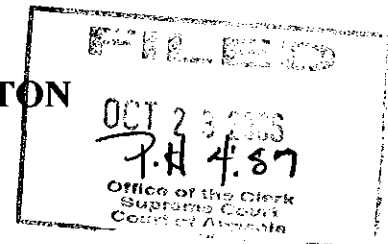


**COPY**

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**TYRONE MORTON AND ANNIE MORTON  
APPELLANTS**



**VS**

**CITY OF SHELBY AND JAMES CARMICLE  
IN HIS INDIVIDUAL AND OFFICIAL CAPACITY  
APPELLEES**

**NO. 2006-CA-00255**

**Representing the Appellants**

**Sarah O'Reilly-Evans MSB # [REDACTED]  
Carrie Johnson MSB # [REDACTED]  
Attorneys At Law  
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**Representing the Appellees**

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Hunt & Ross  
123 Court Street  
Clarksdale MS 38614**

**TYRONE MORTON AND ANNIE MORTON**

**APPELLANTS**

**VS.**

**2006-CA-00255**

**CITY OF SHELBY AND JAMES CARMICLE IN  
HIS INDIVIDUAL AND REPRESENTATIVE CAPACITY    APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

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

Carrie Johnson  
Jackson Mississippi  
Counsel for the Appellants

R. Jefferson Allen  
Clarksdale Mississippi  
Counsel for the Appellees

Sarah O'Reilly-Evans  
Jackson Mississippi  
Counsel for the Appellants

Larry O. Lewis  
Clarksdale Mississippi  
Former Judge Bolivar County Circuit Court

Tyrone Morton  
Shelby Mississippi  
Appellant

Charles E. Webster  
Clarksdale Mississippi  
Bolivar County Circuit Court Judge and  
Predecessor of Larry O. Lewis

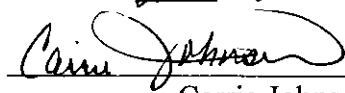
Annie Morton  
Shelby Mississippi  
Appellant

Rosie Simmons  
Cleveland Mississippi  
Bolivar County Circuit Clerk

James Carmicle  
Mound Bayou Mississippi  
Appellee

City of Shelby Mississippi  
Appellee

Certified this the 23<sup>rd</sup> day of October 2006.

  
Carrie Johnson

## **TABLE OF CONTENTS**

	<b>Page</b>
Certificate of Interested Persons	I
Table of Authorities Cited	ii
Statement of the issues	1
Statement of the case	2-3
Facts	4
Summary of Argument	5
Argument	6-17
Conclusion	17
Certificate of Service	18

## TABLE OF AUTHORITIES CITED

	<i>Page</i>
<i>McMillan v. Rodriguez</i> , 823 So. 2d 1173 ( Miss. 2002)	6
<i>Thomas v. Mississippi Dept. of Public Safety</i> , 822 So. 2d 789 (Miss. Ct. App. 2004)	9
<i>Estate of Williams v. City of Jackson</i> , 844 So. 2d 1161 (Miss. 2003)	9
<i>Prescott v. Leaf River Forest Products, Inc.</i> , 740 So.2d 301 (Miss. 1999)	11
<i>DeBlanc v. Stancil</i> , 814 So.2d 796 (Miss. 2002)	14
<i>Baptist Memorial Hospital v. Union County v. Johnson</i> , 754 So.2d 1165 (Miss. 2000)	15

## **STATEMENT OF THE ISSUES**

The following issues are raised by the Appellants on the appeal of the trial court's order granting summary judgment to the Appellees:

- I. Did the trial court apply the standard for granting the motion for summary judgment ?
  - A. The trial court err by shifting the burden to the Appellants who were non-movants?
  - B. The failure of Officer Carmicle to immediately stop following striking an unidentified object or person with his patrol vehicle supports a presumption that the officer was acting in reckless disregard for the safety of others immediately prior to the accident's occurrence and during the accident's occurrence under the totality of the circumstances.
- II. Did the trial court err by granting summary judgment to the Defendants when discovery was incomplete?
- III. Did the trial court commit reversible error by using the Appellant Tyrone Morton's deposition testimony as grounds for granting the Motion for Summary Judgment and denying Appellant's motion to strike the testimony when the Appellee wilfully failed to provide the deposition to Appellant Tyrone Morton for reading and signing?
- IV. Did the trial court erred by denying in part and granting in part the Plaintiffs Motion to Compel?

