

Your assignment is to read the following argument and divide the paragraphs into 4 categories. (ISSUE, RULE OF LAW, ANALYSIS/APPLICATION, and CONCLUSION) Keep in mind, there may be mini-arguments within that will need to be labeled as well. Just writing an I, R, A, or C to the side of the paragraph will suffice.

*\*4 STATEMENT OF FACTS*

On August 21, 1995, Willie McCray was head football coach at Jefferson County High School in Fayette, Mississippi. On that day, Victor Harris was participating in the season football practice under the supervision and control of Willie McCray. (Vol. 8, pp. 9-10, ll. 8-29, R.E. 37-38)

During that time, the afternoon football practice started around 2:30 p.m. (Vol. 8, p. 11 - 12, ll. 22-29, R.E. 39-40) ended around 4:30 p.m. (Vol 8, p. 122, ll. 14 - 21, R.E. 59) The temperature that afternoon was in the nineties and was maybe as high as 97. (Exhibit Vol. 1, P-4, R.E. 91)

Testimony of the fellow football players, Jerry McDonald, Cedric Jackson, and Dexter Harried, established that they only had one water break which occurred near the beginning of practice on the practice field before going to the game field. (Vol. 8, pp. 86 - 87, ll. 23-29, 1-4, p. 100-101, 11. 18-29, 1, p. 126,11. 8-25,R.E. 48-49, 51-52, 63) The water was brought from a hydrant near the practice field and was hot. Coach McCray knew that the water in the field was bad and, therefore, had a higher duty to provide adequate water at practice. (Vol. 8, p. 107, 11. 15-23, R.E. 56) Additionally, there was no ice available to the players while practicing, (Vol.8, p. 126, ll. 18-25, R.E. 63) Coach Pipes and Dr. Ennis Proctor both acknowledged that simply playing in the hottest part of the day requires plenty of water and that it is unreasonable to deny a player water if he requests it.<sup>[FN1]</sup>

1. Dr. Proctor testified that it would be very difficult to continue practice with only one water break if the coach practiced for a two hour period in 90 degree weather in full pads. (Vol. 9, pp. 205, ll. 2-11 R.E. 80) He further testified that the same scenario with an additional two sets of wind sprints and dressed in full gear is unreasonable. But if the players had water, it would not be unreasonable. (Vol. 9, p. 206,11. 12-22, R.E. 81)

Coach Pipes echoed this sentiment and stated that most important factor in practicing in 90 degree weather is that there should be plenty of fluids. (Vol. 9, p. 214, 11. 1-11, R.E. 84)

The defendant's very own witness, Dexter Combs, testified that if a player wanted water and \*5 it was not a water break he could not get it. (Vol. 9, pp. 189-190, ll. 18-21, R.E. 74-75) On the afternoon of August 21, 1995, Dexter heard Victor Harris ask Coach McCray for water on three or four different occasions and the coach denied him the water responding, "suck it up". (This is when Victor first became dehydrated and should have been given water to prevent any serious problems.) (Vol. 9, pp. 189-190,11. 22-29, 1-2, R.E. 74-75) The plaintiff, a running back, had practiced running plays on the game field. Because Victor was having a hard time catching on to the running plays, the Coach made Victor do several repetitions. (Vol.9, p. 190, ll. 8-24, RE. 75) Coach McCray had also denied water to other players, James Jackson, Jerry McDonald and Kenneth Smith, during that practice. (Vol. p. 106, 11. 10-19, p. 125-126, 11. 21-29, 1-4, R.E. 55, 62-63)

Later, Coach McCray had the boys to do a set of wind sprints. After the first set of wind sprints, Coach McCray had the team come together in the middle of the game field for a huddle. Coach noticed that the plaintiff was staggering, walking instead of running to the huddle and he ordered everyone to do some more sprints. At that point, Victor was extremely fatigued and in the first stages of a [heat stroke](#). (p. 123-124, ll. 4-29, 1-17, R.E. 60-61)<sup>[FN2]</sup>

FN2. Cedric Jackson testified as follows:

A. Coach called a huddle, called us to a huddle, We was fixing to end practice, and Jerry McDonald and Victor -- Victor had fell, and Jerry McDonald was walking to the huddle. You know, we usually run to the huddle, and Jerry was walking and, you know, when somebody be walking or somebody was walking then, you know, we have to do some more running.

FN

\* \* \*

Q. What kind of running had you done?

A. Sprints.

(p. 102-103, 11. 25-29, 1-8, R.E. 52-53)

Dexter Combs further testified that Victor had told Coach McCray that he was tired, was getting dizzy and finally came dragging to the huddle. Coach McCray told him two or three times to keep running the plays until he got it perfect and accused him of having bad habits. (Vol. 9, p. \*6 190, 11. 12-24, R.E. 75) Victor was trying but he was tired and weak at that point. (p. 124,11. 14-17, R.E. 61) According to Coach Pipes, the coaches, including Coach McCray, used extra running as a discipline tool during football practice. (p. 220-221,11. 8-29, 1-4, R.E. 89-90)

