IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CASE NO. 2006-CA-00255

TYRONE MORTON AND
ANNIE MORTON — PLAINTIFFS/APPELLANTS

VS.

CITY OF SHELBY, MISSISSIPPI,
AND JAMES CARMICLE, IN HIS
INDIVIDUAL AND OFFICIAL
CAPACITY — DEFENDANTS/APPELLEES

APPEAL FROM THE CIRCUIT COURT OF THE SECOND
JUDICIAL DISTRICT OF BOLIVAR COUNTY, MISSISSIPPI

CIRCUIT CAUSE NO. 2004-0129

BRIEF OF APPELLEES -- CITY OF SHELBY, MISSISSIPPI, AND JAMES CARMICLE

ORAL ARGUMENT REQUESTED

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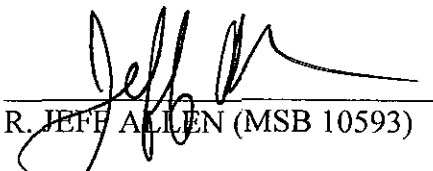
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this particular 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 disqualifications or recusal.

City of Shelby, Mississippi	Defendant/Appellee
James Carmicle	Defendant/Appellee
R. Jeff Allen Hunt & Ross Law Firm	Attorney for Defendants/Appellees
Tyrone Morton Annie Morton	Plaintiffs/Appellants
Carrie Johnson Sarah O'Reilly Evans	Attorneys for Plaintiffs/Appellants
North Bolivar School District	Former Defendant

Shea S. Scott Daniel Coker Horton & Bell	Attorney for former defendant North Bolivar School District
Mississippi Municipal Service Company	Liability Insurer, Defendants/Appellees

Respectfully submitted,



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Whether the lower court was in error in granting Defendants/Appellees City of Shelby, Mississippi, and James Carmicle's motion for summary judgment based upon the finding that the Defendants were immune from suit pursuant to the Mississippi Tort Claims Act, §11-46-1, *et seq.* Additionally, whether the lower court was in error in granting in part and denying in part Plaintiffs' Motion to Compel; and finally, whether the lower court was in error for denying Plaintiffs' Motion to Strike the deposition testimony of Plaintiff Tyrone Morton.

III. STATEMENT OF THE CASE

A. Factual History

The Plaintiffs, Tyrone Morton and Annie Morton, husband and wife, filed this action against the Defendants, the City of Shelby, Mississippi ("City of Shelby") and James Carmicle ("Carmicle"), seeking damages arising from an accident that occurred in the late evening hours of November 21, 2003, in Bolivar County, Mississippi, when a marked police automobile being operated by Defendant Carmicle[1] struck Plaintiff-pedestrian Tyrone Morton who was at the time of this incident jogging. [R. 1-6]. Plaintiff Annie Morton was not directly involved in the accident, but rather presents a claim for loss of consortium. Id. Plaintiffs maintain that Defendant Carmicle, while serving in the scope of his employment as the Shelby Chief of Police, was guilty of negligent and reckless conduct in striking Plaintiff Tyrone Morton. Id.

The subject incident occurred shortly after 9:00 p.m. [R. Supp. 218; R. 76]. At that time, Defendant Carmicle and fellow Officer Marion Bedford were part of an "escort caravan" that was

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[1] James Carmicle was at all pertinent times the Shelby Chief of Police.

providing police protection and supervision to the visiting Ruleville Central High School basketball team; Ruleville High had just completed a game against Shelby Broad Street, a school located within the city limits of Shelby. [R. 164]. At or near the same time, Plaintiff Morton was jogging in or along Industrial Road, a roadway within or near the Shelby city limits and in the chosen pathway of the oncoming police escort. [R. Supp. 218].

But for the precise location of Plaintiff Tyrone Morton in or on the roadway at the moment that he was struck, the manner in which this accident happened is undisputed.[2] What happened may be summarized as follows:

> Plaintiff Morton was jogging on Industrial Road, an east-west route that connects "old" highway 61 (n/k/a 161) with the new four-lane 61 highway. He was running east, from 161 to 61. [R. Supp. 217-18]. It was at least as late as 9:00 p.m. on a November evening, and it was very dark, with little lighting on the subject roadway. Id. Tyrone Morton was wearing cotton sweat pants and a dark sweatshirt with a hood pulled over his head. Id. Morton admittedly failed to wear or utilize any type of reflective outer garment that joggers typically employ to warn others of their presence at nighttime. [R. Supp. 221-222].
>
> Although he was initially running "with traffic," (*i.e.*, in the eastbound lane), he crossed the road and was, at time of impact, running east via the *westbound* lane of traffic (*i.e.*, the passing lane). [R. Supp. 217-22]. Thus, his back was at all times to the vehicles approaching him from his rear. Id.
>
> The "Ruleville procession" -- consisting of Officer Marion Bedford in lead, then the Ruleville bus, and finally Defendant Carmicle -- was also traveling east on Industrial Road from Highway 161 to 61. [R. 165]. The purpose of the caravan was to provide safe passage to the visiting team's bus from Shelby Broad Street out to the highway. Custom and practice was for the "tail" car (Defendant Carmicle) to pass both the team bus and the lead patrol car (Officer Bedford) as the group neared the four-lane highway. [R. 169]. The rear car would then move ahead and briefly close down four-lane 61 so that the team bus would have safe access onto the highway. [R. 168-69].

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[2] Defendants acknowledge Plaintiffs' contention that Mr. Morton was on the side of, and not in or on, the subject roadway at the time of the incident. However, and as the lower court found, this is not a *material* fact which would prevent the granting of summary judgment. [R. 198].

> The police vehicles, in the course of their escort, had on their flashing red/blue lights which Plaintiff Tyrone Morton admittedly saw. [R. Supp. 224]. Morton *did not* see Carmicle, the tail car, but only the lead car and bus. Id. When Defendant Carmicle attempted to pass, his driver-side mirror and/or side-spotlight struck Mr. Morton's right side (which was the side closest to Carmicle's car); the impact dislodged both the spotlight and side-mirror, sending shattered glass into the vehicle through the driver-side window which was rolled down. [E. 38]. Unfortunately for Defendant Carmicle, his eye was struck by a piece of glass, causing injury thereto.[3]
>
> Defendant Carmicle did not know what he hit or, conversely, what hit him, but he knew that he was hurt. [R. 164-66]. Upon radioing Officer Bedford, Bedford advised Carmicle that he had seen a pedestrian run across the road. Id. Carmicle was unable to complete his pass, and Bedford single-handedly escorted the Ruleville bus out the remainder of the way. [R. 169]. The two officers subsequently traveled back to the point of impact where they found Plaintiff Tyrone Morton on the subject roadside. [R. 164-65].

Following the accident, both Plaintiff Morton and Defendant Carmicle were transported in the same ambulance to a hospital in Cleveland, and the only thing Mr. Morton remembers Carmicle saying to him on the way to the hospital was that he, Carmicle, never saw Mr. Morton.

> A: . . . Seem like I remember him saying is, "T. [Plaintiff's nickname], I didn't see you" is the only thing he was saying.
>
> * * *
>
> A: . . . I don't think he'd have hit me if he'd seen me.

[R. Supp. 229-30]. In order to avoid the appearance of any possible conflict or impropriety, the Bolivar County Sheriff's Department was called in to work the subject accident. [R. 166]. Neither the accident report [R. 76] nor any other portion of the subject record contains any finding of wrongdoing on the part of Defendant Carmicle by the third-party investigators.

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[3] Although injured, Defendant Carmicle did not present any claims in this litigation and has never placed his injuries at issue herein.

B. Procedural History

Although Plaintiffs' Notice of Appeal purports to only challenge the lower court's granting of summary judgment [R. 175], the Plaintiffs' Brief nevertheless contains additional challenges concerning the scope of discovery and Defendants' ability to use Plaintiff Tyrone Morton's deposition in these proceedings. Appellants' Brief, p. 1. As admitted on page 2 of Appellants' Brief, the *ore tenus* motion to strike Plaintiff Tyrone Morton's deposition was not made until more than a half-year had passed since it was taken.[4] [R. Supp. 211]. Interestingly, and as discussed in greater detail below, Plaintiff Annie Morton was also deposed that day, but Plaintiffs do not challenge her deposition.

As for Plaintiffs' arguments of whether the court should have deferred granting summary judgment while "discovery was incomplete," Defendants can only point this Court to the August 30, 2005, discovery deadline per the Order *Extending* Discovery and Other Deadlines. [R. 69]. Therein, the deadline was also established for service of summary judgment motions: October 15, 2005. Id. Defendants' motion was served on October 14, 2005. [R. 70-71]. If the additional discovery Plaintiffs desired to conduct included the deposition of Defendant James Carmicle, it should be noted that his deposition was scheduled for June 10, 2005 [R. 54], but was cancelled by Plaintiffs' counsel due to a scheduling conflict and not because Plaintiffs awaited additional records or responses to written discovery. Plaintiffs thereafter failed to reschedule it, basically allowing the case to remain dormant until Defendants filed the underlying summary judgment motion.