## **STATEMENT OF THE CASE**

Tyrone Morton and Annie Morton filed a complaint seeking damages for physical injuries, pain, and suffering, loss of consortium, and economic damages against the City of Shelby and its former Chief of Police, James Carmicle. The injuries and damages sustained by the Plaintiffs arose when James Carmicle struck Plaintiff Tyrone Morton with his patrol vehicle while he was jogging on the night of November 21, 2003 .

## **PROCEDURAL HISTORY**

The Defendants moved for summary judgment on October 19, 2005 and a hearing on the Defendant's motion was held on December 5, 2005. On the same day Defendant's motion for summary judgment was held, a hearing was also held on a Motion to Compel Discovery which had previously been filed by the Plaintiffs.

During the hearing on the Motion for Summary Judgment, the Plaintiffs moved ore tenous to strike the deposition testimony of Plaintiff Tyrone Morton because the Defendants' counsel wilfully failed to produce the deposition to the Plaintiff for reading and signing. The court took the motions under advisement and did not rule on any from the bench. Subsequent to the hearing, the court granted the Defendant's motion seeking summary judgment, but did not rule on the Plaintiff's Motion to Compel Discovery or the Plaintiff's ore tenous motion. The Plaintiffs filed a Motion Seeking Relief Pursuant to Mississippi Rules of Civil Procedure 52, 59, and 60 and brought to the Court's attention that it had not ruled on the Plaintiff's Motion to Compel Discovery and the ore tenous motion to strike. A hearing was held on the Plaintiff's Motion Seeking Relief Pursuant to Mississippi Rules of Civil Procedure 52, 59, and 60. The Court took the motion under advisement and did not rule from the bench.

Subsequently, the Court entered an order granting in part and denying in part the Plaintiff's Motion to Compel Discovery which ordered the Defendants to provide additional discovery to the Plaintiffs in fourteen (14) days. Because the Court did not address the status of its order previously granting summary judgment to the Defendant in its order granting in part and denying in part the Motion to Compel Discovery, the Plaintiffs filed a motion requesting that the Court clarify the status of its grant of summary judgment. The Court subsequently entered orders denying the Motion to Clarify and also the Plaintiff's Motion Seeking Relief Pursuant to Rule 52, 59, and 60 resulting in the current appeal.

## **FACTS**

On or about November 21, 2003, Tyrone Morton was jogging in a grassy area near the Industrial Road outside the corporate limits of the City of Shelby, Mississippi when he was struck by James Carmicle, formerly the police chief for the City of Shelby, Mississippi. Officer Marion Bedford and James Carmicle were escorting one or two school buses of Ruleville Central High School to Highway 61 which intersects Industrial Road in Bolivar County and leads to Shelby, Mississippi. Ruleville Central High School had participated in an athletic contest with Broad Street High School located in Shelby, Mississippi. According to the testimony of Officer Bedford, it was customary for the City of Shelby police department to escort buses from visiting schools to Highway 61 using the same route traveled by Carmicle and he on the night of November 21, 2003.

Marion Bedford lead the escort, and James Carmicle was traveling at the rear of the procession until he decided to pass the buses and Marion Bedford for the purpose of proceeding to the intersection of Highway 161 and Industrial Road. During the passing of the buses and Officer Bedford, Carmicle drove off the paved section of the road and struck Tyrone Morton. Morton rolled off the hood of Carmicle's vehicle into a ditch, and Carmicle continued on his journey though he had an eye injury. Carmicle eventually returned to the accident scene after completing the escort.



## **SUMMARY OF THE ARGUMENT**

The burden of establishing that there are no genuine issues of material fact to be tried lies with the party seeking summary judgment, not the non-movant. Summary judgment proceedings are not to be substituted for the trial of disputed facts, and a non-moving party must be accorded the benefit of the doubt. The trial court was cognizant of this standard but ignored it and committed reversible error by granting summary judgment to the Plaintiffs because they failed to make a “sufficient evidentiary showing”.