At the end-of-practice huddle, Victor came in unable to stand because he was dizzy. He was falling forward and backwards, not able to hold his balance, with his eyes rolled. Coach McCray accused Victor of "faking it". (Vol. 8, p. 93,11.10-29, R.E 50) Victor then fell down forward and was on his hands and knees. Coach McCray saw this and told Victor "to get up, told him to suck it up, that he must not have been in shape" or "wasn't living right". (Vol. 8, p. 106,11.2-4, R.E. 55) Coach McCray did not offer Victor any water or first aid. (Vol. 8, p. 125,11. 12-13, R.E. 62) Victor Harris left the huddle unable to support himself and Dexter Combs, together with other players, assisted Victor to the gym. (Vol. 9, p. 191, ll. 5-12, R.E. 76)

Victor tried to walk back to the gym but kept falling down. Some of the players picked him up and carried him to the bottom of the hill. At that point, Coach McCray told them to leave Victor alone and let him try to go on his own. Victor then fell to his knees and started crawling up the hill. Coach McCray continued to walk up the hill. The players then carried Victor to the top of the hill and Victor just sat there. Coach McCray finally told the players to pick him up and take him to the gym. (Vol. 8, pp. 109-110, 11. 22-29, 1-17, R.E. 57-58)

When Victor made it to the gym, the other players attempted to give him water. He could not talk because he was too weak. At this time Victor was unresponsive and nearly unconscious. After 15 minutes of trying to revive him, someone went to the office and told Coach McCray that Victor was serious. At that time Coach McCray attempted to call an ambulance. (Vol. 8, p. 128-129, ll. 25-29, 1-26, R.E. 64)

\*7 Victor was taken to Jefferson County Hospital where he was diagnosed with a [heatstroke](#), and transferred to Natchez Regional Medical Center where he remained in the hospital for a total of 14 days, 4 days in a coma out of the 8 days in intensive care. (Vol. 9, p. 173-174,11. 23-29, 1-5, R.E. 70-71) Victor made a good recovery after physical therapy and incurred \$68,000.00 in medical bills. (Exhibits Vol. 1, Exhibit P-5, Vol. 8, p. 74, ll. 16-24, R.E. 92, R.E. 41)

According to Victor Harris' mother and schoolmates, Victor suffers from slurred speech, is very heat-sensitive, not as active as before, forgets more, tires quickly, and cannot learn as fast and suffers from depression. His mother says that football was an important part of his life which he really enjoyed and now he misses it a lot. (Vol. 9, pp. 176-177, ll. 19-22, 19-25, R.E. 72-73)

According to Dr. Guild, Dr. Thomas and Dr. Katz, Victor suffered some neurological deficit the extent of which is difficult to determine. They both say Victor could benefit from a neuropsychological evaluation which costs

between \$800.00 to \$1,500.00 (Vol. 8, p. 147,11. 1-10, R.E. 69) and a visit to Timber Ridge ranch between 3 to 9 months at a cost of \$12,000.00 to \$18,000.00 per month. (Vol. 8, p. 144-146, ll. 1-29, 1-29, 1-17, R.E. 66-68) Dr. Ennis Proctor and Superintendent John Dickey testified that there is no governmental “policy making” activity involved in the decision to practice High School football. (Vol. 9, p. 204-207, Vol. 8, pp. 77-82, RE. 79-82)

Coach Pipes and Dr. Proctor both testified that a coach has a duty look after the safety of the children under their supervision. Contained within that responsibility is the duty to recognize heat-related problems in football players practicing in 90 degree weather and a duty to immediately administer first aid when they see a child in their presence who is suffering a heat-related problem. They further testified that it is unreasonable for a coach to practice players in 90 degrees, the hottest part of the day, for two hours with only one water break and do wind sprints at the end of practice. \*8 (Vol. 9, pp. 213-217, pp. 204-207, 11.14-29, *et. seq.*)

For a 2-hour practice, Coach Pipe even testified that 2 to 3 water breaks are unreasonable; the players should have 4 to 5 water breaks. (Vol. 9, p. 221, ll. 12-15, RE. 90)

Coach Pipes and Dr. Proctor said that having player practice for 2 hours in 90 degree weather with only one water break and wind sprints at the end of the practice would create a dangerous condition at the practice site. (Vol. 9, p. 219, ll. 3-17; 205-206,11. 14-29, 1, R.E. 88)

#### \*12 LEGAL ARGUMENT

##### I. *THE TRAIL COURT COMMITTED REVERSIBLE ERROR IN DETERMINING THAT THE DEFENDANTS WERE IMMUNE FROM LIABILITY IN THIS CASE UNDER THE MISSISSIPPI TORT CLAIMS ACT*

###### A. *Introduction: Standard of Review*

The major question of law before this Court is whether Jefferson County School District is immune from liability under the Mississippi Tort Claims Act (“MTCA”), [Miss. Code Ann. §11-46-1 to §11-46-23 \(Supp.2000\)](#). Statutory interpretation is a question of law, and this Court shall review questions of law de novo. [Donald v. Amoco Prod. Co., 735 So.2d 161, 165 \(Miss. 1999\)](#); [Pearl Public School District, 784 So.2d 911,913 \(Miss. 2001\)](#); [Tucker v. Hinds County, 558 So.2d 869, 872 \(Miss. 1990\)](#); [UHS-Oualicare, Inc. v. Gulf Coast Community Hospital, Inc., 525 So.2d 746, 754 \(Miss. 1987\)](#). This Court has the authority to reverse trial court decisions for erroneous interpretations or applications of the law. [Bank of Miss. v. Hollingsworth 609 So.2d 422, 424 \(Miss. 1992\)](#) (citing [Harrison County v. City of Gulfport 557 So.2d 780, 784 \(Miss. 1990\)](#)). If the trial court's findings were manifestly wrong or the court applied an erroneous legal standard, this Court has the authority to reverse. [Tilley v. Tilley, 610 So.2d 348, 351 \(Miss. 1992\)](#). Therefore this Court is not required to defer to the trial court's judgments or rulings.