Finally, Defendants will simply add that the decision of the lower court in granting summary judgment was thoughtful and sound, evidenced by the fact that it originally provided the parties with

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[4] Tyrone and Annie Morton were both deposed on June 1, 2005. [R. Supp. 211]. This was the same day Officer Marion Bedford was deposed. [R. 162].

a well reasoned opinion on or about January 20, 2006. [R. 103-13]. It then issued a separate, reasoned opinion concerning the discovery dispute on or about March 6, 2006. [R. 183-86]. Finally, and in a large rehashing of many of the same issues upon which it had already ruled, the lower court issued its final decision on April 5, 2006, therein providing sound factual findings for its decision in favor of Defendants. [R. 195-201].

IV. SUMMARY OF THE ARGUMENT

The Court herein is faced with primary arguments that have been previously -- if not recently -- addressed by the Court of Appeals and/or the Supreme Court as it concerns immunities arising under Mississippi's Tort Claims Act. First, this Court must again address the question of whether an officer's conduct in driving a police vehicle under the facts as they existed herein constitutes "reckless disregard," or whether Defendants are exempt from liability. MISS. CODE ANN. §11-46-9(1)(c). Secondly, and independent of the former issue, this Court must address whether, under the same factual scenario, the Defendants would be exempt from liability pursuant to the discretionary conduct exemption (*even if such discretion be abused).* MISS. CODE ANN. §11-46-9(1)(d).[5]

The record in this case solidly supports the argument that Defendant James Carmicle did not act with reckless disregard as to the safety and well-being of Plaintiff Tyrone Morton. MISS. CODE ANN. §11-46-9(1)(c). The record indicates that in the course and scope of performing a police maneuver, the act of which encompassed a police escort of a group of school children, Defendant Carmicle had no knowledge that Plaintiff Tyrone Morton was even in the subject roadway when he lawfully moved to pass the subject school bus as planned. This was compounded by Mr. Morton's poor judgment in wearing dark clothes (including a hood over his head) on a dark road, at night; also, Mr. Morton was running in the same direction as the procession, meaning that his face was not visible. The Court of Appeals and Supreme Court have consistently held that the standard for "reckless disregard" is a high one, even greater than that of gross negligence and bordering upon an

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[5] Defendants would acknowledge that despite the inclusion of the "discretionary conduct" exemption argument (MISS. CODE ANN. §11-46-9(1)(d)) in its supporting brief before the lower court, said court's ruling is void of any reference to the same.

intent to do a wrongful act. As discussed herein-below, Defendants cite numerous opinions wherein the conduct seems *much more egregious* than here, yet reckless disregard was not found.

Also, it is apparent that the conduct of Defendant Carmicle was discretionary in nature. MISS. CODE ANN. §11-46-9(1)(d). Mississippi's appellate courts have long recognized that the act of driving a police car may be a discretionary task. This is important as it affords the Defendants not one, but two separate exemptions from liability, or two bites at the proverbial apple in a case where they only need one for dismissal of this suit. The entire course of conduct -- from deciding to escort the bus to the manner in which Defendant Carmicle followed the school bus to the route taken -- clearly involved and evoked discretion. Chief Carmicle had to arrange the placement of the police vehicles (*e.g.*, a lead and follow car), the path to take, when and where to pass, how and when to shut down (temporarily) the four-lane highway, *etc.* Although Defendants believe Plaintiffs have offered no substantive proof -- and the record is void of -- any driving error on the part of Defendant Carmicle, should the Court finds such error, Carmicle is exempt *even if* he abused his discretion.

As for Plaintiffs' argument concerning its rejected *ore tenus* motion to strike the deposition of Plaintiff Tyrone Morton, and despite the lack of any valid authority to support the deposition being stricken, Defendants are at a loss as to *why* Plaintiffs would want it stricken, other than the fact that the truthful sworn testimony given therein before an official court reporter is harmful to Plaintiffs' case. While Defendants do not profess to understand the true intent of Rule 30(e), M.R.C.P., as Plaintiffs apparently do, said rule does not reference as a remedy thereto that a deposition should be stricken if not affirmed. M.R.C.P. 30(e). Defendants would also offer that Plaintiffs should not benefit from their attorneys' own dilatory and negligent conduct -- all they had to do was buy the depositions or make arrangements for their clients to meet with the court reporter to read and sign.