In addition to applying an incorrect legal standard, the trial court erred by granting summary judgment to the Defendants prior to completion of discovery when it was clear that the Defendants had failed to adequately respond to discovery and in denying the Plaintiffs Motion to Strike the deposition of Plaintiff Tyrone Morton because the Defendants wilfully refused to submit the deposition to the Plaintiff for reading and signing and had not produced a writing setting forth the reason why the Plaintiff had not read and affirmed the deposition.

Notwithstanding the court’s application of an incorrect legal standard in its grant of the Defendant’s motion for summary judgment, the court sanctioned the Defendant’s failure to comply with discovery by granting the summary judgment motion.

## ARGUMENT

### I. Did the trial court err in the granting of the motion for summary judgment?

This Court's standard of review related to the grant or denial of a motion for summary judgment is synonymous with the standard to be employed by trial courts pursuant to Rule 56 ( c ) of the Mississippi Rules of Civil Procedure. *McMillan v. Rodriguez*, 823 So.2d 1173, 1176 (Miss. 2002). A de novo standard of review is employed by examining all the evidentiary matters before the trial court - admissions in pleadings, answers to interrogatories, depositions, affidavits, etc... *McMillan*, 823 So.2d at 1177. Evidence must be viewed in a light most favorable to the party against whom the motion has been made. *Id.* If there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. *McMillan*, 823 So.2d at 1177. The burden of proving that no genuine issue of material fact exists is on the moving party. *Id.* A non-movant should be given the benefit of the doubt. *McMillan v. Rodriguez*, 823 So.2d 1173, 1177 (Miss. 2002).

#### A. The trial court erred by applying an incorrect standard and shifting the burden to the Appellants.

In its order granting summary judgment to the Defendants, the Court stated that the Plaintiffs failed to make a "*sufficient evidentiary showing*" that Defendant Carmicle recklessly disregarded the safety of others when he attempted to pass the school bus during the nighttime police escort. The Plaintiffs were not required to make a "sufficient evidentiary showing". The Defendants who moved for summary judgment were required to show and establish that there were no genuine issues of material fact to be tried entitling them to judgment as a matter of law.

Even though the Appellants were not required to make an evidentiary showing and did not bear the burden of establishing that there were no genuine issues of material facts, the Plaintiffs did not rely on the mere pleadings in their complaint. The Plaintiffs responded to the Defendant's Motion for Summary Judgment and demonstrated to the court that there were genuine issues of material fact to be tried. The Plaintiffs contended that the Defendant Carmicle was driving his vehicle in excess of the speed limit in a non-emergency situation contrary to the provisions of Section 63-3-517 of the Mississippi Code. The trial court erroneously concluded that the only evidence before it concerning the speed of Carmicle was the accident report indicating that his estimated speed was 35 miles per hour.

On the contrary, the deposition testimony of Marion Bedford contradicts the accident report and the judge's conclusion. Marion Bedford testified that when providing an escort, the speed limit was usually followed, and the speed limit was 45 miles per hour. Because Bedford's testimony suggests that the speed limit was being followed and Carmicle attempted to pass the school bus and the vehicle operated by Bedford so that he could arrive at the intersection of Highway 61 prior to Bedford and the buses, one may reasonably infer that Carmicle significantly exceeded 45 miles per hour. Indeed, the court acknowledged that the passing of someone would require the acceleration of one's speed (Tr 101).

No evidence was introduced by the Defendants contradicting Bedford's testimony that the speed limit on Highway 61 was 45 miles per hour, and his statement that they usually traveled the speed limit. Because Bedford's testimony contradicted the speed estimate indicated on the accident report, the court should not have resolved that there was not a triable issue of fact concerning Carmicle's speed. Issues of fact sufficient to require denial of a motion for summary

judgment are present where one party swears to one version of the matter in issue and another says to the opposite. *McMillan*, 823 So. 2d at 1177. Moreover, if the court was going to resolve the issue concerning the speed of Carmicle, its resolution should have been in favor of the Plaintiffs, who were non-movants. This is especially true when one considers that the court stated that “it is speculation either way”. (Tr 101). The court’s indication that “it is speculation either way” is synonymous with a conclusion that there was a genuine issue of material fact.