B. *Because the acts and omissions of the defendants do not involve a basic governmental policy decision, the defendants are not entitled to discretionary function immunity under the Mississippi Tort Claims Act.*

The MTCA provides the exclusive remedy against a governmental entity or its employee for acts or omissions which give rise to a suit. [L.W. v. McComb Separate Municipal School District, 754 So.2d 1136, 1138 \(Miss. 1999\)](#). See also, [Miss. Code Ann. §11-46-7\(1\) \(Supp. 2000\)](#). Any tort \*13 claim filed against a government entity or its employee shall be brought only under the MTCA. *Id.* The MTCA waives sovereign immunity from claims for money damages arising out of the torts of governmental entities and their employees. *Id.* However, certain circumstances are exempt from this waiver of immunity. *Id.* at 1139. The Mississippi Legislature codified several exceptions, two of which are germane to the case *sub judice*:

(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:

(b) Arising out of any act or omission of any 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 ...

(d) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on part of a governmental entity or employee thereof whether or not the discretion is abused. ...

[Miss. Code Ann. § 11-46-9\(b\)\(d\)](#)

This Court has addressed the issue of whether the act(s) and/or omission(s) of a governmental entity are discretionary or ministerial in nature. [L.W., 754 So.2d at 1141](#). For purposes of determining immunity under the MTCA, an act or omission is “ministerial” if it is positively imposed by law and if the performance of the conditions imposed are not dependent on an officer’s judgment or discretion. *Id.* (citing [Davis v. Little, 362 So.2d 642, 644 \(Miss. 1978\)](#)).

In contrast, a duty is “discretionary” within the meaning of the MTCA if it requires an official to use his own judgment and discretion in the performance thereof. *Id.* In determining whether governmental conduct is discretionary within the meaning of the MTCA, courts must answer two questions: (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. \*14 [Jones v. Miss. Dep’t of Transp., 744 So.2d 256, 260 \(Miss. 1999\)](#). Therefore, the *Jones* test requires a determination of (1) whether the supervision of Willie McCray, acting in the line and scope of his employment with Jefferson County School District, involved an element of choice and judgment; and if so (2) whether the choice of judgment exercised by Mr. McCray involved social, economic, or political policy.

In the instant case, the trial court determined that no official rule or regulation existed at the time of the accident concerning requisite breaks and hydration methods for football players within the school district. (Vol. 6, pp. 861-863, R.E. 27-29). Further, the trial court held that the conduct of the government was discretionary in nature, so as to entitle the defendants to immunity. (Vol. 6, pp. 861-863, R.E. 27-29). It follows that the defendants made a judgment of how to supervise the football players during practices. To such an end, the first step of *Jones* may or may not be satisfied.

The second step in *Jones* involves a determination as to whether the judgment of how to supervise the high school athletes involves public policy. *Id.* In the instant case, the trial court did not make such a determination, before ruling in favor of the defendants, whether the supervision of high school athletes is grounded in public policy. Having been decided before the promulgation of *Jones*, the trial court in the instant case, did not consider whether or not the decisions of McCray and Jefferson County School District involved substantive public policy. Plaintiff contends that the law set forth in *Jones* is controlling, as well as, retroactive to the extent that claims against the state and its political subdivisions, tried before lower courts, may be appealed to Mississippi appellate courts for a determination of law.

\*15 Essentially, *Jones* stands for the proposition that only those functions which by nature are policy decisions, whether made at the operational or planning level, are protected. *Id.* In the instant case, conducting football practice in the extreme conditions by the defendants did not involve official discretionary decision-making by the school district or Mr. McCray. Mr. John E. Dickey, Superintendent for Jefferson County School District, was asked during trial whether the football practices involved the formulation and implementation of government policy, and his response was that it did not. When asked about safety policies and regulations, he responded, “We didn’t put a lot of emphasis on the safety, no.”<sup>[FN3]</sup>

FN3. Refer to testimony of Superintendent Dickey. (p. 78, ll. 6-26, p. 82, 11

Assuming *arguendo* that the decision as to when and how to practice high school football involves governmental “policy making” activity as required by *Jones*, then the safety of the student athletes during football practice would be considered a ministerial function. The students’ safety may be considered a ministerial duty because state law places a duty of ordinary care on school personnel to minimize risks of personal injury and to provide a safe school environment. [L.W., 754 So.2d at 1143](#). Coach Alex Pipes, the present head football coach and assistant principal, and Dr. Ennis Proctor, the executive director of the Mississippi High School Activities Association, both testified that it was the duty of the teachers and staff members of a school system to provide reasonable and adequate

supervision, to provide for the safety of the children, and to render first aid to a child who has suffered a sudden illness or sustained an injury in their presence.<sup>[FN4]</sup> Coach Pipes and Dr. Proctor stated that it was the duty of a football coach, practicing in hot weather, to recognize and treat heat-related illness(es). Coach Pipes testified that there was no discretion involved in “when” and “how” you treat heat-related illnesses.<sup>[FN5]</sup> Plaintiff contends that the acts and omissions by the defendants were gross acts of negligence and not substantive policy decisions. The gross negligence alleged and proven by plaintiff far exceeds the minimum standard of “simple acts of negligence” or “mere negligence”, as set by this reviewing Court. In [Gale v. Thomas, 759 So. 2d 1150, 1162 \(Miss. 1999\)](#), it was noted, “[T]his Court must distinguish between real policy decisions implicating governmental functions and simple acts of negligence which injure innocent citizens.”

