. 2d 89 (Miss. 1997).
Suspension, fine & public reprimand	Justice	Judge ordered or allowed an alteration of court dockets, & he improperly purchased replevined property. <i>In re Mullen</i> , 530 So. 2d 175 (Miss. 1988).
Suspension without pay & court costs	County	While speaking to a political organization, the judge made a number of inflammatory, racial remarks which were not deemed to be protected political speech; judges are however permitted to speak at political gatherings on their own behalf while candidates for re-election. <i>MCJP v. Osborne</i> , 11 So. 3d 107 (Miss. 2009).
Suspension without pay & court costs	County	Judge intervened on behalf of a family member in a vehicle repossession & used his judicial office in a manner to impede a quick & peaceful resolution to the matter. <i>MCJP v. Osborne</i> , 977 So. 2d 314 (Miss. 2008).
Suspension & fine	Justice	Judge had jailer park his vehicle across from house of minor who had made allegations against judge in order to intimidate minor & her family, & judge interjected himself in a meeting between student & principal & used his position as judge to intimidate the student. <i>MCJP v. Bishop</i> , 761 So. 2d 195 (Miss. 2000).
Suspension & fine	Justice	Judge assaulted a litigant in the courtroom & used profane language at the defendant during the altercation. <i>MCJP v. Guest</i> , 717 So. 2d 325 (Miss. 1998).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Suspension & fine	Justice	Judge dismissed charges pursuant to ex parte communications with defendant and defendant's aunt; prior discipline of judge involved political activity & attempting to have another justice court judge dismiss a person's traffic violation. <i>MCJP v. Peyton</i> , 645 So. 2d 954 (Miss. 1994) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Suspension & court costs	Justice	Judge conducted ex parte bond hearings; assigned his daughter as public defender; improperly set aside judgment. <i>MCJP v. Peyton</i> , 812 So. 2d 204 (Miss. 2002).
Suspension	Youth	Judge granted ex parte order changing child custody. <i>MCJP v. Perdue</i> , 853 So. 2d 85 (Miss. 2003).
Suspension (Interim)	Circuit	Judge engaged in ex parte communications; suspension pending resolution of formal complaints. <i>MCJP v. Delaughter</i> , 35 So. 3d 1208 (Miss. 2008).
Suspension (Interim)	Justice	Judge had 2 pending felony indictments; suspension was pending resolution of the indictments. <i>MCJP v. Hartzog</i> , 822 So. 2d 941 (Miss. 2002).
Suspension	Municipal	Judge pled guilty to felony in federal district court, & was convicted of alcohol-related misdemeanors; judge was suspended from office as municipal judge pro tempore as long as he served as mayor, which was analogous to removal. <i>MCJP v. Thomas</i> , 549 So. 2d 962 (Miss. 1989).

Judicial Sanctions Ordered by the Mississippi Supreme Court			
Public censure	Supreme	Judge conducted himself in a manner prejudicial to the administration of justice which brought the judicial office into disrepute.	<i>MCJP v. McRae</i> , 700 So. 2d 1331 (Miss. Const. Tribunal 1997).
Public censure	Justice	Judge remained active in a political party following his election to bench.	<i>MCJP v. Peyton</i> , 555 So. 2d 1036 (Miss. 1990).
Public reprimand, fine & court costs	Justice	Judge failed to give notice to a litigant that she would face an eviction and an increase in the amount of the judgment against her; granted unrequested relief; acted with ignorance or disregard of the law; entered an unsupported judgment which caused direct harm to the a litigant; and gave legal advice to a litigant.	<i>MCJP v. Roberts</i> , 227 So. 3d 938 (Miss. 2017).
Public reprimand, fine & court costs	Chancery	Judge abused his contempt powers, failed to recuse himself from contempt proceedings, and prevented those he charged with contempt from presenting any defense.	<i>MCJP v. Harris</i> , 131 So. 3d 1137 (Miss. 2013).
Public reprimand, fine & court costs	Circuit	Judge failed to disclose a conflict to the parties in a civil lawsuit and failed to rule on counsel's motion to recuse made after the conflict was discovered.	<i>MCJP v. Bowen</i> , 123 So. 3d 381 (Miss. 2013).
Public reprimand, fine & court costs	Municipal	Judge attempted to use his judicial office to advance the private interests of his tenant, and by extension, his own private financial interests as landlord. Judge was also impatient and discourteous and abused his contempt power when arguing with a probation officer.	<i>MCJP v. Fowlkes</i> , 121 So. 3d 904 (Miss. 2013).
Public reprimand, fine & court costs	Circuit	Judge was discourteous to two (2) attorneys, a bail bondsman, and a litigant appearing before him in court and wrongfully imposed contempt of court sanctions against the two (2) attorneys and the bail bondsman.	<i>MCJP v. Smith</i> , 78 So. 3d 889 (Miss. 2011).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Public reprimand, fine & court costs	Youth	Judge wrongfully imposed criminal contempt of court sanctions against a party without affording her due process rights. <i>MCJP v. Darby</i> , 75 So. 3d 1037 (Miss. 2011).
Public reprimand, fine & court costs	Justice	Judge engaged in ex parte communications; allowed the defendant's mother to enter a plea on behalf of her daughter; did not treat parties with courtesy; wrote a note on behalf of a party to her employer. <i>MCJP v. Vess</i> , 10 So. 3d 486 (Miss. 2009).
Public reprimand, fine & court costs	Justice	Judge had unlawfully denied bond and entered court orders which exceeded the authority of the court. (Judge no longer in office at the time of the opinion). <i>MCJP v. Boland</i> , 998 So. 2d 380 (Miss. 2008) <i>overruled by</i> <i>MCJP v. Osborne</i> , 11 So. 3d 107 (Miss. 2009).
Public reprimand, fine & court costs	Justice	Judge wrote checks in excess of \$330,000 from a closed account. <i>MCJP v. Hartzog</i> , 904 So. 2d 981 (Miss. 2004) <i>overruled in part on</i> <i>other grounds by</i> <i>MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Public reprimand, fine & court costs	Justice	Judge improperly suspended fines in 13 cases and improperly suspended state assessments in 4 cases. <i>MCJP v. Sheffield</i> , 883 So. 2d 546 (Miss. 2004).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Public reprimand, fine & court costs	Municipal	Judge improperly set aside judgments entered by previous judge, without any notice or hearing. <i>MCJP v. Gibson</i> , 883 So. 2d 1155 (Miss. 2004) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011). <i>MCJP v. Williams</i> , 880 So. 2d 343 (Miss. 2004). <i>MCJP v. Gunter</i> , 797 So. 2d 988 (Miss. 2001). <i>MCJP v. Warren</i> , 791 So. 2d 194 (Miss. 2001). <i>MCJP v. Russell</i> , 724 So. 2d 873 & 691 So. 2d 929 (Miss. 1997). <i>MCJP v. Boykin</i> , 763 So. 2d 872 (Miss. 2000). <i>MCJP v. Jones</i> , 735 So. 2d 385 (Miss. 1999).
Public reprimand, fine & court costs	Justice	Judge improperly dismissed cases and dismissed speeding tickets.
Public reprimand, fine & court costs	Municipal	Judge improperly used his judicial office for benefit in private practice; showed improper demeanor towards litigants and court personnel.
Public reprimand, fine & court costs	Justice	Judge engaged in ex parte communications; dismissed tickets based on ex parte communications; failed to conduct hearings on court matters.
Public reprimand, fine & court costs	Circuit	Judge improperly released prisoners & engaged in ex parte communications.
Public reprimand & fine	Justice	Judge engaged in ticket fixing & in ex parte communications with defendants.
Public reprimand & fine	Justice	Judge reduced charges of DUI to disorderly conduct or DUI first offenses.

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Public reprimand & fine	Circuit	Judge suspended sentence of former client & placed another inmate on probation after his conviction & sentence had been affirmed. <i>MCJP v. Sanders</i> , 708 So. 2d 866 (Miss. 1998).
Public reprimand & fine	Municipal	Judge pointed a loaded weapon at individuals who were believed to be trespassing on neighboring land; fired shots at tires of individuals' vehicle; & placed handcuffs on & temporarily detained individuals. <i>MCJP v. Whitten</i> , 687 So. 2d 744 (Miss. 1997).
Public reprimand & fine	Justice	Judge reduced 3 citations for DUI in violation of statute precluding such reductions; assessed fines in excess of statutory maximum in 6 criminal cases, failed to require affidavits in 4 criminal cases; issued orders without authority; & allowed cameras in courtroom. <i>MCJP v. Emmanuel</i> , 688 So. 2d 222 (Miss. 1997).
Public reprimand & fine	Municipal	Judge violated judicial canon requiring judge to resign his office when he became a candidate in general election for non-judicial office. <i>MCJP v. Haltom</i> , 681 So. 2d 1332 (Miss. 1996).
Public reprimand & fine	Justice	Judge dismissed numerous speeding & traffic tickets & engaged in ex parte communications. <i>MCJP v. Bowen</i> , 662 So. 2d 551 (Miss. 1995).
Public reprimand & fine	Justice	Judge altered final judgment on his own volition because of ex parte communications. <i>MCJP v. Underwood</i> , 644 So. 2d 458 (Miss. 1994).
Public reprimand & fine	Justice	Judge violated judicial canon requiring judge to resign his office when he became a candidate in general election for non-judicial office. <i>MCJP v. Ishee</i> , 627 So. 2d 283 (Miss. 1993).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Public reprimand & fine	Justice	Judge engaged in ticket fixing & in ex parte communications concerning charges. <i>MCJP v. Gunn</i> , 614 So. 2d 387 (Miss. 1993) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011). <i>In re Seal</i> , 585 So. 2d 741 (Miss. 1991). <i>MCJP v. Cowart</i> , 566 So. 2d 1251 (Miss. 1990). <i>In re Chambliss</i> , 516 So. 2d 506 (Miss. 1987). <i>In re Hearn</i> , 515 So. 2d 1225 (Miss. 1987). <i>In re Odom</i> , 444 So. 2d 835 (Miss. 1984).
Public reprimand & fine	Justice	Judge dismissed traffic offenses at request of persons with no prosecutorial responsibility; allowed clerical personnel to adjudicate criminal cases; & allowed traffic tickets to be adjudicated by highway patrol officers &/or court clerk or deputy clerk.
Public reprimand & fine	Justice	Judge improperly dismissed nonmoving violations; assessed excessive fees, charges, & costs; & failed to properly docket cases.
Public reprimand & fine	Justice	Judge interfered with administration of police officers; improperly questioned rape victim; failed to pay traffic fine; failed to properly register automobile; & publicly supported bond issue.
Public reprimand & fine	Justice	Judge had found defendants not guilty without a trial after being contacted by other officials; had unlawfully entered a JNOV; had interfered with the assignment of cases; had unlawfully handled bad check cases; and had improperly assessed constable fees.
Public reprimand & fine	Justice	Judge used criminal process or threat of criminal process to collect "bad checks"; failed to properly docket & process "bad check" cases on criminal or civil docket; failed to collect civil court costs in advance; failed to keep required records; & collected court costs from county for cases which were never docketed.

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Public reprimand & fine	Justice	Judge failed to properly docket & use lawful procedure to collect on “bad check” claims. <i>In re Lambert</i> , 421 So. 2d 1023 (Miss. 1982).
Public reprimand & fine	Justice	Judge failed to use lawful procedure to collect on “bad check” claims. <i>In re Branan</i> , 419 So. 2d 145 (Miss. 1982).
Public reprimand & court costs	Municipal	Judge made improper statements on social media and in a newspaper interview; improperly ordered participants into a drug court program; and exhibited discourteous conduct in the courtroom. <i>MCJP v. Clinkscales</i> , 192 So. 3d 997 (Miss. 2016).
Public reprimand & court costs	Justice	Judge had ex parte communication with a defendant about his pending criminal case; failed to disclose such ex parte communication to the prosecutor; dismissed the charges against the defendant without a hearing and without any motion to dismiss by the prosecutor; and falsified court records. <i>MCJP v. Carver</i> , 107 So. 3d 964 (Miss. 2013).
Public reprimand & court costs	Chancery	Judge misused contempt powers by holding an attorney in criminal contempt of court for failing to say the Pledge of Allegiance in open court. <i>MCJP v. Littlejohn</i> , 62 So. 3d 968 (Miss. 2011).
Public reprimand & court costs	County	Judge repeatedly failed to issue orders in court proceedings. <i>MCJP v. Agin</i> , 17 So. 3d 578 (Miss. 2009).
Public reprimand & court costs	Municipal	Judge had presided over a legal proceeding concerning a defendant, i.e, had signed the warrant for his arrest, and then represented the defendant against the same criminal charges. <i>MCJP v. Pittman</i> , 993 So. 2d 816 (Miss. 2008).