**B. The failure of Officer Carmicle to immediately stop after striking an unknown object or person supports a presumption that he acted with reckless disregard for the safety of others under the totality of the circumstances**

The Defendant admitted in responses to interrogatories that as he passed the school bus, he “felt something bump his car and glass strike his face”, yet he continued to Highway 61 and did not immediately stop. Pursuant to Section 63-401 of the Mississippi Code, a driver of a motor vehicle must immediately stop a vehicle at the scene of the accident or as close thereto as possible and return and shall remain at the scene of the accident. Officer Carmicle proceeded to complete the escort despite having knowledge that he had struck something near the road way and despite having eye injuries.

The Plaintiffs contended that a reasonably prudent individual and law enforcement officer would have immediately stopped and identified the person or object struck instead of proceeding with the escort; therefore, one might infer that Officer Carmicle consciously disregarded the safety of others when he attempted to pass the school bus and vehicle operated by Bedford in excess of speed limits. The court again, refused to accord the Plaintiffs the benefit of the doubt stating “actions taken after the impact are not necessarily reflective of driving demeanor prior to

and at the time of the accident.”

The court’s reasoning and analysis mirrors that of the Defendants and is flawed. In *Thomas v. Mississippi Dept. Public Safety*, the Court of Appeals indicated that in finding reckless disregard, the totality of the circumstances of an officer’s conduct must be considered. *Thomas v. Mississippi Dept. Public Safety*, 882 So.2d 789, 796 (Miss.Ct.App. 2004). The activity or conduct being evaluated in the instant case is the operation of a vehicle by Defendant Carmicle. In evaluating and assessing whether Defendant Carmicle operated the vehicle which struck Plaintiff Morton in a reckless manner, the totality of the circumstances required that his actions in moving and stopping be considered by the court. See *Estate of Williams v. City of Jackson*, 844 So. 2d 1161, 1165 (Miss. 2003) (court affirmatively stated that operating a vehicle involves both the moving and stopping).

In the present case, the court erroneously isolated the conduct of Officer Carmicle to the conduct believed to be exhibited immediately prior to striking the Plaintiff Morton and determined that there was no reckless disregard. The actions exhibited by Carmicle before, during, and after the accident constitutes the totality of the circumstances; therefore, it was error for the court to not consider Officer Carmicle’s conduct subsequent to striking the Plaintiff.

The following facts were present in the record and should have been considered under the totality of the circumstances in evaluating the conduct of Defendant Carmicle: (1) Officer Carmicle was operating his vehicle in non-emergency circumstances; (2) Officer Carmicle desired to arrive at the intersection of Highway 61 before the vehicle operated by Bedford and the school bus; (3) In order to arrive at the intersection of Highway 61 before Bedford and the bus, Carmicle had to increase his speed and travel from the rear of the school bus he followed; (4)

Carmicle traveled off the paved road and struck something when he attempted to pass the school bus and Bedford's patrol vehicle but did not immediately stop to ascertain what he struck; (5) Carmicle sustained an eye injury from glass but continued to operate his vehicle and proceeded to the intersection; (6) Carmicle's arrival at the intersection prior to Bedford was not absolutely necessary (7) Carmicle attempted to pass a patrol vehicle and a bus on a road which with little lighting (8) No sirens were being used by Carmicle which would alert the Plaintiff to his presence.<sup>1</sup>

**II. Did the trial court err in granting summary judgment to the Defendants when discovery was not complete.**

Prior to hearing the Defendants Motion for Summary Judgment, the trial court had been made aware that the Defendants had refused to produce discovery sought by the Plaintiffs, and there was a pending Motion to Compel discovery, which had been filed several months prior to the Defendants Motion for Summary Judgment; however, the same had not been set for hearing because Plaintiff and Defendant's counsel had made efforts to resolve the dispute. A hearing was held on the Motion to Compel and during the course of the hearing, Plaintiff's counsel advised the court that the information it sought was within the province of the Defendants, and the Defendants had refused to produce the information despite numerous requests and prior to deposing Defendant Carmicle, the Plaintiffs desired certain information, which was within the sole province of the Defendants. Because the Defendants had not provided the information sought, the Plaintiffs requested that the court grant their motion to compel and allow them an opportunity to depose the Defendant Carmicle. ( Tr 1-22 and Tr 42).

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<sup>1</sup>The Plaintiff Morton in his deposition admitted that he saw one police car and a school bus, but he was not aware that there was another patrol vehicle behind the bus.