FN4. Refer to the testimony of Dr. Proctor. (p. 201-202, ll. 24-29, 1). Refer to the testimony of Coach Pipes. (p. 215, ll. 10-16)

FN5. Refer to the testimony of Coach Pipes. (p. 216-217). Refer to the testimony of Dr. Proctor. (p 201-202, ll. 22-29, 1-21).

Other jurisdictions determining whether governmental immunity was appropriate have analyzed whether the discretionary decisions were grounded in public policy. For example, the New Hampshire Supreme Court in [Hacking v. Town of Belmont 143 N.H. 546, 736 A.2d 1229, 1232 \(1999\)](#), held that the town and school district were not entitled to discretionary function immunity in a negligence action arising from injuries suffered by a student while participating in an elementary school basketball game. The *Hacking* Court noted that while the student and her parents challenged the defendants' selection of coaches and referees, even though coaches and referees were volunteers, decisions of the referees and coaches were not decisions that concerned municipal planning and public policy. *Id.* at 1233. In *Hacking*, plaintiff, a sixth grade student, was injured during a girls basketball game. *Id.* at 1231. As a result of accident, plaintiff sustained a permanent injury to her leg. *Id.* In declining to extend immunity to the coaches and referees, the Court noted:

The discretionary function exception ‘was not designed to cloak the ancient doctrine of [municipal] immunity in modern garb.’ ” [Adriance v. Town of Standish, 687 A.2d 238, 241 \(Me. 1996\)](#). Elevating the decisions of referees and \*17 coaches in the course of an elementary school basketball game to the level of governmental planning or policy formulation would indeed undermine the rule ... establishing immunity as the exception.

Accordingly, we hold that the trial court did not err in denying the motion to dismiss on the grounds that the decisions of the referees and coaches were not entitled to discretionary function immunity.

[Hacking v. Town of Belmont, 143 N.H. 546, 736 A.2d 1229, 1234 \(1999\)](#).

In [Peavler v. Bd. of Comm'rs, 528 N.E.2d 40, 48 \(Ind. 1988\)](#), the Indiana Supreme Court held summary judgment was inappropriate where the counties did not demonstrate a policy-oriented decision-making process. The *Peavler* Court acknowledged that government immunity still exists for actions that involve actual policy-making decisions.<sup>[FN6]</sup> In *Peavler*, plaintiffs, motorists, brought suit against counties alleging negligent failure to post warning signs on county roads. *Id.* at 41. The county moved for summary judgment on the grounds of governmental immunity for discretionary functions. *Id.* On interlocutory appeal, the Indiana Court of Appeals determined that such a decision of where to place road signs was discretionary. *Id.* The Indiana Supreme Court vacated the decision of the Court of Appeals and held:

FN6. The *Peavler* Court outlined several questions for the trial court to use in determining whether the governmental action furthered public policy: (1) the nature of the conduct; (2) the effect on governmental operations; and (3) the capacity of the court to evaluate the propriety of the government's action - whether the torts standards offer an insufficient analysis of plaintiff's claim. [Peavler, 528 N.E.2d at 46](#).

Immunity for discretionary functions; however, does not protect all mistakes of judgment The discretionary function exception insulates only those significant policy and political decisions which cannot be assessed by customary tort standards. In this sense, the word discretionary' does not mean mere judgment or discernment. Rather, it refers to the

exercise of political power which is held accountable only to the Constitution or the political process.” (quoting [Miller v. United States](#), 583 F.2d 857, 866-867 (6th Cir. 1978)).

[Peavler v. Bd. of Comm'rs](#), 528 N.E.2d 40, 48 (Ind. 1988).

\*18 In [Alake v. City of Boston](#), 40 Mass.App.Ct. 610, 666 N.E.2d 1022 (1996), the Appeals Court of Massachusetts held that discretionary function immunity was not appropriate in that particular case. In *Alake*, plaintiff sustained injuries while on an escalator at a subway station as the result of pushing and jostling by a large group of high school students. *Id.* at 1023. Plaintiff brought suit against the City of Boston, alleging that the city provided too few supervisors and that those present were negligent in carrying out their duties. *Id.* The Appeals Court of Massachusetts overruled the trial court's grant of summary judgment for the defendant and held that the imposition of liability for such conduct does not have major implications with respect to public education. *Id.* at 1025. The Court held, “while this conduct undoubtedly did involve the exercise of judgment and discretion, the nature of that judgment is not qualitatively different from the judgments of private individuals which are reviewed daily through actions in tort.” *Id.* (quoting [Whitney v. Worcester](#), 373 Mass. 208, 366 N.E.2d 1210 (1977)).