Judicial Sanctions Ordered by the Mississippi Supreme Court			
Public reprimand & court costs	Justice	Judge made a number of inappropriate and offensive remarks while attending a seminar in her capacity as a judge; her offensive remarks were not protected by the First Amendment. (Judge no longer in office at the time of the opinion).	<i>MCJP v. Boland</i> , 975 So. 2d 882 (Miss. 2008).
Public reprimand & court costs	County	Judge had failed repeatedly to issue rulings in cases pending before him.	<i>MCJP v. Agin</i> , 987 So. 2d 418 (Miss. 2008).
Public reprimand & court costs	Justice	Judge conducted ex parte communications with a party and ordered a stay of his own order; in another case, the judge failed to dispose of a pending case.	<i>MCJP v. Sutton</i> , 985 So. 2d 322 (Miss. 2008) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Public reprimand & court costs	Justice	Judge became involved in a court matter by attempting to talk to a fellow justice court judge about the court matter & subsequently told a justice court deputy clerk not to issue an arrest warrant, which had been signed by the other justice court judge.	<i>MCJP v. Thompson</i> , 972 So. 2d 582 (Miss. 2008) <i>overruled in part on other grounds by MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Public reprimand & court costs	Municipal	Judge received a DUI – 1 st Offense to which he pled guilty; judge payed the fine and complied with all sentencing conditions; judge also self-reported his charge to the MCJP.	<i>MCJP v. Westfaul</i> , 962 So. 2d 555 (Miss. 2007).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Public reprimand & court costs	Justice	Judge reinstated his grandson's license and intervened on his behalf in a sentencing matter. <i>MCJP v. Cole</i> , 932 So. 2d 9 (Miss. 2006) overruled in part on other grounds by <i>MCJP v. Boone</i> , 60 So. 3d 172 (Miss. 2011).
Public reprimand & court costs	Chancery	Judge failed to pay vendors for items purchased even after he was reimbursed for the purchases by the State. <i>MCJP v. Teel</i> , 863 So. 2d 973 (Miss. 2004).
Public reprimand & court costs	Justice	Judge conducted ex parte communications about dismissal of charges. <i>MCJP v. Blakeney</i> , 848 So. 2d 824 (Miss. 2003).
Public reprimand & court costs	Justice	Judge found a defendant guilty of the crime charged without giving her the opportunity to defend herself. <i>MCJP v. Wells</i> , 794 So. 2d 1030 (Miss. 2001).
Public reprimand & court costs	Justice	Judge allowed media to videotape court proceedings. <i>MCJP v. Carr</i> , 786 So. 2d 1055 (Miss. 2001).
Public reprimand & court costs	Justice	Judge dismissed charges & then reinstated them; exceeded jurisdiction of the court. <i>MCJP v. Neal</i> , 774 So. 2d 414 (Miss. 2000).
Public reprimand & court costs	Municipal	Not stated. <i>MCJP v. White</i> , 660 So. 2d 226 (Miss. 1995).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Public reprimand & reinstatement	County	Judge improperly filed 6 new complaints on behalf of clients after appointment to the bench. <i>MCJP v. Osborne</i> , 876 So. 2d 324 (Miss. 2004).
Public reprimand	Chancery	Judge improperly issued subpoenas and admitted that he had failed to comply with the law. <i>MCJP v. Buffington</i> , 55 So. 3d 167 (Miss. 2011).
Public reprimand	Justice	Judge refused to return handgun to a defendant who was not charged. <i>MCJP v. Lewis</i> , 830 So. 2d 1138 (Miss. 2002).
Public reprimand	Justice	Judge made ex parte communications about pending cases; remanded cases to the file which were assigned to another judge. <i>MCJP v. Lewis</i> , 801 So. 2d 704 (Miss. 2001).
Public reprimand	Justice	Judge made ex parte contacts with another judge who was assigned to his son's DUI case; contacted arresting officer; & contacted that officer's supervisor. <i>MCJP v. Brown</i> , 761 So. 2d 182 (Miss. 2000).
Public reprimand	Circuit	Judge abused court's contempt powers, among other misconduct. <i>MCJP v. Byers</i> , 757 So. 2d 961 (Miss. 2000).
Public reprimand	Circuit	Judge abused court's contempt powers against circuit clerk, & unlawfully expunged felony convictions of 2 criminal defendants. <i>MCJP v. Sanders</i> , 749 So. 2d 1062 (Miss. 1999).
Public reprimand	Court of Appeals	Judge committed offense of DUI. <i>MCJP v. Thomas</i> , 722 So. 2d 629 (Miss. 1998).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Public reprimand	Justice	Judge attempted to limit a litigant's rights to execute upon a judgment & then vacated the judgment without notice or hearing. <i>MCJP v. Fisher</i> , 706 So. 2d 1107 (Miss. 1998).
Public reprimand	Justice	Judge had ex parte communications with defendant, defendant's mother, arresting officer, & prosecuting attorney; judge interfered with a defendant's bonding process. <i>MCJP v. Vess</i> , 692 So. 2d 80 (Miss. 1997).
Public reprimand	Municipal	Judge incarcerated a defendant without notice or hearing; sentenced another defendant to more jail time than allowed by law; & found same defendant guilty of perjury based upon judge's own affidavit & warrant. <i>MCJP v. Fletcher</i> , 686 So. 2d 1075 (Miss. 1997).
Public reprimand	Not stated	Not stated. <i>MCJP v. Jenkins</i> , 677 So. 2d 171 (Miss. 1996).
Public reprimand	Justice	Judge notarized deed with a false acknowledgment & entered orders in cases not pending before judge's court. <i>MCJP v. Hartzog</i> , 646 So. 2d 1319 (Miss. 1994).
Public reprimand	Municipal	Judge set accused's bail while serving as municipal judge & thereafter sought to reduce bail while acting as practicing attorney representing accused. <i>MCJP v. Atkinson</i> , 645 So. 2d 1331 (Miss. 1994).
Public reprimand	Justice	Not stated. <i>MCJP v. Vess</i> , 637 So. 2d 882 (Miss. 1994).
Public reprimand	Justice	Judge failed to pay hospital account & issued arrest warrant in dispute between a car dealer and customer which was not properly before the court. <i>MCJP v. Cantrell</i> , 624 So. 2d 94 (Miss. 1993).

Judicial Sanctions Ordered by the Mississippi Supreme Court			
Public reprimand	Justice	Not stated.	<i>MCJP v. Riley</i> , 572 So. 2d 875 (Miss. 1990).
Public reprimand	Justice	Judge held an unsuccessful litigant in contempt of court.	<i>MCJP v. Walker</i> , 565 So. 2d 1117 (Miss. 1990).
Public reprimand	Justice	Judge had defendant in an eviction proceeding unlawfully jailed and in another proceeding, entered an order granting relief from a temporary restraining order which had been granted by another justice court judge.	<i>In re Bailey</i> , 541 So. 2d 1036 (Miss. 1989).
Public reprimand	Justice	Judge disrupted court proceedings; made accusations of impropriety against another judge & wildlife officers; & acted on behalf of a criminal defendant.	<i>In re Cooksey</i> , 515 So. 2d 957 (Miss. 1987).
Private reprimand	Justice	Judge improperly sentenced a defendant (sentence was the result of a plea bargain).	<i>MCJP v. T.T.</i> , 922 So. 2d 781 (Miss. 2006).
Private reprimand	Justice	Judge allowed a photograph to be taken during a court proceeding and had failed to wear a robe during a court proceeding.	<i>MCJP v. Blakeney</i> , 905 So. 2d 521 (Miss. 2004).
Private reprimand	Chancery	Judge had excessive delays in rendering opinions and orders in 6 cases before the court.	<i>MCJP v. U.U.</i> , 875 So. 2d 1083 (Miss. 2004).
Private reprimand	Justice	Judge's participation in drafting petition against law enforcement officer was willful misconduct.	<i>MCJP v. S.S.</i> , 834 So. 2d 31 (Miss. 2003).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
Private reprimand	Municipal	Judge ordered probationers to marry as a condition of probation, & set bond for his own client. <i>MCJP v. A Municipal Court Judge</i> , 755 So. 2d 1062 (Miss. 2000).
Private reprimand	Justice	Judge commented to clerk that clerk "checked out" all the men that came into the office & that clerk also "checked out" the judge. <i>MCJP v. R.R.</i> , 732 So. 2d 224 (Miss. 1999).
Private reprimand	Justice	Judge collected fines in lieu of court clerk & dismissed cases upon representations by offender without hearing the State's side. <i>MCJP v. A Justice Court Judge</i> , 580 So. 2d 1259 (Miss. 1991).
Private reprimand	Justice	Judge requested assistance for a person charged with a traffic violation in another court, but this was an isolated instance occurring shortly after election to his first term. <i>MCJP v. Peyton</i> , 555 So. 2d 1036 (Miss. 1990).
Private reprimand	Chancery	Judge called a litigant involved in an action pending before the judge & solicited his political support, but other mitigating circumstances existed. <i>In re Baker</i> , 535 So. 2d 47 (Miss. 1988).
Private admonishment	Justice	Judge was prohibited from serving as a justice court judge and a part-time police officer as this was a violation of the separation of powers, and he failed to issue garnishment writs even though he had collected the filing fees. <i>In re Anderson</i> , 447 So. 2d 1275 (Miss. 1984).

Judicial Sanctions Ordered by the Mississippi Supreme Court		
No sanction & dismissal of proceedings	Justice	<p>Judge was accused of willful misconduct for “passing to the file” sixteen (16) DUI charges based on written motions filed by the county prosecutor; these actions were allegedly in violation of Mississippi Code § 63-11-39.</p> <p>After reviewing the language in § 63-11-39, the Mississippi Supreme Court found that passing the DUI charges to the file was not in fact a reduction in the charges. Therefore, the Court held that the proposed sanctions were not warranted, and it dismissed the complaint against the judge with prejudice.</p>
No sanction & dismissal of proceedings	Justice	<p>Judge improperly denied bond to a criminal defendant but her actions did not show a willful desire to disregard the state constitution.</p>
No sanction & dismissal of proceedings	Justice	<p>Judge may exercise his or her protected free speech rights, under certain circumstances, without violating the Code of Judicial Conduct.</p>
Dismissal of interim suspension because suspension was moot as judge had resigned from office	Justice	<p>An order for interim suspension had been granted by the Supreme Court; the judge and the commission entered into a memorandum of understanding and sought the interim suspension to be vacated; the Supreme Court denied the motion; the judge resigned from office; on rehearing, the Supreme Court held that a memorandum of understanding is not an allowed disposition if misconduct has been found.</p> <p>Note: The Supreme Court is in the process of amending Rule 6(b) of the Rules of the Commission on Judicial Performance. <i>Mississippi Comm’n on Jud. Perf. v. Martin</i>, 995 So. 2d 727, 730 (Miss. 2008).</p>

MCJP v. Little,
72 So. 3d 501
(Miss. 2011).

MCJP v. Martin,
921 So. 2d 1258
(Miss. 2005).

MCJP v. Wilkerson,
876 So. 2d 1006
(Miss. 2004).

MCJP v. Martin,
995 So. 2d 727
(Miss. 2008).

Judicial Sanctions Ordered by the Mississippi Supreme Court			
Dismissal of interim suspension because judge complied with judicial education requirements	Justice	Judge, who had failed to attend annual training by the Mississippi Judicial College, was suspended pending his compliance with the mandatory judicial education training requirements.	<i>In re Cadle</i> , 466 So. 2d 79 (Miss. 1985).
Commission recommendation affirmed by the Mississippi Supreme Court	Municipal	Mississippi Supreme Court affirmed the recommendation of the Commission on Judicial Performance that municipal court judges should be suspended from serving as judges as long as they are either mayor or mayor pro tempore of their respective municipalities, as this creates an unavoidable conflict of interest in holding the dual offices of mayor and municipal judge.	<i>In re Grant</i> , 631 So. 2d 758 (Miss. 1994).
Agreed Statement of Facts and Recommendations approved by Supreme Court	Circuit	Judge, who had resigned from office, joined with the Commission in an Agreed Statement of Facts and Recommendations filed with the Supreme Court; if judge violated agreement, he would be subject to removal.	<i>In re Maples</i> , 611 So. 2d 211 (Miss. 1992).

whose identity should have been included in the notice under this rule, the party shall promptly notify the other party or the other party's attorney of the name and address of such additional witness.

(2) Effect of Failure to Comply. If there is a failure to comply with the requirements of subsection (b)(1), the court may use such sanctions as it deems eluding:

- (A) Granting a continuance and/or assessing costs against the appropriate attorney or party;
- (B) Limiting further discovery of the party failing to comply;
- (C) Finding the attorney failing to comply in contempt; or
- (D) Excluding the testimony of appropriate witnesses.

(c) Exceptions. For good cause shown, the court may grant an exception to the requirements of sections (a) and (b).

Trial Proceedings

The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

Witnesses

Mississippi Rule of Civil Procedure 45:

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

Sequestration Rule

Mississippi Rule of Evidence 615:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

Advisory Committee Note:

This rule does not discuss sanctions for violation of the sequestration order. Under existing Mississippi law the court has the discretion to exclude the offending witness from testifying. *See Johnson v. State*, 346 So. 2d 927 (Miss. 1977). The trial judge should not permit a witness who has violated the rule to testify unless he has first determined that the adversary would not be prejudiced by the violation of the rule. Other available remedies might be to strike the testimony of a witness who violated the rule, cite the witness for contempt, or allow a “full-bore” cross-examination. *See Douglas v. State*, 525 So. 2d 1312 (Miss. 1988).