The court did not rule on the Plaintiff's motion but took same under advisement (Tr 23). Even though the court was aware that there was a pending a motion to compel, which it took under advisement, the court granted the Plaintiffs motion for summary judgment. Subsequently, the Plaintiffs filed a Motion Seeking Relief Pursuant Rules 52, 59, and 60 of the Mississippi Rules of Civil Procedure and brought to the court's attention that it had not ruled on the Plaintiff's Motion to Compel. The motion advised the court that it was sanctioning the Defendant's non-compliance with reasonable discovery requests by granting it summary judgment. Another request was made by the Plaintiffs that it allow additional discovery and compel discovery from the Defendants. (RE 114- 121 ).

The court subsequently granted the Defendants motion to compel discovery in part but did not afford the Defendants an opportunity to conduct additional discovery. Among the discovery which the Defendant was required to produce was to advise or state whether a blood-alcohol or drug test was administered and also provide photographs of the vehicle. The Defendants were ordered to provide the supplements within fourteen (14) days. The Defendant's did not mail the supplemented information until March 24, 2006. (RE 197). The court subsequently entered orders denying the Plaintiff's Motion for Relief Pursuant to Rule 52, 59, and 60 of the Mississippi Rules of Civil Procedure on March 31, 2006 and the Plaintiff's Motion to Clarify the status of the summary judgment order. ( RE 195-201 and 202).

In *Prescott v. Leaf River Forest Products, Inc.*, this Court stated that the decision to grant a continuance or order further discovery rests within the sound discretion of the trial judge and will not be reversed unless his decision can be characterized as an abuse of discretion. *Leaf River Forest Products, Inc.*, 740 So.2d 301, 309 (Miss. 1999). The trial court abused its

discretion in the instant case because it ordered the Defendants to provide additional discovery to the Plaintiffs but did not afford the Plaintiffs an opportunity to depose Defendant Carmicle or conduct additional discovery subsequent to receipt of the discovery responses. It is clear from the record that the Plaintiffs had not been lazy or dilatory and taken steps to obtain access to information within the province of the Defendants; however, the Defendants wilfully failed to respond and their failure to comply delayed the taking of Defendant Carmicle's deposition. Therefore, the Defendants should not have been allowed to benefit from its discovery violation. The court abused its discretion and sanctioned the Defendant's discovery violation by refusing to allow additional discovery by the Plaintiffs. Indeed, the Plaintiffs are perplexed. Why order the Defendants to supplement discovery if the Plaintiffs were not going to be afforded an opportunity to conduct additional discovery?

**III. The trial court erred in denying the Plaintiffs motion to strike the deposition of Plaintiff Tyrone Morton.**

During the hearing on the Motion for Summary Judgment, the Plaintiffs advised the court that the Defendants did not submit the deposition of Plaintiff Tyrone Morton for reading and signing because the Defendants refused to submit same. The court was asked to provide "guidance" on whether the Defendants were required to submit the deposition for reading or signing or otherwise, the Plaintiffs requested that the deposition be stricken. (Tr 35-36). The court did not respond to the matter, and it was the Plaintiffs belief that the court was taking all issues before it under advisement as it had previously indicated.

When the court entered the motion for summary judgment, the Plaintiffs again called to the court's attention that the Defendants had failed to produce and submit Plaintiff Morton's



deposition for reading and signing when it filed the Motion for Relief Pursuant to Rule 52, 59, and 60 of the Mississippi Rules of Civil Procedure and during the hearing on the motion on February 23, 2006. (Tr 77-81). The Plaintiffs advised the court that it had made several requests to the Defendants to produce the deposition for reading and signing, but they refused. Plaintiffs request was not denied by Mr. Allen, counsel for the Defendants. In responding, Mr. Allen stated that he advised Plaintiffs “buy it or contact Ms. Marinelli” (Tr 82). The court reporter sent correspondence to Plaintiff’s counsel indicating that the Plaintiffs could schedule a meeting with her for the purpose of reading and signing the depositions; however, Plaintiffs counsel advised the court reporter that the rules afforded Plaintiffs thirty days to affirm the deposition and a single meeting for a few hours in her office was not contemplated by the rules. (RE 157 )