The interpretation of the discretionary function exception as set forth by the *Restatement (Second) of Torts* is as follows:

Even when a State is subject to tort liability, it and its governmental agencies are immune to liability for acts and omissions constituting

- (a) the exercise of a judicial or legislative function, or
- (b) the exercise of an administrative function involving the determination of fundamental government policy.

*Restatement*, *supra* §895B(3).

The progeny of cases of [Prince v. Louisville Mun. School Dist.](#), 741 So.2d 207 (Miss. 1999), [Quinn v. Mississippi State University](#), 720 So.2d 843 (Miss. 1998), and \*19 [Lennon v. Peterson](#), 624 So.2d 171 (Ala. 1993) are not controlling authority on the issue of whether or not the defendants' actions rise to the level of discretionary acts, so as to provide immunity. Clearly, each case presents conduct on the part of governmental entities and governmental actors which does not rise to the level of policy-oriented decision-making processes. The cases are distinguishable from the instant case in that *Prince*, *Quinn*, and *Lennon* do not present governmental conduct which has major policy implications on public education. In *Prince*, this Court held that the defendants (coaches) were entitled to qualified immunity because their conduct was considered discretionary in nature. *Id.* at 212. In *Quinn*, this Court faced with a comparable factual situation, ruled that the defendants (coaches) were entitled to qualified immunity because their conduct was considered discretionary in nature. *Id.* at 849. However, the instant case is readily distinguishable from *Prince* and *Quinn* and forces this Court to distinguish between real policy decisions implicating governmental functions and simple acts of negligence which injure innocent citizens.

The trial court has relied upon [T.M. v. Noblitt](#), 650 So.2d 1340, 1346 (Miss. 1995) and [Region VII Mental Health-Mental Retardation Center v. Isaac](#), 523 So.2d 1013, 1017 (Miss. 1988) to establish the proposition that supervision is a discretionary function. This argument is without merit. First, any reliance upon *Noblitt* is misplaced in that the case did not stand for the proposition that supervision in a school setting is a discretionary function. The *Noblitt* opinion determined that, for purposes of government immunity, the statutory framework of reporting cases of suspected child abuse included elements of both ministerial and discretionary conduct. *Id.* at 1346. Second, neither *Noblitt* nor *Isaac* comports with the more current test to determine a discretionary act, as set forth in *Jones*. Again, *Jones* stands for the proposition that only those functions which by nature are substantive policy decisions are protected. *Id.* at 260. Essentially, supervision is not such a \*20 substantive policy-oriented process, significant enough to warrant immunity.

Other states have weighed in on this issue of discretionary function immunity. It is not enough for a challenged activity to simply involve evaluation, judgment and expertise; the activity must also be based on public policy consideration.

[Carroll v. City of Portland, 1999 ME 131, 736 A.2d 279 \(1999\)](#). A discretionary decision is not simply a routine decision made by an employee in the course of day-to-day activities. [Garrison v. Deschutes County, 162 Or. App. 160, 986 P.2d 62 \(1999\)](#). Not every governmental action involving discretion is a discretionary function; only those decisions arising out of a governmental entity's basic policy-making function qualify for immunity under the discretionary function exception. [Trujillo v. Utah Dept. of Transp., 1999 UT app 227, 986 P.2d 752 \(1999\)](#). This Court should abandon the decisions rendered in *Prince and Quinn* as no longer appropriate for claims arising under the MTCA. Instead, this Court should follow the modern position taken by a majority of jurisdictions, as well as, that taken by the *Restatement (Second) of Torts* in holding that only decisions arising out of a governmental entity's basic policy-making function will qualify for immunity under the state's discretionary function exception.

The record does not contain any evidence which establishes that Willie McCray or Jefferson County School District engaged in any policy-oriented, decision-making process(es) concerning the supervision of their student athletes. The testimonies of Mr. McCray, Mr. Pipes, Mr. Dickey, and Dr. Proctor reflect that the supervision of high school football players during practice did not involve any policy-oriented decision making process on the part of Mr. McCray nor the school district. There is no evidence in the record of any sort resembling a policy decision. For these reasons, it follows that the learned trial judge erred in determining that the defendants' conduct was discretionary in nature.

**\*21 II. JEFFERSON COUNTY SCHOOL DISTRICT AND WILLIE MCCRAY FAILED TO EXERCISE ORDINARY CARE IN THE PERFORMANCE OF THEIR DUTIES, AND BECAUSE OF SUCH, THEY ARE NOT PROTECTED BY THE SHIELD OF IMMUNITY, EVEN THOUGH THE ACT OR OMISSION IS HELD TO BE DISCRETIONARY IN NATURE.**

In [Stewart \*el rel.\* v. City of Jackson, 804 So.2d 1041, 1047 \(Miss. 2002\)](#), this Court held that in a claim under the Mississippi Tort Claims Act (MTCA), even if the government entity and its employee can pass the public policy function test, and the act or omission is held to be discretionary, it does not absolve the government entity and its employee from using ordinary care in the exercise of their discretion. If the state actor fails to use ordinary care, then there is not shield of immunity. *Id.* at 1047. In *Stewart*, plaintiff, a senior citizen, was injured when attempting to exit a van which was managed, operated and controlled by the City of Jackson. *Id.* at 1044. Plaintiff brought suit against the City of Jackson, the driver, and University of Mississippi Medical Center. *Id.* The trial court granted summary judgment in favor of the City of Jackson and the van's driver. *Id.* On interlocutory appeal, this Court said even if the governmental entity and its employee can pass the "public policy function test," (set forth in *Jones*), and the act or omission is held to be discretionary, it does not absolve the government entity and its employee from using ordinary care in the exercise of their discretion. *Id.* at 1047. (quoting [Leflore County v. Givens, 754 So.2d 1223, 1227 \(Miss. 2000\)](#)). Further, the *Stewart* Court noted that if the state actor fails to use ordinary care, then there is no shield of immunity. *Id.* (emphasis added).