During the course of the trial, the witness Charles Coleman, who had apparently been subpoenaed by the State and who had been in the courtroom during the testimony of previous witnesses, was offered as a witness in the case-in-chief for the State. Gerrard objected, saying first that the witness had not been disclosed to the defense, and, second, that sequestration had been violated. The State announced that it would withdraw Coleman as a witness. Thereafter, Coleman sat in the courtroom for the remainder of the trial. After the defense had rested, the State announced that it would call Coleman as a rebuttal witness. This too brought an objection by the defense. . . . When the defense objected to Coleman's testimony as being in violation of the Rule, the parties went into chambers. . . . The prosecutor felt that Coleman deserved an opportunity to respond to Gerrard's statements. The defense objected, stating that the prosecutor knew Gerrard would so testify because he had said it before. The trial judge then asked defense counsel to state specifically from where these statements appeared. Defense counsel did not answer. The trial judge then stated that he would allow the prosecution to ask only two questions, the content of which was established in chambers, and further stated that the defense would have wide open cross-examination. The defense at no time proffered how asking these two questions prejudiced their case. Since the trial court followed our rule and Comments thereto, there was no abuse of discretion. The trial court allowed the prosecution to ask only two questions, of which the content was limited. The defense declined cross-examination. This matter was properly within the discretion of the trial judge, and he conducted the proceedings in accordance with the standards set forth by this Court. . . . *Gerrard v. State*, 619 So. 2d 212, 217-18 (Miss. 1993).

Contempt of Court for Failure to Pay Fines

2018 House Bill 387 provides:

(1) Incarceration shall not automatically follow the nonpayment of a fine, restitution or court costs. Incarceration may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant was not indigent or could have made payment but refused to do so. When determining whether a person is indigent, the court shall use the current Federal Poverty Guidelines and there shall be a presumption of indigence when a defendant's income is at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, subject to a review of his or her assets. A defendant at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines without substantial liquid assets available to pay fines, fees, and costs shall be deemed indigent. In determining whether a defendant has substantial liquid assets, the judge shall not consider up to Ten Thousand Dollars (\$10,000.00) in tangible personal property, including motor vehicles, household goods, or any other assets exempted from seizure under execution or attachment as provided under Section 85–3–1. If the defendant is above one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, the judge shall make an individualized assessment of his or her ability to pay based on the totality of the circumstances including, but not limited to, the defendant's disposable income, financial obligations and liquid assets. If the judge determines that a defendant who claims indigence is not indigent and the defendant could have made payment but refused to do so, the case file shall include a written explanation of the basis for the determination of the judge. In justice and municipal court, such finding shall be included in the court's order.

(2) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order that allows the defendant additional time for payment, reduces the amount of each installment, revokes the fine, in whole or in part, or allows the defendant to perform community service at the state minimum wage per hour rate. If the court finds nonpayment is willful after consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of incarceration, if any, subject to the limitations set by law and subsection (3) of this section.

(3) If at the time the fine, restitution or court cost is ordered, a sentence of incarceration is also imposed, the aggregate total of the period of incarceration imposed pursuant to this section and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense. . .

§ 99-19-20 Fines; payment; indigent defendants; inability to work or unavailability of work:

(1) Except as otherwise provided under Section 1 of [H.B. 387], when any court sentences a defendant to pay a fine, the court may order

- (a) that the fine be paid immediately, or
- (b) that the fine be paid in installments to the clerk of the court or to the judge, if there be no clerk, or
- (c) that payment of the fine be a condition of probation, or
- (d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or
- (e) any combination of the above.

(2) Except as otherwise provided under Section 1 of this act, the defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations provided under this section. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned. This subsection shall be limited as follows:

- (a) In no event shall such period of imprisonment exceed one (1) day for each One Hundred Dollars (\$100.00) of the fine.
- (b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.
- (c) It shall be in the discretion of the judge to determine the rate of the credit to be earned for work performed under subsection (1)(d), but the rate shall be no lower than the rate of the highest current federal minimum wage.

(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

We now hold that when a circuit court makes release from prison contingent upon payment of a fine, it is mandatory that the circuit court follow the statutory requirement of Miss. Code Ann. § 99-19-20(2). The court must make an inquiry as to whether the convicted defendant is in fact

able to pay the fine, and make a finding on this question. *Jones v. State*, 564 So. 2d 848, 851 (Miss. 1990) (discussing prior version of statute).

To begin with, it is established beyond per adventure that an indigent may not be incarcerated because he is financially unable to comply with an otherwise lawfully imposed sentence of a fine. So long as Cassibry is “financially unable to pay a fine” and the trial court so finds, he may not be imprisoned, period. *Cassibry v. State*, 453 So. 2d 1298, 1299 (Miss. 1984) (citations omitted) (discussing prior version of statute).

Section 99-19-20(1)(d) authorizes the trial judge to require that Cassibry perform public service. Considering the present state of things, the trial judge may well want to employ this alternative and allow Cassibry to begin to work off his fine. Section 99-19-20(2)(c) provides that he would receive credit against his fine for any such public service work at the rate of the highest current federal minimum wage. Another alternative available to the trial judge at this time is the establishment of a realistic installment plan for the payment of the fine. Accepting the fact that Cassibry is financially unable to pay the \$45,000.00 at this time, the trial judge would be well within the scope of the discretionary authority vested in him by statute if he required that Cassibry pay what he reasonably could at reasonable, periodic intervals. *Cassibry v. State*, 453 So. 2d 1298, 1299-300 (Miss. 1984) (citations omitted) (discussing prior version of statute).

§ 99-37-7 Contempt for default:

(1) Subject to the provisions of Section 1 of [H.B. 387], when a defendant sentenced to pay a fine or to make restitution defaults in the payment thereof or of any installment, the court, on motion of the district attorney, or upon its own motion, may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

(2) Subject to the provisions of Section 1 of this act, unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine or the restitution, or a specified part thereof, is paid.

(3) A judicial officer shall not be held criminally or civilly liable for failure of any defendant to pay any fine or to make restitution if the officer exercises his judicial authority in accordance with subsections (1) and (2) of this section to require the payment of such fine or restitution.

(4) When a fine or an order of restitution is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine or make the restitution from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

CHAPTER 19

MISSISSIPPI TORT CLAIMS ACT

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CHAPTER 19

MISSISSIPPI TORT CLAIMS ACT

Legislative Intent

§ 11-46-3 Declaration of legislative intent:

(1) The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare, provide, enact and reenact that the "state" and its "political subdivisions," as such terms are defined in Section 11-46-1, are not now, have never been and shall not be liable, and are, always have been and shall continue to be immune from suit at law or in equity on account of any wrongful or tortious act or omission or breach of implied term or condition of any warranty or contract, including but not limited to libel, slander or defamation, by the state or its political subdivisions, or any such act, omission or breach by any employee of the state or its political subdivisions, notwithstanding that any such act, omission or breach constitutes or may be considered as the exercise or failure to exercise any duty, obligation or function of a governmental, proprietary, discretionary or ministerial nature and notwithstanding that such act, omission or breach may or may not arise out of any activity, transaction or service for which any fee, charge, cost or other consideration was received or expected to be received in exchange therefor.

(2) The immunity of the state and its political subdivisions recognized and reenacted herein is and always has been the law in this state, before and after November 10, 1982, and before and after July 1, 1984, and is and has been in full force and effect in this state except only in the case of rights which, prior to the date of final passage hereof, have become vested by final judgment of a court of competent jurisdiction or by the express terms of any written contract or other instrument in writing.

Through the Mississippi Tort Claims Act (MTCA), the Legislature has provided that, as a matter of public policy, the state and its political subdivisions are immune from tortious acts or omissions by its employees while they are acting within the course and scope of their employment.
City of Laurel v. Williams, 21 So. 3d 1170, 1174 (Miss. 2009).

Definitions

§ 11-46-1 Definitions:

As used in this chapter, the following terms shall have the meanings ascribed

unless the context otherwise requires:

(a) “Claim” means any demand to recover damages from a governmental entity as compensation for injuries.

(b) “Claimant” means any person seeking compensation under the provisions of this chapter, whether by administrative remedy or through the courts.

(c) “Board” means the Mississippi Tort Claims Board.

(d) “Department” means the Department of Finance and Administration.

(e) “Director” means the executive director of the department who is also the executive director of the board.

(f) “Employee” means any officer, employee or servant of the State of Mississippi or a political subdivision of the state, including elected or appointed officials and persons acting on behalf of the state or a political subdivision in any official capacity, temporarily or permanently, in the service of the state or a political subdivision whether with or without compensation, including firefighters who are members of a volunteer fire department that is a political subdivision. The term “employee” shall not mean a person or other legal entity while acting in the capacity of an independent contractor under contract to the state or a political subdivision; and

(i) For purposes of the limits of liability provided for in Section 11-46-15, the term “employee” shall include:

1. Physicians under contract to provide health services with the State Board of Health, the State Board of Mental Health or any county or municipal jail facility while rendering services under the contract;
2. Any physician, dentist or other health care practitioner employed by the University of Mississippi Medical Center (UMMC) and its departmental practice plans who is a faculty member and provides health care services only for patients at UMMC or its affiliated practice sites, including any physician or other health care practitioner employed by UMMC under an arrangement with a public or private health-related organization;
3. Any physician, dentist or other health care practitioner employed by any university under the control of the Board of Trustees of State Institutions of Higher Learning who practices only on the campus of any university under the control of the Board of

Trustees of State Institutions of Higher Learning;

4. Any physician, dentist or other health care practitioner employed by the State Veterans Affairs Board and who provides health care services for patients for the State Veterans Affairs Board;

(ii) The term “employee” shall also include Mississippi Department of Human Services licensed foster parents for the limited purposes of coverage under the Tort Claims Act as provided in Section 11-46-8; and

(iii) The term “employee” also shall include any employee or member of the governing board of a charter school but shall not include any person or entity acting in the capacity of an independent contractor to provide goods or services under a contract with a charter school.

The Tort Claims Act, with a few enumerated exceptions, explicitly excludes independent contractors from its provisions. Pursuant to Miss. Code Ann. § 11-46-1(f), the definition of employee excludes “a person or other legal entity while acting in the capacity of an independent contractor under contract to the state of a political subdivision.” The employer of an independent contractor is not responsible for torts committed by the contractor. *Owens v. Thomae*, 759 So. 2d 1117, 1122 (Miss. 1999) (citations omitted).

(g) “Governmental entity” means the state and political subdivisions.

The [school] District constitutes a “governmental entity” and a “political subdivision” pursuant to the Mississippi Tort Claims Act (MTCA), § 11-46-1. *Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 4 (Miss. 2010).

(h) “Injury” means death, injury to a person, damage to or loss of property or any other injury that a person may suffer that is actionable at law or in equity.

(i) “Political subdivision” means any body politic or body corporate other than the state responsible for governmental activities only in geographic areas smaller than that of the state, including, but not limited to, any county, municipality, school district, charter school, volunteer fire department that is a chartered nonprofit corporation providing emergency services under contract with a county or municipality, community hospital as defined in Section 41-13-10, airport authority, or other instrumentality of the state, whether or not the body or instrumentality has the authority to levy taxes or to sue or be sued in its own name.

(j) “State” means the State of Mississippi and any office, department, agency, division, bureau, commission, board, institution, hospital, college, university, airport authority or other instrumentality thereof, whether or not the body or instrumentality has the authority to levy taxes or to sue or be sued in its own name.

(k) “Law” means all species of law, including, but not limited to, any and all constitutions, statutes, case law, common law, customary law, court order, court rule, court decision, court opinion, court judgment or mandate, administrative rule or regulation, executive order, or principle or rule of equity.

Waiver of Immunity

§ 11-46-5 Waiver of immunity; course and scope of employment; presumptions:

(1) Notwithstanding the immunity granted in Section 11-46-3, or the provisions of any other law to the contrary, the immunity of the state and its political subdivisions from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment is hereby waived from and after July 1, 1993, as to the state, and from and after October 1, 1993, as to political subdivisions; provided, however, immunity of a governmental entity in any such case shall be waived only to the extent of the maximum amount of liability provided for in Section 11-46-15.

The MTCA provides the exclusive remedy against a governmental entity or its employee for the act or omission which gave rise to the suit. The intent of the MTCA is to provide immunity from suit to the state and its political subdivisions; however, the MTCA waives immunity for claims for money damages arising out of the torts of government entities and employees while acting within the course and scope of their employment to the extent set forth in the MTCA. *Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 4 (Miss. 2010).

(2) For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense other than traffic violations.

(3) For the purposes of this chapter and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the

place of his employment is within the course and scope of his employment.

(4) Nothing contained in this chapter shall be construed to waive the immunity of the state from suit in federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.

§ 11-46-7 Exclusiveness of remedy; joinder of government employee; immunity for acts or omissions occurring within course and scope of employee's duties; provision of defense for and payment of judgments or settlements of claims against employees; contribution or indemnification by employee:

(1) The remedy provided by this chapter against a governmental entity or its employee is exclusive of any other civil action or civil proceeding by reason of the same subject matter against the governmental entity or its employee or the estate of the employee for the act or omission which gave rise to the claim or suit; and any claim made or suit filed against a governmental entity or its employee to recover damages for any injury for which immunity has been waived under this chapter shall be brought only under the provisions of this chapter, notwithstanding the provisions of any other law to the contrary.

(2) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties. For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense.