Finally, following the lower court's Order Granting, in Part, and Denying, in Part, Plaintiffs' Motion to Compel Discovery Responses [R. 183-86], Defendants would offer there is nothing left of any material substance that has not been produced. While Plaintiffs ostensibly desired Defendant Carmicle's medical records, their true intent in requesting the same was any evidence of drug or alcohol screening following the accident, and this information -- over the objection of Defendant Carmicle – was ordered to be produced. [R. 185-86]. Therein, Plaintiffs -- and the lower court -- learned that there were no drug or alcohol screening tests performed. [R. 198].

V. ARGUMENT

A. Plaintiffs' Claims Are Governed by the Mississippi Tort Claims Act

Since the City of Shelby is a governmental entity, and since Defendant Carmicle was at all relevant times an employee of the City of Shelby who was acting in the course and scope of his employment, this action is controlled by the Mississippi Tort Claims Act [the "Tort Claims Act"], MISS. CODE ANN. §§ 11-46-1, *et seq.* The cornerstone of the Tort Claims Act is sovereign immunity -- that is, the principle that the State of Mississippi and its political subdivisions "are, always have been and shall continue to be immune from suit . . . on account of any wrongful or tortious act or omission." MISS. CODE ANN. §11-46-3(1). The Tort Claims Act provides a waiver of "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." MISS. CODE ANN. §11-46-5(1). However, this waiver of immunity is subject to certain limitations and requirements. City of Jackson v. Lumpkin, 697 So.2d 1179 (Miss. 1997). Among these are a notice requirement (MISS. CODE ANN. §11-46-11), a one-year statute of limitations (MISS. CODE ANN. §11-46-11), a "cap" on compensatory damages (MISS. CODE ANN. §11-46-15) and an exclusion of punitive damages, prejudgment interest, and attorney's fees (MISS. CODE ANN. §11-46-15).

As it concerns this action, the Tort Claims Act provides, in pertinent part:

> (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:
>
> * * *
>
> (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; [or]
>
> (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 is abused***; ... .

MISS. CODE ANN. §11-46-9(1). Because Carmicle was executing his duties as a law enforcement officer, both he and the City of Shelby are specifically immunized from liability in this matter pursuant to both subsections (c) and (d) as noted above.

Finally, as it concerns these cases pending by way of a claim brought under the Tort Claims Act, the Mississippi Supreme Court has stated as follows concerning summary judgment:

> The Mississippi Legislature has determined that governmental entities and their employees **shall be exempt from liability** in certain situations as outlined in MISS. CODE ANN. §11-46-9. This exemption, like that of qualified or absolute immunity, **is an entitlement not to stand trial** rather than a mere defense to liability and, therefore, **should be resolved at the earliest possible stage of litigation**. Cf. Saucier v. Katz, 533 U.S. 194, 200-01, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Therefore, immunity is a question of law and is a **proper matter for summary judgment** under Miss. R. Civ. P. 56.

Mitchell v. City of Greenville, 846 So.2d 1028, 1029 (Miss. 2003). Accordingly, should this Court find in Defendants' favor on just one of the two above-cited exemptions, then the lower court's decision granting summary judgment should be affirmed.

B. Defendants Are Immune from Liability Pursuant to MISS. CODE ANN. §11-46-1 *et seq.*

1. The "Reckless Disregard" Exemption: §11-46-9(1)(c)

Applying Section 11-46-9(1)(c), it is evident that Defendant Carmicle, while providing a police escort to the visiting Ruleville high school team, was engaged in the "performance or execution of duties . . . relating to police . . . protection." Therefore, the Defendants, via this exemption, are immune from liability unless the Plaintiffs can establish that Carmicle acted "in reckless disregard of the safety and well-being" of Tyrone Morton. Stated with particular application to the facts of this case, the question may be posed as follows:

> Did Defendant Carmicle act with reckless disregard when -- in the course of lawfully passing a vehicle for which he was then providing a police escort, with the intent of moving ahead to block traffic to allow safe entry by said vehicle onto the highway -- he struck a jogger who at 9:00 at night, in complete darkness, was running in/near the roadway while wearing dark clothes, a hood, and no reflective clothing or safety apparatus which might have warned an approaching vehicle of his presence?