In [L.W. v. McComb Separate Municipal School District, 754 So.2d 1136, 1138 \(Miss. 1999\)](#), the plaintiff, student was assaulted by a fellow student while at school. Plaintiff brought suit against the school district, alleging *inter alia* negligence in providing supervision, monitoring, and a safe environment. *Id.* at 1137. The trial court granted the defendant's Motion to Dismiss on the \*22 grounds that the conduct was discretionary, and plaintiff perfected an appeal. *Id.* This Court in *L.W.*, noted that discretionary conduct alone is not an absolute bar to liability. *Id.* at 1411. When conduct is found to be discretionary, a determination of ordinary care must then be made before the statutory bar is raised. *Id.* (Emphasis added).

In the instant case, plaintiff contends that the learned trial judge erred in concluding that plaintiff made no showing of any failure on the part of the defendants to exercise reasonable care. (Vol. 6, pp. 861-863, R.E. 27-29). In *Stewart* this Court noted that determining whether certain patrons needed assistance while walking from the van to the elderly home involved judgment and choice. *Id.* at 1048. However, the Court held that the acts or omissions of the City of Jackson and the driver were not the type of discretionary acts or omissions contemplated as granting immunity by the MTCA. *Id.* Therefore, they are discretionary acts or omissions that do not enjoy sovereign immunity. *Id.* (emphasis added).

Comparable to *Stewart*, Mr. Willie McCray created a dangerous condition at the Jefferson County High School football field, when he made his players practice in 90 degree heat, in full gear with only one water break, for two

hours and doing wind sprints at the conclusion of practice. Surely, such negligent conduct constitutes failure to exercise ordinary care. In *Stewart*, this Court determined that a driver's failure to assist an elderly citizen exit a transportation van was a discretionary act not subject to immunity. *Id.* In the instant case, the atrocious condition created by Mr. McCray for his players, is underpinned by the testimony of Mr. Pipes, Mr. Dickey, Dr. Proctor and other witnesses presented by the plaintiff as set out in the facts above. This situation was created by Coach McCray because he was not aware of the serious danger which his players faced by practicing in 90 degree weather, and without adequate water breaks. Further, Mr. John E. Dickey, \*23 Superintendent for Jefferson County School District, was asked during trial asked about safety policies and regulations, he responded, "We didn't put a lot of emphasis on the safety, no."<sup>[FN7]</sup> Such negligence on the part of the defendants clearly constitutes failure to exercise ordinary care for the safety and well being of the participating student athletes. Again, one general maxim which *L.W.* teaches is that in circumstances presented by the case *sub judice*, both state and federal law place a duty of ordinary care on school personnel to minimize risks of personal injury in order to provide a safe school environment. *Id.* at 1145. The defendants in the present case failed to recognize and carry out such duty.

FN7. Refer to testimony of Superintendent Dickey. (p. 78, ll. 6-26, p. 82, 11

In this case, the question is whether a reasonable person in similar circumstances would have practiced at 2:30 in the p.m. for 2 hours in 90-degree heat, without checking the humidity level, in full football gear, and providing only one water break for his players. Would a reasonable person in similar circumstances have made the football players run wind sprints at the end of practice? When informed that one of his players was suffering heat-related problems, would a reasonable person would refuse him water and first aid and then force him to run additional wind sprints? The evidence adduced throughout the trial both on the plaintiffs case-in-chief and the defendant's case-in-chief established only one interpretation of the fact that the minor child was a victim of gross misconduct on the part of the defendant, if, indeed, he only had one drink of water under the practice circumstances. There was no evidence to the contrary. Plaintiff contends and the weight of the credible evidence reflects that a reasonable, prudent high school football coach would not have conducted practice for 2 hours in 90-degree heat; without checking the humidity level and without \*24 providing his players adequate water breaks.

To dispense with any inference that the dangerous condition presented on August 21, 1995 was an "open and obvious" danger which plaintiff voluntarily chose to accept, the "open and obvious" defense to negligence actions has been abolished in our jurisdiction. In the pertinent case law, our Courts have held that since defendant and plaintiff were both at fault in causing or attributing to harm, then damages can be determined through comparative negligence of both; overruling *Kroger, Inc. vs. Ware*, 512 So.2d 1281 (Miss. 1987), Miss. Code Ann. §17-7-15, 17-7-17, *Thar vs. Bunge*, 641 So.2d 20 (Miss. 1994). Assuming *arguendo*, that the Court attributes any negligence toward Victor, his contribution is so small in the equitable distribution of authority between him and Coach McCray that it is negligible. Further, assuming *arguendo*, that contributory negligence is an issue in the present case, the defendants' duty to exercise ordinary care in the performance and execution of their duties is not abrogated or lessened.