(3) From and after July 1, 1993, as to the state, from and after October 1, 1993, as to political subdivisions, and subject to the provisions of this chapter, every governmental entity shall be responsible for providing a defense to its employees and for the payment of any judgment in any civil action or the settlement of any claim against an employee for money damages arising out of any act or omission within the course and scope of his employment; provided, however, that to the extent that a governmental entity has in effect a valid and current certificate of coverage issued by the board as provided in Section 11-46-17, or in the case of a political subdivision, such political subdivision has a plan or policy of insurance and/or reserves which the board has approved as providing satisfactory security for the defense and protection of the political subdivision against all claims and suits for injury for which immunity has been waived under this chapter, the governmental entity's duty to indemnify and/or defend such claim on behalf of its

employee shall be secondary to the obligation of any such insurer or indemnitor, whose obligation shall be primary. The provisions of this subsection shall not be construed to alter or relieve any such indemnitor or insurer of any legal obligation to such employee or to any governmental entity vicariously liable on account of or legally responsible for damages due to the allegedly wrongful error, omissions, conduct, act or deed of such employee.

(4) The responsibility of a governmental entity to provide a defense for its employee shall apply whether the claim is brought in a court of this or any other state or in a court of the United States.

(5) A governmental entity shall not be entitled to contribution or indemnification, or reimbursement for legal fees and expenses from its employee unless a court shall find that the act or omission of the employee was outside the course and scope of his employment. Any action by a governmental entity against its employee and any action by an employee against the governmental entity for contribution, indemnification, or necessary legal fees and expenses shall be tried to the court in the same suit brought on the claim against the governmental entity or its employee.

(6) The duty to defend and to pay any judgment as provided in subsection (3) of this section shall continue after employment with the governmental entity has been terminated, if the occurrence for which liability is alleged happened within the course and scope of duty while the employee was in the employ of the governmental entity.

(7) For the purposes of this chapter and not otherwise, it shall be a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment.

(8) Nothing in this chapter shall enlarge or otherwise adversely affect the personal liability of an employee of a governmental entity. Any immunity or other bar to a civil suit under Mississippi or federal law shall remain in effect. The fact that a governmental entity may relieve an employee from all necessary legal fees and expenses and any judgment arising from the civil lawsuit shall not under any circumstances be communicated to the trier of fact in the civil lawsuit.

§ 11-46-9 Exemption of governmental entity from liability on claims based on specified circumstances:

(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:

(a) Arising out of a legislative or judicial action or inaction, or

administrative action or inaction of a legislative or judicial nature;

The failure of the municipal court clerk to send Smith's abstract to the Department of Public Safety was an "administrative action or inaction of a legislative or judicial nature." . . .Therefore we find that Smith's claim is clearly barred by the MTCA. ***Smith v. City of Saltillo*, 44 So. 3d 438, 441 (Miss. Ct. App. 2010).**

(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;

On the other hand, "an act is ministerial if the duty is one which has been positively imposed by law and its performance required at a time and in a manner or under conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." If the District's conduct is deemed ministerial, it is then protected from liability only if ordinary care is exercised in performing or failing to perform the statutory duty or regulation. ***Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 5 (Miss. 2010) (citations omitted).**

Conversely, conduct will be considered ministerial, and, therefore, immunity will not apply, if the obligation is imposed by law leaving no room for judgment. ***Pettis v. Mississippi Transp. Comm'n*, 44 So. 3d 425, 427 (Miss. Ct. App. 2010) (citations omitted).**

(c) Arising out of any act or omission of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;

Mississippi's public-policy function test has two parts. "This Court first must ascertain whether the activity in question involved an element of choice or judgment." If so, this Court also must decide whether that choice or judgment involved social, economic, or political-policy considerations. Only when both parts of the test are met does a government defendant enjoy discretionary-function immunity. This test, of course, presupposes the court has correctly identified "the activity in question" - the allegedly tortious act

giving rise to the claim. ***Wilcher v. Lincoln Cty. Bd. of Supervisors*, 243 So. 3d 177, 187 (Miss. 2018) (citations omitted).**

This Court has stated that “apparent in the language of Miss. Code Ann. § 11-46-9[(c)] is that those officers who act within the course and scope of their employment, while engaged in the performance of duties relating to police protection, without reckless disregard for the safety and well being of others, will be entitled to immunity.” Indeed, this Court noted that “the purpose of Miss. Code Ann. § 11-46-9 is to ‘protect law enforcement personnel from lawsuits arising out of the performance of their duties in law enforcement, with respect to the alleged victim.’” ***City of Jackson v. Brister*, 838 So. 2d 274, 278 (Miss. 2003) (citations omitted).**

Reckless Disregard

Further, Officer . . . violated various mandates of his department's General Order 600–20 and failed to perform the requisite balancing of the gravity of the offenses the driver had committed versus the danger posed to the public by pursuing a fleeing vehicle. Most egregious was Officer[’s] wanton defiance of the order of his superior to terminate pursuit and his failure to comply with the standard articulated by this Court for communicating termination to the pursued party. . . . Based on the totality of the circumstances, Officer . . . recklessly disregarded the safety of the public by pursuing [suspect]. We cannot say that the trial court's finding was unsupported by substantial evidence. Nevertheless, on rehearing, we reverse the judgment of the Circuit Court . . . and remand the case for further proceedings. . . . The City . . . raised the issue of apportionment in its Reply Brief before the Court of Appeals, but argued that the trial court failed to apportion percentages of fault for each party alleged to be at fault. We find that the court did, in fact, apportion percentages of fault. . . . We therefore reverse and remand for an apportionment of damages, which shall take into account this contributing cause. ***City of Jackson v. Lewis*, 153 So. 3d 689, 700-01 (Miss. 2014).**

The applicable exception in this case provides that when a police officer acts within the scope of his or her

employment, the city will not be held civilly liable unless the officer acted with reckless disregard of the safety and well-being of a person not engaged in criminal conduct. . . . To recover damages in such a matter, a plaintiff must “prove by a preponderance of evidence that the defendants acted in reckless disregard of his safety and that the plaintiff was not engaged in criminal activity at the time of injury.” “Reckless disregard has been defined by this Court as a higher standard than gross negligence, and it embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act.” “Reckless disregard usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow.” Reckless disregard occurs when the “conduct involved evinced not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved.” In addition, “the nature of the officers’ actions is judged on an objective standard with all the factors that they were confronted with.” ***City of Laurel v. Williams*, 21 So. 3d 1170, 1174-75 (Miss. 2009) (citations omitted).**

To be entitled to immunity, the officer must not have acted with reckless disregard for the safety of others. Reckless disregard is more than mere negligence, but less than an intentional act. While we agree that reckless disregard would encompass gross negligence, we hold that reckless disregard is a higher standard than gross negligence by which to judge the conduct of officers. “Disregard” of the safety of others is at least negligence if not gross negligence. Because “reckless” precedes “disregard,” the standard is elevated. As quoted above from Black’s Law Dictionary, “reckless,” according to the circumstances, “may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive or negligence.” In the context of the statute, reckless must connote “wanton or willful,” because immunity lies for negligence. And this Court has held that “wanton” and “reckless disregard” are just a step below specific intent. “Our case law indicates ‘reckless disregard’ embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act.” “Reckless disregard usually is accompanied by a conscious indifference to consequences, amounting

almost to a willingness that harm should follow.”
***Mississippi Department of Public Safety v. Durn*, 861 So. 2d 990, 994-95 (Miss. 2003) (citations omitted).**

Factors which support a finding of reckless disregard in connection with police pursuits include: (1) the length of the chase; (2) type of neighborhood; (3) characteristics of the streets; (4) the presence of vehicular or pedestrian traffic; (5) weather conditions and visibility; (6) the seriousness of the offense for which the police are pursuing the suspect; (7) whether the officer proceeded with sirens and blue lights; (8) whether the officer had available alternatives which would lead to the apprehension of the suspect besides pursuit; (9) the existence of police policy which prohibits pursuit under the circumstances; and (10) the rate of speed of the officer in comparison to the posted speed limit. ***Johnson v. City of Cleveland*, 846 So. 2d 1031, 1037 (Miss. 2003) (citations omitted).**

***See Rayner v. Pennington*, 25 So. 3d 305 (Miss. 2010)** (deputy who crossed an intersection against a red stop light in responding to a disturbance call was not acting in reckless disregard).

***See City of Laurel v. Williams*, 21 So. 3d 1170 (Miss. 2009)** (police officers did not act in reckless disregard when they did not arrest a man who caused a domestic disturbance and he subsequently killed the victim).

***See Davis v. City of Clarksdale*, 18 So. 3d 246 (Miss. 2009)** (police officer’s alleged failure to properly respond to a 911 call did not constitute reckless disregard conduct).

***See City of Jackson v. Lipsey*, 834 So. 2d 687 (Miss. 2003)** (police officer responded to an emergency call without turning on his headlights, blue lights, or siren and thereby caused an automobile accident was acting in reckless disregard).

***See City of Jackson v. Perry*, 764 So. 2d 373 (Miss. 2000)** (police officer who was on his way to dinner and speeding was acting in reckless disregard when he caused an automobile accident).

See Turner v. City of Ruleville, 735 So. 2d 226 (Miss. 1999) (police officer wrongfully and intentionally allowed a visibly intoxicated driver to continue driving showing a reckless or wanton or willful disregard for the safety of other drivers on the road).

(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;

The trial court granted the Lincoln County Board of Supervisors' and the City of Brookhaven, Mississippi's motions to dismiss Samuel Wilcher, Jr.'s personal injury suit, finding both governmental entities enjoyed discretionary-function immunity. In doing so, the judge employed this Court's recently created "Brantley" test. On appeal, we face head on one of the unintended but predicted consequences of *Brantley* - that the test forces parties and judges to wade through an ever-deepening quagmire of regulations and ordinances to locate "ministerial" or "discretionary" duties, over complicating the process of litigating and deciding claims involving governmental entities. Unfortunately, this methodology, though well-intentioned, has over time proved unworkable. Instead of trying to retool the Brantley test to somehow make it workable, we concede this short-lived idea, which was meant to be a course correction, has ultimately led this Court even farther adrift. Because the *Brantley* line of cases has not fulfilled its purpose - getting our discretionary-function analysis back on track - we abandon this failed venture. We find it best to return to our original course of applying the widely recognized public-policy function test - the original Mississippi Tort Claims Act (MTCA) test first adopted by this Court in 1999 in *Jones*. Applying the *Jones* test to this case, we hold that Wilcher's claim that County and City employees negligently left an unfinished culvert installation overnight, without warning drivers they had removed but not yet replaced a bridge, is not barred by discretionary-function immunity. Wilcher is not trying to second-guess a policy decision through tort. He is seeking to recover for injuries caused by run-of-the-mill negligence. Because, from the face of the complaint, the County and City are not immune, we reverse the grant of their motions to dismiss. We thus remand this case to the trial court for further proceedings consistent with this opinion. ***Wilcher v. Lincoln Cty. Bd. of Supervisors, 243***

So. 3d 177, 180 (Miss. 2018).

We admit the public-policy function test is not perfect and has been misapplied in the past. We are particularly mindful of this Court's decision in *Pratt*, which stretched the bounds of “policy” beyond credulity. [See] *Pratt v. Gulfport-Biloxi Reg'l Airport Auth.*, 97 So. 3d 68, 75 (Miss. 2012) (holding the placement of nonslip tape on tarmac stairs was an operational decision involving economic policy and was thus immune). And we agree with and adopt as part of our public-policy function analysis Chief Justice Waller's dissent from that case. *Wilcher v. Lincoln Cty. Bd. of Supervisors*, 243 So. 3d 177, 188 (Miss. 2018).

Because I would hold that the actions at issue in this case - maintaining passenger air stairs - do not enjoy discretionary-function immunity, I respectfully dissent. I agree with the plurality that the decision to operate an airport is an immune discretionary function. However, the act at issue does not encompass a policy decision or act properly the subject of governmental immunity. *Pratt* does not claim to have been injured by the decision to operate the Gulfport–Biloxi Regional Airport. In fact, neither party argues that the decision to operate the airport is the act at issue. Rather, it is the alleged negligent placement of anti-slip tape on the air stairs on which *Pratt* slipped that he claims caused his injuries. In applying the discretionary-function exception, “this Court must distinguish between real policy decisions implicating governmental functions and simple acts of negligence which injure innocent citizens.” The exception “protects only governmental actions and decisions based on considerations of public policy.” When reviewing whether a challenged action is afforded immunity, a court's focus is “on the nature of the actions taken and whether they are susceptible to policy analysis.” As the Court of Appeals recognized, no “policy” was involved in the placing of the anti-slip tape. . . . The Court of Appeals noted that there was an adequate supply of tape to cover the entire surface. I agree, then, with the Court of Appeals that the manner in which the maintenance personnel placed the anti-slip tape did not implicate social, economic, or political policy, but was simply “a completely random decision.” . . . Rather, *Pratt*'s claim is based on the airport's alleged failure to provide a safe means of exiting an airplane—a simple act of negligence. . . . The action complained of by *Pratt* does not implicate social, economic, or political policy. As such, I would hold that it does not enjoy

discretionary-function immunity. For the above reasons, I respectfully dissent. *Pratt v. Gulfport-Biloxi Reg'l Airport Auth.*, 97 So. 3d 68, 76-77 (Miss. 2012) (Waller, C.J., dissenting), *abrogated by Wilcher v. Lincoln Cty. Bd. of Supervisors*, 243 So. 3d 177, 188 (Miss. 2018).