It is clear from the record that counsel for the Defendants refused to comply with the provisions of Rule 30 of the Mississippi Rules of Civil Procedure because he wanted to force the Plaintiffs to purchase the deposition of Plaintiff Morton. Indeed, Defendants’ counsel acknowledged that he was “trying to defend the right of court reporters to earn a living” and he considered it a professional courtesy. The actions of defense counsel may have been considered noble by the court however; he was not absolved of the duty and obligation to comply with the provisions of Rule 30 which requires a party desiring to use a transcription to note on the transcription or in a separate writing, the reason for the refusal to affirm the deposition. It also does not absolve him of the duty and responsibility to submit the deposition. As noted with the trial court, though Rule 30 does not specifically state that the party taking the deposition must submit it for reading and affirmation; however, it logically follows that if Mr. Allen had an obligation to note on the transcription or in a separate writing, the reason for refusal to affirm the

deposition, he also had an obligation to submit it for affirmation.

The decisions of a trial court concerning discovery matters is reviewed based upon abuse of discretion. *DeBlanc v. Stancil*, 814 So.2d 796, 798 (Miss. 2002) (citations omitted). In the instant case, the court abused its discretion by denying the motion to strike and sanctioning Mr. Allen's wilful violation of the requirements of Rule 30 of the Mississippi Rules of Civil Procedure. He never submitted to Plaintiff Morton the deposition for affirmation in accordance with the rules, and he did not explain the reason for the non-affirmation in a separate writing prior to using the transcription.<sup>2</sup>

**IV. The trial court erred by denying in part and granting in part the Plaintiff's Motion to Compel.**

The court granted in part the Plaintiff's Motion to Compel and required the Defendants to answer and state whether a blood-alcohol or drug test was administered to Defendant Carmicle within six (6) hours of the accident; however, the court denied Plaintiff's access to any documents or records which would establish or show that a test was not performed based upon privilege.

In the hearing on the Plaintiff's Motion for Relief Pursuant to Rules 52, 59, and Rule 60 addressing the court's failure to rule on the motion to compel, the Plaintiffs argued to the court that the Defendants had refused to respond to interrogatories and produce documents related to whether the Defendant Carmicle had been administered any test analyzing his blood for alcohol or drugs. It was noted that whether Defendant Carmicle was operating the vehicle impaired was

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<sup>2</sup>Subsequent to the hearings on the various motions, obtained the deposition of Plaintiff Morton from the court reporter only after it tendered the sum of \$207.30 for same. It is important to note that the Plaintiff never refused to affirm the deposition. The deposition was not tendered to him, and he was not afforded thirty (30) days to affirm as contemplated by the rules.

an issue in the case, which the Plaintiffs were entitled to receive discovery. (Tr 68-72). The court agreed indicating that the records could be produced in camera. (Tr 71-72).

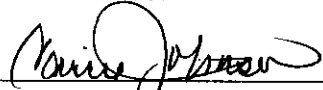
In *Baptist Memorial Hospital Union County v. Johnson*, this Court stated that public policy encouraging and expediting the investigation and solving of crimes outweighs the privacy rights of individuals. *Baptist Memorial Hospital Union County v. Johnson*, 754 So.2d 1165, 1168 (Miss. 2000) (citation omitted). Similarly, there is a compelling interest in finding out the truth in a civil matter. *Baptist Memorial Union*, 754 So.2d at 1168. The court's interest in finding out whether Carmicle operated a vehicle under an impairment was paramount when one considers that his reason for failing to stop immediately after striking something in accordance with law was never explained by the Defendants. At the very minimum, the court should have required the records of Defendant Carmicle's hospital admission to be produced for in camera inspection and a protective order issued, and it was an abuse of discretion to not do so. This is especially true when one considers that the court placed on the Plaintiffs the onerous burden of making a "sufficient evidentiary showing". Absent in camera inspection and more substantive disclosure than that required by the trial court, Defendants like the City of Shelby may hide behind the physician-patient privilege to prevent discovery of reckless behaviors such as driving with an impairment.

In addition to only requiring the Defendants to answer the interrogatory stating whether it was aware of a blood-alcohol or drug analysis test being conducted, the court merely required the Defendants to produce negatives of the patrol car by making arrangements with the Plaintiffs; however, the court did not require the Defendants to produce the name, address, and repair invoices and statements of the entity who repaired the vehicle because it concluded that the

### CERTIFICATE OF SERVICE

I, Carrie Johnson do hereby certify that I have this day mailed via United States mail postage prepaid a true and correct copy of the Appellant's brief and record excerpts at the following: Honorable R. Jefferson Allen, Hunt and Ross at Post Office Box 1196, Clarksdale, MS 38614.