If anything, the condition set up and created by Coach McCray was one of a latent defect. This principle has been recognized in our juridical decisions. For example, in the case of *Stelly v. Barlow Woods, Inc.*, 830 F. Supp. 936, affirmed 47 F.3d 427 (SD 1993), the Court held that a lack of lighting and mass of people on a dance floor where drinks were spilled resulting in customer's fall and [knee injury](#) created a latent defect, a risk of which customer could not be deemed to have assumed.

Based upon the conduct of the governmental actors in *L.W.* and *Stewart*, it is clear from the facts of the instant case that negligence on the part of the defendants clearly constitutes failure to exercise ordinary care for the safety and well being of the participating student athletes. Mr. McCray \*25 and Jefferson County School District had a duty of ordinary care to minimize risks of personal injury to their student athletes. By failing to check the humidity and dew point levels, failing to provide adequate water breaks for the players, and failing to provide water to requesting players; the defendants clearly deviated from the requisite standard of care. To such an end, plaintiff contends that the learned trial judge erred in concluding that the plaintiff made no showing that defendants failed to exercise reasonable care. Considering that the defendants failed to exercise reasonable care in the execution of their duties, *Stewart* dictates that the defendants should not be afforded immunity.

### III. THE COURT ERRED IN FAILING TO RECOGNIZE PLAINTIFF AS AN INVITEE. RATHER THAN A MERE LICENSEE. AND AS AN INVITEE, HE WAS ENTITLED TO A HIGHER STANDARD OF DUE CARE AND WARNING OF HAZARDS BY THE DEFENDANTS

In the instant case, the trial court erred in failing to recognize that plaintiff was an invitee, and as such, he was entitled to a higher standard of due care by the defendants, Willie McCray and Jefferson County School District. In [Martin v. B.P. Exploration & Oil, Inc., 769 So.2d 261, 263 \(Miss. 2000\)](#) this Court held that an invitee is a person who goes upon the premises of another in answer to the express or implied invitation of the owner for their mutual advantage, while a licensee is one who enters upon the property of another for his own convenience, pleasure or benefit. (quoting [Hoffman v. Planter Gin Co., Inc., 358 So.2d 1008, 1011 \(Miss. 1978\)](#)). The *Martin* Court goes further and notes, a premises owner owes an invitee the duty to use ordinary care to have the premises in a reasonably safe condition for use in a manner consistent with the purposes of the invitation. *Id.* at 264. A “public invitee” has been characterized as one who is invited to enter or remain on the premises as a member of the public for a purpose for which the land is held open to the public. *Id.*

\*26 Mississippi courts have yet to characterize students as invitees of their respective school districts. However, other jurisdictions have held that students, as well as student athletes, are considered by the law as invitees, rather than mere licensees, and are entitled to a higher standard of due care and warning of any hazard from the landowner which he knows about or has reason to know about. [Tanari v. School Directors of Dist. No. 502, Bureau County, 69 Ill. 2d 630, 373 N.E.2d 5 \(1977\)](#).

In [Kimes v. Unified School Dist. No. 480, 934 F.Supp. 1275, 1278 \(Kan. 1996\)](#), a United States District Court for the North District of Kansas recognized a vocational student as an invitee in a negligence suit against the school district. As an invitee, the court recognized that the occupant of premises must use ordinary care to keep the premises in a reasonably safe condition, and must warn invitees of concealed dangers of which the proprietor knows or should know. *Id.* (citations omitted).

In [Home v. North Kitsap School Dist., 92 Wash.App. 709, 965 P.2d 1112, 1115 \(1998\)](#), the Court of Appeals of Washington held that a junior high school football coach had the status of a “public invitee” when he was injured during a football game. The Court noted that because the plaintiff was related to the school district and his presence was related to the school's business, he was an invitee as a matter of law.

Similar to the above authority, plaintiff in the instant case should have been properly categorized as a public invitee. According to the records, plaintiff was invited to enter or remain on the premises of Jefferson County School District as a member of the student body for a purpose of participating in a district sanctioned event. As such, the defendants, Willie McCray and the Jefferson \*27 County School District, owed the plaintiff a duty to make the premises safe, as well as, a duty to warn of hazards which were known or should have been known. The defendants could have easily achieved this duty by simply providing adequate amounts of water to the student athletes and providing reasonable numbers of breaks. Because of the defendants' breach of this duty, plaintiff suffered a [heat stroke](#) and damages in the amount of \$350,000.00. (Vol. 6, pp. 861-863, R.E. 27-29).

The defendants will contend that [§ 11-46-9\(1\)\(v\)](#) of the MTCA specifically exempts claims from the waiver of immunity which arise as a result of a dangerous condition on public property which was not caused by an employee. Further, they assert that high temperatures are a phenomenon of nature and cannot be linked to the conduct of Willie McCray or Jefferson County School District.

Plaintiff does not claim that the defendants' are liable in that they created the dangerous conditions which caused plaintiff's injuries. Instead, plaintiff asserts that the defendants are negligent in that they failed to make the premises safe and failed to warn of hazards which were known or should have been known. To such an end, the MTCA does not preclude plaintiff from establishing liability against the defendants under premises liability theories.