Although not raised by the parties, we address whether immunity exists under Section 11-46-9(1)(d), which provides immunity for claims “[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused.” The MTCA provides no exception to immunity for ministerial actions. A duty is ministerial if it is 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. This Court held in *Little v. Mississippi Department of Transportation*, 129 So. 3d 132, 136 (Miss. 2013), that the language of Section 11-46-9(1)(d) requires us to look at the function performed not the acts that are committed in furtherance of that function to determine whether immunity exists. We further held that where a statute mandates the government or its employees to act, all acts fulfilling that duty are considered mandated as well, and neither the government nor its employees enjoys immunity. Plainly, Section 27-41-79 mandates the tax collector to act; the statute positively imposes upon the tax collector the duty to file the tax-sale list with the chancery clerk. There is no element of choice or judgment. Therefore, the duty is ministerial, and the MTCA affords no immunity. This Court holds that an action under Section 27-41-79 is not a tort action subject to the MTCA, but a separate statutory action, and that BCR stated a claim under the statute. We further find that the MTCA does not afford the City . . . immunity from suit on BCR's negligence claim. We reverse the grant of the motions to dismiss and remand the case for further proceedings. *Booneville Collision Repair, Inc. v. City of Booneville*, 152 So. 3d 265, 276 (Miss. 2014) (citations omitted).

Previously, we have said that, while a certain act may be mandated by statute, how that act is performed can be a matter of discretion. It is the function of a governmental entity not the acts performed in order to achieve that function to which immunity does or does not ascribe under the MTCA. Today we make it clear that, pursuant to *Montgomery*, the line of cases holding otherwise is overruled. We hold that, where a statute mandates the government or its

employees to act, all acts fulfilling that duty are considered mandated as well, and neither the government nor its employees enjoys immunity. Because Section 65-1-65 requires the Department to maintain and repair state highways, that duty and all acts in furtherance of that duty are ministerial unless, as in *Montgomery*, another statute makes a particular act discretionary. Today, we overrule the line of cases holding otherwise. The Department is not entitled to discretionary-function immunity for failure to properly maintain and repair highways because that function is ministerial. Therefore, the circuit court erred in granting the Department's motion to dismiss on that basis, and we reverse and remand for further proceedings consistent with this opinion. ***Little v. Mississippi Dep't of Transp.*, 129 So. 3d 132, 137-38 (Miss. 2013) (citations omitted).**

A duty is discretionary if it requires the official to use her own judgment and discretion in the performance thereof. ***Covington County Sch. Dist. v. Magee*, 29 So. 3d 1, 5 (Miss. 2010).**

To determine whether an act or a failure to act is a discretionary function, we use the following two-part test: (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. ***Pettis v. Mississippi Transp. Comm'n*, 44 So. 3d 425, 427 (Miss. Ct. App. 2010) (citations omitted).**

The supreme court further held that the ordinary-care standard does not apply to section 11-46-9(1)(d). ***Pettis v. Mississippi Transp. Comm'n*, 44 So. 3d 425, 427 (Miss. Ct. App. 2010) (citations omitted).**

- (e) Arising out of an injury caused by adopting or failing to adopt a statute, ordinance or regulation;
- (f) Which is limited or barred by the provisions of any other law;
- (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;
- (h) Arising out of the issuance, denial, suspension or revocation of, or the

failure or refusal to issue, deny, suspend or revoke any privilege, ticket, pass, permit, license, certificate, approval, order or similar authorization where the governmental entity or its employee is authorized by law to determine whether or not such authorization should be issued, denied, suspended or revoked unless such issuance, denial, suspension or revocation, or failure or refusal thereof, is of a malicious or arbitrary and capricious nature;

(i) Arising out of the assessment or collection of any tax or fee;

(j) Arising out of the detention of any goods or merchandise by any law enforcement officer, unless such detention is of a malicious or arbitrary and capricious nature;

(k) Arising out of the imposition or establishment of a quarantine, whether such quarantine relates to persons or property;

(l) Of any claimant who is an employee of a governmental entity and whose injury is covered by the Workers' Compensation Law of this state by benefits furnished by the governmental entity by which he is employed;

(m) Of any claimant who at the time the claim arises is an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution, regardless of whether such claimant is or is not an inmate of any detention center, jail, workhouse, penal farm, penitentiary or other such institution when the claim is filed;

(n) Arising out of any work performed by a person convicted of a crime when the work is performed pursuant to any sentence or order of any court or pursuant to laws of the State of Mississippi authorizing or requiring such work;

(o) Under circumstances where liability has been or is hereafter assumed by the United States, to the extent of such assumption of liability, including, but not limited to, any claim based on activities of the Mississippi National Guard when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USCS 715 (32 USCS 715), or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances;

(p) Arising out of a plan or design for construction or improvements to public property, including, but not limited to, public buildings, highways,

roads, streets, bridges, levees, dikes, dams, impoundments, drainage channels, diversion channels, harbors, ports, wharfs or docks, where such plan or design has been approved in advance of the construction or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design;

(q) Arising out of an injury caused solely by the effect of weather conditions on the use of streets and highways;

(r) Arising out of the lack of adequate personnel or facilities at a state hospital or state corrections facility if reasonable use of available appropriations has been made to provide such personnel or facilities;

(s) Arising out of loss, damage or destruction of property of a patient or inmate of a state institution;

(t) Arising out of any loss of benefits or compensation due under a program of public assistance or public welfare;

(u) Arising out of or resulting from riots, unlawful assemblies, unlawful public demonstrations, mob violence or civil disturbances;

(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;

Here, the allegedly tortious act was the construction crew's alleged failure to barricade or warn against the significant drop-off in the road - a condition it created. This alleged failure was not the result of noncompliance with Section 63-3-305. And applying the public-policy function test, it certainly was not the result of a policy decision. Rather, if indeed there was such a failure, it was the result of straight-up negligence. . . . Because discretionary-function immunity “protects only governmental actions and decisions based on considerations of public policy,” when “applying the discretionary-function exception, this Court

must distinguish between real policy decisions implicating governmental functions and simple acts of negligence which injure innocent citizens.” Thus, “[w]hen reviewing whether a challenged action is afforded immunity, a court’s focus is on the nature of the actions taken and whether they are susceptible to policy analysis.” Wilcher has alleged a “simple act of negligence,” and not a real policy decision, caused his injury. Therefore, the County and City cannot take refuge in discretionary-function immunity. ***Wilcher v. Lincoln Cty. Bd. of Supervisors*, 243 So. 3d 177, 188 (Miss. 2018).**

Accordingly, we find that the trial court erred in denying the Commission's motion for summary judgment without first considering whether the Commission's duty to warn of the pothole was a discretionary duty under the public-function test. If the nature of the Commission's duty to warn of this pothole indeed involves choice or judgment and is grounded in policy considerations, then the Commission is immune under Section 11-46-9(1)(d). The trial court's order reveals that it denied the Commission's motion for summary judgment because issues of fact existed as to whether the Commission had notice of the pothole. We find the trial court erred by failing first to consider whether the failure to warn was a discretionary function under the public-function test. Accordingly, we reverse the trial court's denial of summary judgment and remand this case to the Circuit Court . . . for proceedings consistent with this opinion. Specifically, we remand for a determination of whether the Commission's duty to warn was discretionary under Section 11-46-9(1)(d). If the trial court determines that the duty to warn of a dangerous pothole on a highway is not discretionary under the public-function test, then the trial court may consider the extent to which genuine issues of material fact exist under Section 11-46-9(1)(v). ***Mississippi Transp. Comm'n v. Montgomery*, 80 So. 3d 789, 800 (Miss. 2012) (citations omitted).**

(w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice;

The MTCA also grants immunity to governmental employees for failure to warn, unless the absence [of a] warning device is not

corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice. This provision is additionally limited by the fact that the MTCA grants immunity where a governmental entity fails to warn of a dangerous condition which is obvious to one exercising due care. In other words, a governmental agency can suffer no liability for dangers that are open and obvious to a person exercising due care. *Willingham v. Mississippi Transp. Comm'n*, 944 So. 2d 949, 952 (Miss. Ct. App. 2006) (citations omitted).

(x) Arising out of the administration of corporal punishment or the taking of any action to maintain control and discipline of students, as defined in Section 37-11-57, by a teacher, assistant teacher, principal or assistant principal of a public school district in the state unless the teacher, assistant teacher, principal or assistant principal acted in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety; or

(y) Arising out of the construction, maintenance or operation of any highway, bridge or roadway project entered into by the Mississippi Transportation Commission or other governmental entity and a company under the provisions of Section 1 or 2 of Senate Bill No. 2375, 2007 Regular Session, where the act or omission occurs during the term of any such contract.

(2) A governmental entity shall also not be liable for any claim where the governmental entity:

- (a) Is inactive and dormant;
- (b) Receives no revenue;
- (c) Has no employees; and
- (d) Owns no property.

(3) If a governmental entity exempt from liability by subsection (2) becomes active, receives income, hires employees or acquires any property, such governmental entity shall no longer be exempt from liability as provided in subsection (2) and shall be subject to the provisions of this chapter.

Notice of Claim

§ 11-46-11 Statute of limitations; notice of claim requirements; savings clause in favor of infants and those of unsound mind:

(1) After all procedures within a governmental entity have been exhausted, any person having a claim under this chapter shall proceed as he might in any action at law or in equity, except that at least ninety (90) days before instituting suit, the person must file a notice of claim with the chief executive officer of the governmental entity.

Pursuant to Mississippi Code Section 11-46-11(1), a potential plaintiff must provide the governmental entity ninety days' written notice before filing suit. *Saul v. South Central Regional Medical Center, Inc.*, 25 So. 3d 1037, 1041 (Miss. 2010) (prior version of § 11-46-11).

(2) (a) Service of notice of claim shall be made as follows:

(i) For local governments:

1. If the governmental entity is a county, then upon the chancery clerk of the county sued;
2. If the governmental entity is a municipality, then upon the city clerk.

(ii) If the governmental entity to be sued is a state entity as defined in Section 11-46-1(j), or is a political subdivision other than a county or municipality, service of notice of claim shall be had only upon that entity's or political subdivision's chief executive officer. The chief executive officer of a governmental entity participating in a plan administered by the board pursuant to Section 11-46-7(3) shall notify the board of any claims filed within five (5) days after receipt thereof.

(b) Every notice of claim shall:

(i) Be in writing;

(ii) Be delivered in person or by registered or certified United States mail; and

(iii) Contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of

all persons known to be involved, the amount of money damages sought, and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

In *Thornburg*, the Mississippi Supreme Court addressed circumstances in which a plaintiff proceeding under the MTCA sent the statutory notice-of-claim letter by first-class mail instead of by personal delivery or registered or certified mail. The supreme court held that “failure to comply with this provision should not, as a matter of law, serve as a basis for dismissing a lawsuit.” The supreme court went on to hold that “in cases in which notice is sent by first[-]class mail, a governmental entity must demonstrate actual prejudice resulting from the failure to comply with the ‘registered or certified mail’ requirement in order to be entitled to a dismissal on this basis.” Finally, the supreme court instructed that “there is no valid reason why the sending of the notice by first[-]class mail should result in a dismissal in cases in which the governmental entity has (1) received the notice and (2) suffered no actual prejudice as a result of the plaintiff’s failure to comply with [§] 11-46-11(2).” Consequently, the supreme court reversed the circuit court’s decision to dismiss the complaint and remanded the case for further proceedings. The question is whether a MTCA plaintiff substantially complies with section 11-46-11(2) by faxing a notice-of-claim letter. The Guthries’ attorney noted that he had received a confirmation fax indicating that the faxed notice of claim had been successfully transmitted and that the District had received it. The District has never claimed that it did not receive the faxed notice of claim on February 23, 2010. In *McNair v. University of Mississippi Medical Center*, the supreme court held that a plaintiff substantially satisfied the notice requirements of 11-46-11(2) despite the fact that the plaintiff had sent the notice-of-claim letter “to the wrong person and . . . via an improper route.” Similarly, the Guthries sent their notice-of-claim letter via an improper route, albeit a different improper route than in *Thornburg* and *McNair*. There is no dispute that the District received the faxed notice-of-claim letter on February 23, 2010. The supreme court has clearly held that substantial compliance with section 11-46-11(2) is sufficient to toll the one-year statute of limitations that applies to MTCA cases. We find that the Guthries substantially complied with section 11-46-11(2). The District did not argue that it had not received the Guthries’ faxed notice-of-claim letter on February 23, 2009. Likewise, the District did not argue that it was prejudiced by the manner in which the

Guthries delivered their notice-of-claim letter. Accordingly, we find the circuit court erred when it held that the Guthries' notice of claim was insufficient because they were obligated to strictly comply with section 11-46-11(2). We, therefore, reverse the judgment of the circuit court and remand this matter for further proceedings. ***Guthrie v. Jones County Sch. Dist.*, 102 So. 3d 1224, 1226-27 (Miss. Ct. App. 2012) (citations omitted).**