This the 23<sup>rd</sup> day of October 2006.

  
\_\_\_\_\_  
Carrie Johnson

Sarah O'Reilly-Evans  
Carrie Johnson  
Attorneys for Appellants  
Post Office Box 1167  
Jackson MS 39215  
Phone: 601-353-7464/Facsimile: 601-957-7685

Defendants had sufficiently responded. The record does not support the conclusion. In the trial transcript, the court was advised that the information had not been provided (Tr 5-6, 65).

Defendant's counsel acknowledged that he had not completely responded. (Tr 67). The court was advised that the information was relevant and necessary for establishing the accident's occurrence, the degree of damage, and whether or not Plaintiff should have been visible. The information sought was within the province of the Defendants yet defense counsel was allowed to hide behind the shield "I don't have it". The information was in the possession of his client, but it does not appear he asked though he said he would attempt to determine whether any repair bills exist. (Tr. 17, 65-67).<sup>3</sup>

Recognizing that he had not completely responded to the interrogatory and request for production, Mr. Allen asked "How is that relevant to the issue of reckless disregard?" (Tr. 67). The court stated that it did not know unless the repair showed some other part of the vehicle being repaired. (Tr 67). The information sought by the Plaintiffs was necessary and pertinent to the Plaintiff's retention of an expert in accident reconstruction or other expert. Because the vehicle had been repaired, it was necessary to have the information available to submit to an accident reconstruction expert or other expert for the purpose of providing an opinion on the speed of the vehicle at the point of impact with the Plaintiff Morton and Plaintiff Morton's visibility to the driver at the point of impact. Failing to require the Defendants to provide the information and afford the Plaintiffs an opportunity to conduct additional discovery concerning the aforementioned was an abuse when one considers that the Defendants had no legitimate

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<sup>3</sup> Mr. Allen did not respond to the Court's question concerning whether the vehicle was repaired by someone on their payroll. *See page 66 of transcript.*

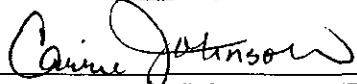

reason for failing to provide same.

### CONCLUSION

The court's grant of summary judgment to the Defendants was based on its application of an erroneous legal standard and the shifting of the burden of proof upon the Plaintiffs when they were not movants. The Defendants bore the burden of proving that there were no genuine issues of material fact and the Defendants failed to meet that burden when one considers that the Plaintiffs were to accorded the benefit of the doubt. The interrogatories, pleadings, admissions, and the record before the court clearly indicate that the Defendant Carmicle failed to stop upon striking the Plaintiff Morton. Because this court has previously opined that the operation of a vehicle involves both its moving and stopping, the trial court erred when it did not consider this fact along with unresolved issues concerning the speed of the Defendant Carmicle when it granted the summary judgment motion of the Defendants.

Notwithstanding the court's improper grant of the summary judgment motion, the court sanctioned Defendants failure to comply with discovery rules including but not limited to providing complete responses to discovery and submitting the Plaintiff's deposition for reading and affirmation by granting it summary judgment. These errors of the trial court were cumulative, prejudicial, and require reversal of the court's order.

Respectfully submitted this the 25<sup>th</sup> day of October 2006.

  
Carrie Johnson, MSB # 

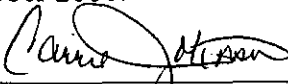
## CERTIFICATE OF SERVICE

I Carrie Johnson do hereby certify that I have this day caused to be mailed to Larry O. Lewis, former judge of the Bolivar County Circuit Court and his predecessor Judge Charles E. Webster a true and correct copy of the Appellant's Brief at the following address:

Honorable Charles E. Webster  
Bolivar County Circuit Judge  
Post Office Box 998  
Clarksdale MS 38614-0998

Larry O. Lewis  
Attorney At Law  
330 Pecan  
Post Office Box 209  
Marks MS 38646

This the 25<sup>th</sup> day of October 2006.

  
\_\_\_\_\_  
Carrie Johnson