### IV THE DEFENDANT IS LIABLE FOR ITS USE OF AND CONDONATION OF FORCE AS A FORM OF DISCIPLINE INASMUCH AS THE ACTIONS OF THE HEAD COACH AND COACHING STAFF FALLS

IWITHIN THE MISSISSIPPI TORTS CLAIM ACT Further, another ground for liability against the defendants is founded in Miss. Code Ann.

[§11-46-9 \(1\)\(x\)](#) which states, in its pertinent part:

(1) A governmental entity and its employee acting within the course and scope of their employment or duties shall not be liable for any claim:

(x) Arising out of... the taking of any action to maintain control and discipline of students by teacher ... unless the teacher ... acted in bad faith or with malicious \*28 purpose or in a manner exhibiting a wanton and willful disregard of human rights or safety.

The facts in the instant case are replete with examples and instances of misconduct of the head coach and coaching staff that exhibits “a wanton and willful disregard of human rights or safety”.

The plaintiff, a running back, had practiced running plays on the game field. Because Victor was having a hard time catching on to the running plays, the Coach made Victor do several repetitions. (Vol.9, p. 190,11. 8-24, R.E. 75) Coach McCray had also denied water to other players, James Jackson, Jerry McDonald and Kenneth Smith, during that practice. (Vol. 8, p. 106, ll. 10-19, p. 125-126,11. 21-29, 1-4, R.E. 55, R.E. 62-63)After the first set of wind sprints, Coach McCray had the team come together in the middle of the game field for a huddle. Coach noticed that the plaintiff was staggering, walking instead of running to the huddle and he ordered everyone to do some more sprints. (p. 123-124, ll. 4-29, 1-17, RE. 60-61)

Cedric Jackson testified as follows:

A. Coach called a huddle, called us to a huddle. We was fixing to end practice, and Jerry McDonald and Victor -- Victor had fell, and Jerry McDonald was walking to the huddle. You know, we usually run to the huddle, and Jerry was walking and, you know, when somebody be walking or somebody was walking then, you know, we have to do some more running. p. 102-103, 11. 25-29, 1-8, R.E. 53-54)(Emphasis added.)

According to Coach Pipes, the coaches, including Coach McCray, used extra running as a discipline tool during football practice. (p. 220-221,11. 8-29, 1-4, R.E. 89-90)

Hence, the plaintiff has more than met his burden of establishing that the school district is liable for his injuries sustained as a proximate cause of the head coach's use of discipline which exhibited a wanton and wilful disregard for the safety of Victor Harris.

*\*29 V. THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFF SUFFERED DAMAGES IN THE AMOUNT OF \$350,000.00.*

Per damages of Victor Harris, the plaintiff respectfully submits that the trial court erred in its assessment of damages in the amount of \$350,000.00. Assuming that this Court reverses this case on the issue of liability, the damages issue should be reconsidered by the trial court.

It is uncontroverted that Victor Harris sustained serious injuries. Victor was taken to Jefferson County Hospital where he was diagnosed with a [heatstroke](#), and transferred to Natchez Regional Medical Center where he remained in the hospital for a total of 14 days, 4 days in a coma out of the 8 days in intensive care. (Vol. 9, p. 173-174, 11. 23-29, 1-5, R.E. 70-71) Victor made a good recovery after physical therapy and incurred \$68,000.00 in medical bills. (Exhibits Vol. 1, Exhibit P-5, Vol. 8, p. 74, 1. 16-24, R.E. 92, R.E. 41)

According to Victor Harris' mother and schoolmates, Victor suffers from slurred speech, is very heat-sensitive, not as active as before, forgets more, tires quickly, and cannot learn as fast and suffers from depression. His mother says

that football was an important part of his life which he really enjoyed and now he misses it a lot. (Vol. 9, pp. 176-177, ll. 19-22, 19-25, R.E. 72-73)

According to Dr. Guild, Dr. Thomas and Dr. Katz, Victor suffered some neurological deficit the extent of which is difficult to determine. They both say Victor could benefit from a neuropsychological evaluation which costs between \$800.00 to \$1,500.00 (Vol. 8, p. 147, ll. 1-10, R.E. 69) and a visit to Timber Ridge ranch between 3 to 9 months at a cost of \$12,000.00 to \$18,000.00 per month. (Vol. 8, p. 144-146, ll. 1-29, 1-29, 1-17, R.E. 66-68)

These undisputed facts relating to Victor's injuries and permanent damages far exceed an \*30 award of \$350,000.00. Based on the cases of [\*Detroit Marine v. McCree\*, 510 So.2d 462 \(Miss. 1987\)](#) and [\*Flightline, Inc. v. Tanksley\*, 608 So.2d 1149 \(Miss. 1992\)](#), we believe that the case has a damage value of \$1,500,000.00 to 2,000,000.00. As bears pointing out, in the case of *Detroit Marine*, supra our Mississippi Supreme Court affirmed an award of \$1,000,000.00 based upon \$18,000.00 medical bills, \$17,000.00 in lost wages, and no permanent loss of wage earning capacity.

#### IV. CONCLUSION

Considering the above arguments and propositions, Plaintiff, Victor Harris, By and Through His Mother, and Next Friend, Betty Jean Harris, seek that this Court reverse and render on the issue of liability, and reverse and remand on the issue of damages to the Circuit Court of Jefferson County of Mississippi for reconsideration.