Subsection (2) of Section 11-46-11 provides the “seven required categories of information which must be included” in the notice of claim. . . . According to SCRMC, even if Saul's action is not barred by the statute of limitations, the case should be dismissed because the notice-of-claim letter was insufficient. Although the written notice identified Saul as one of Cook's surviving children, it did not give her address. Instead, the notice-of-claim letter gave the address of Dale Cook, because Dale sent the notice. Thus, SCRMC asserts that notice was insufficient because it did not identify Saul's residence. We disagree. The written notice-of-claim letter sent by Dale Cook contained a statement of the facts upon which the claim was based, including the circumstances which brought about Raymond Cook's injuries, and the time, place, and extent of those injuries, including his alleged wrongful death. The notice also included the names of all persons known to be involved, including Saul, Dale Cook, Dewayne Cook, the doctor who performed the surgery, and the allegedly negligent hospital and nursing staff. The letter also specified the amount of money damages sought by Saul and the Cooks. Finally, the letter gave the residence address of Dale Cook, one of the persons making the claim and the person who sent the notice. Therefore, we find that the notice-of-claim letter complied fully with the requirements of Section 11-46-11(2). ***Saul v. South Central Regional Medical Center, Inc.*, 25 So. 3d 1037, 1041 (Miss. 2010) (prior version of § 11-46-11).**

Lee argues the trial judge applied strict compliance to the notice of claim. The trial judge explicitly stated that Lee's notice of claim failed to provide information for all seven categories required by Section 11-11-46(2). The trial court applied *South Central Regional Medical Center v. Guffy*, 930 So. 2d 1252 (Miss. 2006), and found the notice amounted to noncompliance with Section 11-46-11(2). After reviewing the notice of claim, this Court finds that Lee substantially complied with the notice requirements of Section 11-46-11(2). First, Lee listed the circumstances which brought about the injury. . . . Lee also provided the extent of her

injuries when she noted “multiple sternum fractures, devitalized cartilage and the Robicsek wire reinforcement had pulled completely pulled through the left sternum.” In light of her *res ipsa loquitur* claim, Lee provided sufficient dates of her injury when she informed MHG she had been hospitalized from July 25, 2005, to August 23, 2005, and her injuries were discovered on August 8, 2005. Accordingly, she substantially complied with the statute's requirement that she list “all persons known to be involved” by stating multiple MHG employees caused her injuries. This is a *res ipsa loquitur* claim, and Lee set forth in her complaint that she was unconscious a majority of her time at MHG and was unable to verify who cared for her or when the injury occurred. If the identity of these persons is not known, obviously Lee was not required to provide their names. Furthermore, Lee clearly provided the place of her injury: Memorial Hospital at Gulfport. Lee also stated her medical special damages exceeded \$100,000, which we find substantially complies with the statutory requirement concerning notice of money damages sought. Last, the notice of claim contained the letterhead of Lee's attorney, Lee's name, and Lee's date of birth. While Lee did not provide her residence at the time of the injury or at the time of the notice, we find the information provided to be in substantial compliance with the statutory requirements. While there may be some cases in which the claimant's residence is a critical issue, clearly it was not in this case. The address of Lee's counsel was provided, and Lee's date-of-birth and dates of hospitalization were provided for identification purposes. Clearly, MHG was able to identify Lee as a patient and investigate and conduct a “review of the matter” as evidenced by its letter of denial. Our holding today should not be interpreted as holding that the required elements do not need to be explicitly stated in the notice of claim. However, we continue to apply a substantial compliance standard to the notice requirements under Section 11-46-11(2). ***“What constitutes substantial compliance, while not a question of fact but one of law, is a fact-sensitive determination.”*** Based on the facts and circumstances of this case, we find the information provided in Lee's letter substantially complied with the statutory requirements of Section 11-46-11(2). . . . ***Lee v. Memorial Hosp. at Gulfport, 999 So. 2d 1263, 1266-67 (Miss. 2008) (citations omitted) (emphasis added).***

(3) (a) All actions brought under this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct

on which the liability phase of the action is based, and not after, except that filing a notice of claim within the required one-year period will toll the statute of limitations for ninety-five (95) days from the date the chief executive officer of the state entity or the chief executive officer or other statutorily designated official of a political subdivision receives the notice of claim.

(b) No action whatsoever may be maintained by the claimant until the claimant receives a notice of denial of claim or the tolling period expires, whichever comes first, after which the claimant has an additional ninety (90) days to file suit; failure to file within the time allowed is an absolute bar to any further proceedings under this chapter.

(c) All notices of denial of claim shall be served by governmental entities upon claimants by certified mail, return receipt requested, only.

- (d) (i) To determine the running of limitations periods under this chapter, service of any notice of claim or notice of denial of claim is effective upon delivery by the methods statutorily designated in this chapter.
- (ii) The limitations period provided in this section controls and shall be exclusive in all actions subject to and brought under the provisions of this chapter, notwithstanding the nature of the claim, the label or other characterization the claimant may use to describe it, or the provisions of any other statute of limitations that would otherwise govern the type of claim or legal theory if it were not subject to or brought under the provisions of this chapter.

Discovery Rule - Wrongful Death Actions - Medical Malpractice

Our decision in *Caves* reaffirmed the application of the discovery rule in wrongful-death actions predicated on allegations of medical malpractice and brought under the MTCA. We followed the “judicially created” discovery rule we originally had incorporated into the MTCA in *Barnes v. Singing River Hospital*, 733 So. 2d 199 (Miss. 1999), finding that “justice is best served by applying a discovery standard to such cases.” Thus, we held in *Caves* that “the limitations period for MTCA claims does not begin to run until all the elements of a tort exist,” and we concluded that “the operative question is whether statutory notice was provided within a year next following the earliest date the decedent (or his personal representative), by exercise of reasonable diligence, should have known of the injury and the acts or omission which caused them.” We further held in *Caves* that “the finder of fact must decide when those requirements are satisfied.” *Caves* also “explained” that the wrongful-death statute allows an action which includes not only

the beneficiaries' "wrongful-death" claims, such as loss of consortium, society, and companionship, but also the decedent's own pre-death "survival-type" claims, such as claims for his or her personal injury, property damage, and medical expenses. "The statute of limitations for 'wrongful-death' claims, however, can not begin to run until, at the earliest, the date of death, and the date the wrongful-death claimant's damages accrued." *Saul v. South Central Regional Medical Center, Inc.*, 25 So. 3d 1037, 1039-40 (Miss. 2010) (citations omitted) (prior version of § 11-46-11) (explaining *Caves v. Yarbrough*, 991 So. 2d 142 (Miss. 2008)).

The MTCA includes within its provisions and language no discovery rule which tolls or delays the beginning of the running of the statute of limitations until the claimant discovers the injury or the claim. Because it is this Court's duty to apply the law as written, not as we think it should have been written, we concluded in our original opinion in this case that the absence of any discovery rule within the provisions of the MTCA was binding on this Court. On rehearing, both Mrs. Caves and amici forcefully argue that, even though the MTCA has no discovery provision, previous decisions of this Court have held otherwise, and the doctrine of stare decisis requires us to follow those prior decisions, whether or not this Court now agrees with them. . . . Pursuant to the doctrine of stare decisis, we therefore shall continue to recognize a discovery rule with respect to Section 11-46-11(3). Having held that a discovery rule applies to claims under the MTCA, we must now proceed to discuss its effect on the case before us today. . . . Thus, we hold today that the limitations period for MTCA claims does not begin to run until all the elements of a tort exist, and the claimant knows or, in the exercise of reasonable diligence, should know of both the injury and the act or omission which caused it. . . . We hold today that the MTCA's one-year statute of limitations begins to run when the claimant knows, or by exercise of reasonable diligence should know, of both the damage or injury, and the act or omission which proximately caused it. We further hold that the finder of fact (in this case, the trial judge) must decide when those requirements are satisfied. *Caves v. Yarbrough*, 991 So. 2d 142, 150-55 (Miss. 2008) (citations omitted) (prior version of § 11-46-11).

(4) From and after April 1, 1993, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the

time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

Unconstitutionality of this Subsection

At the outset, we recount the relevant amendments to the MTCA. The MTCA was enacted in 1993 to create a limited waiver of sovereign immunity of the state and its political subdivisions. As first enacted, the MTCA provided a strict one-year statute of limitations. In *Marcum*, this Court considered whether the general savings clause applies to the MTCA and held “that § 11-46-11's one (1) year statute of limitations is not tolled by the general minor savings clause.” “The MTCA clearly mandates that a one (1) year statute of limitations be applied to any actions brought under the Act. . . .” In April of 2000, subsection (4) was added to § 11-46-11. Subsection (4) provided:

From and after May 15, 2000, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

The practical result of this amendment is that as of May 15, 2000, any injured party under disability of infancy or unsoundness of mind whose remedy is not yet barred by the statute of limitations may avail themselves of the savings clause. Because it was prospective in nature, this amendment created no constitutional issues. Indeed, this amendment only enhanced or extended the rights of actions still existing. It did not include any retroactive language nor did the language indicate that the Legislature sought to revive any barred claims. In 2002, the Legislature again amended § 11-46-11 by changing the effective date of subsection (4). This final version, and that which is presently before the Court, provides:

(4) From and after April 1, 1993, if any person entitled to bring any action under this chapter shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of mind, he may bring the action within the time allowed in this section after his disability shall be removed as provided by law. The savings in favor

of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

It is this second amendment which today we find unconstitutional under Miss. Const. § 97. . . . Article 4, § 97 of the Mississippi Constitution provides: “The legislature shall have no power to revive any remedy which may have become barred by lapse of time, or by any statute of limitations of this state.” The principle espoused in § 97 of the 1890 constitution is firmly grounded under Mississippi law. . . . The March 2002 amendment to § 11-46-11(4) is unconstitutional to the extent that it makes the savings clause applicable to all claims since April 1, 1993. However, the savings clause as first enacted in April of 2000 is valid and enforceable. Those claims in existence on May 15, 2000, are subject to the savings clause. The Legislature is invited to amend § 11-46-11 in accordance with this opinion. Until such is done, the application of the savings clause will differ from that which is provided in the code. *University of Mississippi Medical Center v. Robinson*, 876 So. 2d 337, 339-41 (Miss. 2004) (citations omitted).

Jurisdiction and Venue

§ 11-46-13 Jurisdiction; appeals; venue:

(1) Jurisdiction for any suit filed under the provisions of this chapter shall be in the court having original or concurrent jurisdiction over a cause of action upon which the claim is based. The judge of the appropriate court shall hear and determine, without a jury, any suit filed under the provisions of this chapter. Appeals may be taken in the manner provided by law.

(2) The venue for any suit filed under the provisions of this chapter against the state or its employees shall be in the county in which the act, omission or event on which the liability phase of the action is based, occurred or took place. The venue for all other suits filed under the provisions of this chapter shall be in the county or judicial district thereof in which the principal offices of the governing body of the political subdivision are located. The venue specified in this subsection shall control in all actions filed against governmental entities, notwithstanding that other defendants which are not governmental entities may be joined in the suit, and notwithstanding the provisions of any other venue statute that otherwise would apply.

Limitations of Liability

§ 11-46-15 Limitation of liability; exemplary or punitive damages; interest; attorney's fees; reduction of award:

(1) In any claim or suit for damages against a governmental entity or its employee brought under the provisions of this chapter, the liability shall not exceed the following for all claims arising out of a single occurrence for all damages permitted under this chapter:

(a) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1993, but before July 1, 1997, the sum of Fifty Thousand Dollars (\$50,000.00);

(b) For claims or causes of action arising from acts or omissions occurring on or after July 1, 1997, but before July 1, 2001, the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00);

(c) For claims or causes of action arising from acts or omissions occurring on or after July 1, 2001, the sum of Five Hundred Thousand Dollars (\$500,000.00).

(2) No judgment against a governmental entity or its employee for any act or omission for which immunity is waived under this chapter shall include an award for exemplary or punitive damages or for interest prior to judgment, or an award of attorney's fees unless attorney's fees are specifically authorized by law.

(3) Except as otherwise provided in Section 11-46-17(4), in any suit brought under the provisions of this chapter, if the verdict which is returned, when added to costs and any attorney's fees authorized by law, would exceed the maximum dollar amount of liability provided in subsection (1) of this section, the court shall reduce the verdict accordingly and enter judgment in an amount not to exceed the maximum dollar amount of liability provided in subsection (1) of this section.

Standard of Review

The standard of review of a judgment entered following a bench trial is well-settled. The trial court is entitled to the same deference accorded to a chancellor, that is, we will uphold the trial court's findings of fact, so long as they are supported by “substantial, credible, and reasonable evidence.” However, we review conclusions of law, including the proper application of the MTCA, de novo. *City of Jackson v. Presley*, 40 So. 3d 520, 522 (Miss. 2010).

Appendix to

Chapter 19

Mississippi Tort Claims Act

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**MISSISSIPPI TORT CLAIMS ACT
DISCRETIONARY FUNCTIONS**

Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation
Traffic-control device placement or maintenance	A truck driver was injured in an accident with a MDOT vehicle being driven by a MDOT employee.	<p>The commissioner of public safety and the state highway commission shall place and maintain such traffic-control devices conforming to its manual and specifications, upon all state and county highways as it shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic.</p> <p>Miss. Code. Ann. § 63-3-303.</p>	<p>Notwithstanding the provisions of section 63-3-303, the act giving rise to the injuries here is not the placement or maintenance of a traffic-control device but rather [the employee's] alleged negligent operation of the pickup. And although [the employee] may have been performing a discretionary function on the day of the collision, Mississippi law does not authorize governmental employees to violate traffic regulations en route to and from the site at which a discretionary function is performed. . . . [The MDOT employee's] duty to adhere to applicable traffic regulations was in no way discretionary. Consequently, the circuit court erred in finding MDOT immune under section 11-46-9(1)(d). Further, based on the evidence presented in support of and against MDOT's summary-judgment motion, we find that there are genuine issues of material fact with respect to how the accident occurred. Therefore, we find that summary judgment was improperly granted.</p> <p>Arguably, immunity would exist for acts pertaining to the placement or maintenance of a traffic-control device.</p>	<p><i>Mixon v. Mississippi Dep't of Transp.</i>, 186 So. 3d 90 (Miss. Ct. App. 2015).</p>

MISSISSIPPI TORT CLAIMS ACT DISCRETIONARY FUNCTIONS				
Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation
Sewage-system construction, operation, and maintenance	A homeowner brought an action against the city after raw sewage entered her house through a shower drain and flooded several rooms.	A municipality . . . is authorized and empowered, in the discretion of its governmental authorities, to exercise the following powers and authority within the area and territories comprising the metropolitan area of which it is a part: . . . (b) To construct, operate and maintain sewerage systems, sewage treatment facilities and sewage disposal systems in the manner and to the extent required by the metropolitan area plan. . . . Miss. Code. Ann. § 21-27-189.	[The] overarching functions of sewage-system construction, operation, and maintenance in this case are not imposed by any law. . . . On the contrary, Section 21-27-189 gives municipal authorities complete discretion in exercising these functions. Thus, the overarching governmental functions in this case are discretionary under Section 11-46-9(1)(d). However, there are numerous statutes and regulations that render various narrow duties related to sewage-system maintenance ministerial. . . . On remand, [plaintiff] must present evidence that her claim arises out of [the City’s] performance or failure to perform an act which “furthered a more narrow function or duty which is made ministerial by another specific statute, ordinance, or regulation promulgated pursuant to lawful authority.” If she cannot present such evidence, [the City] is entitled to discretionary-function immunity. Immunity for the overarching governmental function of sewage-system construction, operation, and maintenance.	<i>City of Magee v. Jones</i> , 161 So. 3d 1047 (Miss. 2015).

**MISSISSIPPI TORT CLAIMS ACT
DISCRETIONARY FUNCTIONS**

Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation
Sewage-system maintenance	A property owner brought an action against the city to recover for damages sustained as the result of sewage backup.	<p>A municipality . . . is authorized and empowered, in the discretion of its governmental authorities, to exercise the following powers and authority within the area and territories comprising the metropolitan area of which it is a part:</p> <p>. . .</p> <p>(b) To construct, operate and maintain sewerage systems, sewage treatment facilities and sewage disposal systems in the manner and to the extent required by the metropolitan area plan. . . .</p> <p>Miss. Code. Ann. § 21-27-189.</p>	Sewage-system maintenance is presumptively discretionary and entitled to immunity. But on remand, if [plaintiff] can prove that the City's alleged inaction in repairing the sewage system was related to a more narrow function made ministerial by statute, ordinance, regulation, or other binding directive, then he may proceed with his claim. If not, the City is entitled to immunity under Section 11-46-9(d), as the overarching function of sewage maintenance is a discretionary one.	<i>Boroujerdi v. City of Starkville</i> , 158 So. 3d 1106 (Miss. 2015), overruled by <i>Wilcher v. Lincoln Cty. Bd. of Supervisors</i> , 243 So. 3d 177 (Miss. 2018).
			Immunity for the overarching governmental function of sewage maintenance.	

MISSISSIPPI TORT CLAIMS ACT DISCRETIONARY FUNCTIONS				
Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation
Traffic-control device placement	A motorist brought an action against MDOT and a regional railroad company for injuries she sustained after her vehicle crashed into a concrete railroad trestle.	The commissioner of public safety and the state highway commission shall place and maintain such traffic-control devices conforming to its manual and specifications, upon all state and county highways as it shall deem necessary to indicate and to carry out the provisions of this chapter or to regulate, warn, or guide traffic. Miss. Code. Ann. § 63-3-303.	Again, proof of causation aside, we find that this allegation also involves a discretionary function, and that MDOT is therefore immune from liability altogether. In <i>Little</i> , this Court stated: “Because Section 65-1-65 requires MDOT to maintain and repair state highways, that duty - and all acts in furtherance of that duty - are ministerial unless, as in <i>Montgomery</i> , another statute makes a particular act discretionary.” Here, we find that there is another statute that makes the placement of traffic-control devices discretionary. We find that [§ 63-3-303] allows MDOT, in its discretion, to determine the appropriate type, number, and location of traffic-control devices, making it immune from liability for this claim under Section 11-46-9(1)(d).	<i>Alabama Great S. R. Co. v. Jobes</i> , 156 So. 3d 871 (Miss. 2015).
			Immunity for overarching governmental function of traffic-control device placement.	

MISSISSIPPI TORT CLAIMS ACT DISCRETIONARY FUNCTIONS				
Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation
Operation of an ambulance service	An ambulance patient filed a personal injury action against the city alleging that he was injured by the negligence of a city fire department emergency medical technician (EMT).	The board of supervisors of any county and the governing authorities of any city, town, or any political subdivision thereof, either separately or acting in conjunction, in their discretion and upon finding that adequate public ambulance service would not otherwise be available, may own, maintain, and operate a public ambulance service as a governmental function. . . . Miss. Code. Ann. § 41-55-1.	The City's operation of an ambulance service is a discretionary function. As such, acts performed as part of its engagement in such a function generally entitle it to discretionary-function immunity pursuant to Section 11-46-9(1)(d).	<i>Brantley v. City of Horn Lake</i> , 152 So. 3d 1106 (Miss. 2014), overruled by <i>Wilcher v. Lincoln Cty. Bd. of Supervisors</i> , 243 So. 3d 177 (Miss. 2018).
			Immunity for the overarching governmental function of operation of an ambulance service.	

**MISSISSIPPI TORT CLAIMS ACT
MINISTERIAL FUNCTIONS**

Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation
State highway maintenance	A truck driver was injured in an accident with a MDOT vehicle being driven by a MDOT employee.	It shall be the duty of the state highway commission to have the state highway department maintain all highways which have been or which may be hereafter taken over by the state highway department for maintenance in such a way as to afford convenient, comfortable, and economic use thereof by the public at all times. To this end it shall be the duty of the director, subject to the rules, regulations and orders of the commission as spread on its minutes, to organize an adequate and continuous patrol for the maintenance, repair, and inspection of all of the state-maintained state highway system, so that said highways may be kept under proper maintenance and repair at all times.	Mississippi Code section 65-1-65 requires MDOT “to organize an adequate and continuous patrol for the maintenance, repair, and inspection of all of the of the state-maintained state highway system, so that said highways may be kept under proper maintenance and repair at all times.” Thus, MDOT has a ministerial duty to maintain the state highways.	<i>Mixon v. Mississippi Dep’t of Transp.</i> , 183 So. 3d 90 (Miss. Ct. App. 2015).
		Miss. Code. Ann. § 65-1-65.	No immunity for the ministerial function of state highway maintenance.	

MISSISSIPPI TORT CLAIMS ACT MINISTERIAL FUNCTIONS				
Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation
School facility repair	A pedestrian sued the school district after she tripped over a section of conduit that protruded from the surface of a driveway in front of the school district's administrative building.	The school boards of all school districts shall have the following powers, authority and duties in addition to all others imposed or granted by law, to wit: (d) To have responsibility for the erection, repairing and equipping of school facilities and the making of necessary school improvements; Miss. Code. Ann. § 37-7-301.	[We] find that because NASD has a statutory duty to repair a school facility, all acts in furtherance of that duty are ministerial. Furthermore, the repair of improperly protruding conduit that poses a safety hazard necessarily involves the repair of a school facility. It follows that NASD had a ministerial duty to repair the protruding conduit, and it is not entitled to discretionary immunity.	<i>Natchez-Adams Sch. Dist. v. Bruce</i> , 168 So. 3d 1181 (Miss. Ct. App. 2015), <i>cert. denied</i> , 166 So. 3d 38 (Miss. 2015).
			No immunity for the ministerial function of school facility repairs.	

**MISSISSIPPI TORT CLAIMS ACT
MINISTERIAL FUNCTIONS**

Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation
<p>Sewage-system maintenance - Act which caused the injury “furthered a more narrow function or duty made ministerial by another specific statute, ordinance, or regulation promulgated pursuant to a lawful authority”</p>	<p>A property owner brought an action against the city to recover for damages sustained as the result of a sewage backup.</p>	<p>A municipality . . . is authorized and empowered, in the discretion of its governmental authorities, to exercise the following powers and authority within the area and territories comprising the metropolitan area of which it is a part: (b) To construct, operate and maintain sewerage systems, sewage treatment facilities and sewage disposal systems in the manner and to the extent required by the metropolitan area plan. . . .</p> <p>Miss. Code. Ann. § 21-27-189.</p>	<p>Sewage-system maintenance is presumptively discretionary and entitled to immunity. But on remand, if [plaintiff] can prove that the City’s alleged inaction in repairing the sewage system was related to a more narrow function made ministerial by statute, ordinance, regulation, or other binding directive, then he may proceed with his claim.</p>	<p><i>Boroujerdi v. City of Starkville</i>, 158 So. 3d 1106 (Miss. 2015), overruled by <i>Wilcher v. Lincoln Cty. Bd. of Supervisors</i>, 243 So. 3d 177 (Miss. 2018).</p>
			<p>No immunity for a narrow ministerial function required by statute, ordinance, or regulation pertaining to sewage-system maintenance.</p>	

**MISSISSIPPI TORT CLAIMS ACT
MINISTERIAL FUNCTIONS**

Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation
<p>Operation of an ambulance service - “[O]nce a municipality has decided to operate and maintain its own ambulance service, it is subject to several ministerial statutes and regulations which remove the municipality’s discretion from many functions and duties and render such functions and duties ministerial”</p>	<p>An ambulance patient filed a personal injury action against the city alleging that he was injured by the negligence of a city fire department emergency medical technician (EMT).</p>	<p>The board of supervisors of any county and the governing authorities of any city, town, or any political subdivision thereof, either separately or acting in conjunction, in their discretion and upon finding that adequate public ambulance service would not otherwise be available, may own, maintain, and operate a public ambulance service as a governmental function. . . .</p> <p>Miss. Code. Ann. § 41-55-1.</p>	<p>The City’s operation of an ambulance service is a discretionary function. As such, acts performed as part of its engagement in such a function generally entitle it to discretionary-function immunity pursuant to Section 11-46-9(1)(d). However, when engaged in that function, several duties involved with the operation of the ambulance service are ministerial [The] plaintiff has had no opportunity to tailor his discovery or strategy to address the possibility of a rule, regulation, or statute which may render the duty of removing a person from an ambulance a ministerial one, and thus could remove such duty from the umbrella of discretionary-function immunity. On remand, if the plaintiff can prove that the defendant was fulfilling a function or duty mandated by a specific statute, ordinance, or regulation promulgated pursuant to lawful authority, then he may proceed with his claim.</p>	<p><i>Brantley v. City of Horn Lake</i>, 152 So. 3d 1106 (Miss. 2014), <i>overruled by Wilcher v. Lincoln Cty. Bd. of Supervisors</i>, 243 So. 3d 177 (Miss. 2018).</p>
<p>No immunity for a narrow ministerial function required by a rule, regulation, or statute pertaining to the operation of an ambulance service.</p>				

**MISSISSIPPI TORT CLAIMS ACT
MINISTERIAL FUNCTIONS**

Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation
Tax collector duties	The purchaser of property that had been sold for delinquent municipal taxes brought an action against the county, city, and city tax collector for damages incurred from failure to provide statutory notice of tax sales.	The tax collector shall on or before the second Monday of May and on or before the second Monday of October of each year, transmit to the clerk of the chancery court of the county separate certified lists of the lands struck off by him to the state and that sold to individuals, specifying to whom assessed, the date of sale, the amount of taxes for which sale was made, and each item of cost incident thereto, and where sold to individuals, the name of the purchaser, such sale to be separately recorded by the clerk in a book kept by him for that purpose. . . . Miss. Code. Ann. § 27-41-79.	Plainly, Section 27-41-79 mandates the tax collector to act; the statute positively imposes upon the tax collector the duty to file the tax-sale list with the chancery clerk. There is no element of choice or judgment. Therefore, the duty is ministerial, and the MTCA affords no immunity. This Court holds that an action under Section 27-41-79 is not a tort action subject to the MTCA, but a separate statutory action, and that [plaintiff] stated a claim under the statute. We further find that the MTCA does not afford the City and [the justice court clerk] immunity from suit on [plaintiff's] negligence claim. No immunity for failure to perform a ministerial function of tax collector duties.	<i>Booneville Collision Repair, Inc. v. City of Booneville</i> , 152 So. 3d 265 (Miss. 2014).

**MISSISSIPPI TORT CLAIMS ACT
JUDICIAL FUNCTIONS**

Duty/Function	Facts	Statute/Ordinance	Holding	Case Citation(s)
Judicial action(s) or inaction(s)	A person wrongfully arrested filed a complaint against the county after a justice court clerk failed to cancel the arrest warrant, resulting in her arrest and being held in jail.	A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim: (a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature; Miss. Code. Ann. § 11-46-9.	The sole question presented in this interlocutory appeal is whether a DeSoto County justice court clerk's negligence in failing to cancel an arrest warrant subjects the county to a tort lawsuit. We hold that, for the negligent act complained of in this case, the county has immunity under the Mississippi Tort Claims Act. Section 11-46-9 grants immunity to DeSoto County if: (1) its justice court clerk was "acting within the course and scope of [her] employment or duties" and (2) the claim arises "out of a . . . judicial action or inaction, or administrative action or inaction of a . . . judicial nature." We find that the Legislature could not have chosen language that more precisely and clearly provides immunity to the clerk. . . . Immunity for claims arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature.	<i>DeSoto County v. T.D.</i> , 160 So. 3d 1154 (Miss. 2015).

Non-Adjudication

§ 99-15-26 Release after successful completion of conditions:

(1)(a) In all criminal cases, felony and misdemeanor, other than crimes against the person, a crime of violence as defined in Section 97-3-2 or a violation of Section 97-11-31, the circuit or county court shall be empowered, upon the entry of a plea of guilty by a criminal defendant made on or after July 1, 2014, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(b) In all misdemeanor criminal cases, other than crimes against the person, the justice or municipal court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(c) Notwithstanding paragraph (a) of this subsection (1), in all criminal cases charging a misdemeanor of domestic violence as defined in Section 99-3-7(5), a circuit, county, justice or municipal court shall be empowered, upon the entry of a plea of guilty by the criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(d) No person having previously qualified under the provisions of this section shall be eligible to qualify for release in accordance with this section for a repeat offense. A person shall not be eligible to qualify for release in accordance with this section if charged with the offense of trafficking of a controlled substance as provided in Section 41-29-139(f) or if charged with an offense under the Mississippi Implied Consent Law. Violations under the Mississippi Implied Consent Law can only be nonadjudicated under the provisions of Section 63-11-30.

Section 99-15-26 is an extraordinary provision which allows certain misdemeanor and first-time felony offenders to be sanctioned for their offenses by means other than incarceration. A conditional dismissal under this statute is a matter of legislative grace, and it is granted in the first instance at the discretion of the court. In other words, a request to be sentenced pursuant to § 99-15-26 can be offered during plea negotiations, but it is within the circuit or county judge's discretion to accept such a request. *Turner v. State*, 876 So. 2d 1056, 1059 (Miss. Ct. App. 2004) (prior version of § 99-15-26).

(2)(a) Conditions which the circuit, county, justice or municipal court may impose under subsection (1) of this section shall consist of:

- (i) Reasonable restitution to the victim of the crime.
- (ii) Performance of not more than nine hundred sixty (960) hours of public service work approved by the court.
- (iii) Payment of a fine not to exceed the statutory limit.
- (iv) Successful completion of drug, alcohol, psychological or psychiatric treatment, successful completion of a program designed to bring about the cessation of domestic abuse, or any combination thereof, if the court deems treatment necessary.
- (v) The circuit or county court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed five (5) years. The justice or municipal court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed two (2) years.

Even though [§ 99-15-26] does not use the specific word ‘probation,’ nevertheless [it] authorizes the court to place a defendant on probation. ***Brown v. State*, 533 So. 2d 1118, 1122 (Miss. 1988) (prior version of § 99-15-26).**

- (b) Conditions which the circuit or county court may impose under subsection (1) of this section also include successful completion of an effective evidence-based program or a properly controlled pilot study designed to contribute to the evidence-based research literature on programs targeted at reducing recidivism. Such program or pilot study may be community based or institutionally based and should address risk factors identified in a formal assessment of the offender’s risks and needs.
- (3) When the court has imposed upon the defendant the conditions set out in this section, the court shall release the bail bond, if any.
- (4) Upon successful completion of the court-imposed conditions permitted by subsection (2) of this section, the court shall direct that the cause be dismissed and the case be closed.
- (5) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case.

A.E.W. was arrested by the Biloxi Police Department on June 18, 1979, and indicted for the charge of “unnatural intercourse” pursuant to section 97–29–59 of the Mississippi Code (1972). On August 28, 1980, the charge was passed to the inactive file. A.E.W. twice sought to have the charge expunged by the Circuit Court of Harrison County. This is an appeal from the second and supplemental motion to expunge which was denied. A.E.W. argues that the lower court erred in not granting his petition for expungement, and that in applying Mississippi Code Annotated section 99–15–26(5) the lower court did not have discretion to deny an expungement of a case which has been dismissed or in which the charges have been dropped. We find that the circuit court erred and therefore

Revocation of Probation

§ 47-7-37 Probation & post-release supervision violations; procedure; duration:

(1) The period of probation shall be fixed by the court, and may at any time be extended or terminated by the court, or judge in vacation. Such period with any extension thereof shall not exceed five (5) years, except that in cases of desertion and/or failure to support minor children, the period of probation may be fixed and/or extended by the court for so long as the duty to support such minor children exists. The time served on probation or post-release supervision may be reduced pursuant to Section 47-7-40.

(2) At any time during the period of probation, the court, or judge in vacation, may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the probationer to be arrested. Any probation and parole officer may arrest a probationer without a warrant, or may deputize any other officer with power of arrest to do so by giving him a written statement setting forth that the probationer has, in the judgment of the probation and parole officer, violated the conditions of probation. Such written statement delivered with the probationer by the arresting officer to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the probationer.

(3) Whenever an offender is arrested on a warrant for an alleged violation of probation as herein provided, the department shall hold an informal preliminary hearing within seventy-two (72) hours of the arrest to determine whether there is reasonable cause to believe the person has violated a condition of probation. A preliminary hearing shall not be required when the offender is not under arrest on a warrant or the offender signed a waiver of a preliminary hearing. The preliminary hearing may be conducted electronically. If reasonable cause is found, the offender may be confined no more than twenty-one (21) days from the admission to detention until a revocation hearing is held. If the revocation hearing is not held within twenty-one (21) days, the probationer shall be released from custody and returned to probation status.

(4) If a probationer or offender is subject to registration as a sex offender, the court must make a finding that the probationer or offender is not a danger to the public prior to release with or without bail. In determining the danger posed by the release of the offender or probationer, the court may consider the nature and circumstances of the violation and any new offenses charged; the offender or probationer's past and present conduct, including convictions of crimes and any record of arrests without conviction for crimes involving violence or sex crimes; any other evidence of allegations of unlawful sexual conduct or the use of

violence by the offender or probationer; the offender or probationer's family ties, length of residence in the community, employment history and mental condition; the offender or probationer's history and conduct during the probation or other supervised release and any other previous supervisions, including disciplinary records of previous incarcerations; the likelihood that the offender or probationer will engage again in a criminal course of conduct; the weight of the evidence against the offender or probationer; and any other facts the court considers relevant.

- (5) (a) The probation and parole officer after making an arrest shall present to the detaining authorities a similar statement of the circumstances of violation. The probation and parole officer shall at once notify the court of the arrest and detention of the probationer and shall submit a report in writing showing in what manner the probationer has violated the conditions of probation. Within twenty-one (21) days of arrest and detention by warrant as herein provided, the court shall cause the probationer to be brought before it and may continue or revoke all or any part of the probation or the suspension of sentence. If the court revokes probation for one or more technical violations, the court shall impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety (90) days for the first revocation and not to exceed one hundred twenty (120) days for the second revocation. For the third revocation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent revocation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.
- (b) If the offender is not detained as a result of the warrant, the court shall cause the probationer to be brought before it within a reasonable time and may continue or revoke all or any part of the probation or the suspension of sentence, and may cause the sentence imposed to be executed or may impose any part of the sentence which might have been imposed at the time of conviction. If the court revokes probation for one or more technical violations, the court shall impose a period of imprisonment to be served in either a technical violation center or a restitution center not to exceed ninety (90) days for the first revocation and not to exceed one hundred twenty (120) days for the second revocation. For the third revocation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended

portion of the sentence. For the fourth and any subsequent revocation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

(c) If the court does not hold a hearing or does not take action on the violation within the twenty-one-day period, the offender shall be released from detention and shall return to probation status. The court may subsequently hold a hearing and may revoke probation or may continue probation and modify the terms and conditions of probation. If the court revokes probation for one or more technical violations, the court shall impose a period of imprisonment to be served in either a technical violation center operated by the department or a restitution center not to exceed ninety (90) days for the first revocation and not to exceed one hundred twenty (120) days for the second revocation. For the third revocation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent revocation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

(d) For an offender charged with a technical violation who has not been detained awaiting the revocation hearing, the court may hold a hearing within a reasonable time. The court may revoke probation or may continue probation and modify the terms and conditions of probation. If the court revokes probation for one or more technical violations the court shall impose a period of imprisonment to be served in either a technical violation center operated by the department or a restitution center not to exceed ninety (90) days for the first revocation and not to exceed one hundred twenty (120) days for the second revocation. For the third revocation, the court may impose a period of imprisonment to be served in either a technical violation center or a restitution center for up to one hundred eighty (180) days or the court may impose the remainder of the suspended portion of the sentence. For the fourth and any subsequent revocation, the court may impose up to the remainder of the suspended portion of the sentence. The period of imprisonment in a technical violation center imposed under this section shall not be reduced in any manner.

See § 99-19-21 Consecutive or concurrent sentences; felonies committed while under supervision or suspended sentence:

(2) When a person is sentenced to imprisonment for a

felony committed while the person was on parole, probation, earned-release supervision, post-release supervision or suspended sentence, the imprisonment shall commence at the termination of the imprisonment for the preceding conviction. The term of imprisonment for a felony committed during parole, probation, earned-release supervision, post-release supervision or suspended sentence shall not run concurrently with any preceding term of imprisonment. If the person is not imprisoned in a penitentiary for the preceding conviction, he shall be placed immediately in the custody of the Department of Corrections to serve the term of imprisonment for the felony committed while on parole, probation, earned-release supervision, post-release supervision or suspended sentence.

(6) If the probationer is arrested in a circuit court district in the State of Mississippi other than that in which he was convicted, the probation and parole officer, upon the written request of the sentencing judge, shall furnish to the circuit court or the county court of the county in which the arrest is made, or to the judge of such court, a report concerning the probationer, and such court or the judge in vacation shall have authority, after a hearing, to continue or revoke all or any part of probation or all or any part of the suspension of sentence, and may in case of revocation proceed to deal with the case as if there had been no probation. In such case, the clerk of the court in which the order of revocation is issued shall forward a transcript of such order to the clerk of the court of original jurisdiction, and the clerk of that court shall proceed as if the order of revocation had been issued by the court of original jurisdiction. Upon the revocation of probation or suspension of sentence of any offender, such offender shall be placed in the legal custody of the State Department of Corrections and shall be subject to the requirements thereof.

(7) Any probationer who removes himself from the State of Mississippi without permission of the court placing him on probation, or the court to which jurisdiction has been transferred, shall be deemed and considered a fugitive from justice and shall be subject to extradition as now provided by law. No part of the time that one is on probation shall be considered as any part of the time that he shall be sentenced to serve.

(8) The arresting officer, except when a probation and parole officer, shall be allowed the same fees as now provided by law for arrest on warrant, and such fees shall be taxed against the probationer and paid as now provided by law.

(9) The arrest, revocation and recommitment procedures of this section also apply to persons who are serving a period of post-release supervision imposed by the court.

(10) Unless good cause for the delay is established in the record of the proceeding, the probation revocation charge shall be dismissed if the revocation hearing is not held within thirty (30) days of the warrant being issued.

(11) The Department of Corrections shall provide semiannually to the Oversight Task Force the number of warrants issued for an alleged violation of probation or post-release supervision, the average time between detention on a warrant and preliminary hearing, the average time between detention on a warrant and revocation hearing, the number of ninety-day sentences in a technical violation center issued by the court, the number of one-hundred-twenty-day sentences in a technical violation center issued by the court, the number of one-hundred-eighty-day sentences issued by the court, and the number and average length of the suspended sentences imposed by the court in response to a violation.

§ 47-7-37.1 Revocation of probation:

Notwithstanding any other provision of law to the contrary, if a court finds by a preponderance of the evidence, that a probationer or a person under post-release supervision has committed a felony or absconded, the court may revoke his probation and impose any or all of the sentence. For purposes of this section, “absconding from supervision” means the failure of a probationer to report to his supervising officer for six (6) or more consecutive months.

Procedure for Revoking a Suspended Sentence & Probation

It should be noted that while this is not a revocation of probation case because the court did not impose probation, it stands to reason that the same due process analysis applies to revocation of suspended sentence proceedings. *Artis v. State*, 643 So. 2d 533, 536 (Miss. 1994).

Due Process Requirements for a Revocation of Probation &/or Suspended Sentence

(1) Preliminary Hearing

Morrissey v. Brewer requires the following [due process requirements at] the [probationer's] preliminary hearing:

- (1) that some minimal inquiry or preliminary hearing be conducted at or reasonably near the place of the alleged violation or arrest and that [it is held] as promptly as convenient after arrest while information is fresh and sources are available;
- (2) that the determination that reasonable ground exists for revocation should be made by someone not directly involved in the case and that the decision-maker need not be a judicial officer;
- (3) that the defendant [probationer] should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe that he has committed a violation of his probation;
- (4) that the notice should state what violations have been alleged;
- (5) that at the hearing the defendant may appear and speak in his own behalf and he may bring letters, documents, or individuals who can give relevant information to the hearing officer;
- (6) that on request of the defendant, persons who have given adverse information on which revocation is to be based are to be made available for questioning in his presence [unless doing so would possibly subject the persons to harm];
- (7) that the hearing officer shall have the duty of making a summary, or digest, of what occurs at the hearing in terms of the responses of the defendant or evidence given in support of the defendant's position;