Mississippi's appellate courts have examined numerous cases dealing with the "reckless disregard" exemption, and it is interesting to note the numerous and sundry instances where it could be argued that conduct much more egregious than that presented in the instant case was found *not* to have been reckless by the courts; thus, the cases were dismissed. Before discussing said cases, the Defendants will first set forth the Mississippi Supreme Court's interpretation of the "reckless disregard" standard as it applies to "police protection."

Our Supreme Court has stated that for purposes of the Tort Claims Act, **"reckless disregard"** for the safety and well-being of a person not engaged in criminal conduct **embraces *willful or wanton conduct* which requires *knowingly and intentionally* doing a thing or wrongful act.** Bonner v. McCormick, 827 So.2d 39 (Miss. 2002). The Supreme Court has also stated that

"reckless disregard" is a high standard, and while reckless disregard includes gross negligence, it is **a *higher* standard than gross negligence** by which to judge the conduct of officers. Kelley v. Grenada County, 859 So.2d 1049 (Miss. 2003). See Turner v. City of Ruleville, 735 So.2d 226 (Miss. 1999) (holding that "reckless disregard" for safety of others is synonymous with willfulness and wantonness for purposes of exception to immunity under Mississippi Tort Claims Act for police activity); see also, City of Jackson v. Calcote, 2005 WL 43729 (holding that **"reckless disregard"** exists when conduct involved evinces not only some ***appreciation of unreasonable risk* involved, but also *deliberate disregard of that risk* and high probability of harm involved**).

Returning to the instant case and applying the above law, it is evident that Defendant Carmicle's conduct on the night in question did not arise to, or even approach, a level of reckless disregard. For Carmicle to have acted recklessly, he would have had to "embrace willful or wanton conduct" which would have required both knowledge and intent to commit a wrongful act. See Bonner, 827 So.2d 39. Further, for this Court to find that Carmicle acted recklessly, Plaintiffs would have to present conduct which must be judged by "a higher standard than gross negligence." See Kelley, 859 So.2d 1049. Finally, Plaintiffs would have to prove that Carmicle not only appreciated the unreasonable risk involved in his conduct, but then deliberately disregarded that risk and the high probability of harm involved. See Calcote, 2005 WL 43729. As it concerns Plaintiff Morton being hit at nighttime while jogging with no notice or warning of his presence to anyone, including Defendant Carmicle, Plaintiffs will need to show that 1) Carmicle knew Plaintiff was present and jogging at the time of this accident, and that 2) he acted with deliberate disregard to the safety and well-being of the Plaintiff. Rhetorically asked, how can one act with deliberate indifference, and in a willful and wanton manner, to a person that he does not even know is present and could not have known was present?

Following are a number of appellate court decisions which demonstrate the high standard which Plaintiffs herein face in attempting to prove that Defendant Carmicle acted with reckless disregard for Plaintiff Tyrone Morton's safety.

- Police officer did not act in reckless disregard of the safety and well-being of occupants of vehicle with which his patrol car collided while he was pursuing another vehicle, and thus police officer and state Department of Public Safety were immune from liability under Tort Claims Act, where officer turned on his blue lights and "wigwag" lights at the outset of the chase, reduced his speed from approximately 55 miles per hour to approximately 45 miles per hour and sounded his air horn as he approached intersection, entered the intersection on the right shoulder believing he could stop if another car entered the intersection, and testified that the only reason he was unable to prevent the collision was because the dirt and debris on the shoulder caused his car to slide when he applied his brakes. Cole v. Miss. Department of Public Safety, 930 So.2d 472, 476-77 (Miss. App. 2006). See also Reynolds v. County of Wilkinson, 936 So.2d 395 (Miss. App. 2006).

- **Police officer in patrol car did not act recklessly when he struck motorists' automobile from behind** at a traffic light, and thus officer and city were immune from liability for motorists' injuries under Tort Claims Act, ***even though officer was reading warrant while stopped at light and was not paying attention to traffic in his lane***. Joseph v. City of Moss Point, 856 So.2d 548 (Miss. 2003), *rehearing denied, cert. denied* 860 So.2d 315.

- **Police officer who struck motorist's vehicle in intersection did not act with reckless disregard** for safety of others when responding to disturbance call, and thus, was immune from liability under state Tort Claims Act; officer was acting within scope of his employment, he was traveling approximately 37 miles per hour with blue lights, wigwags, and sirens activated as he approached intersection. Davis v. Latch, 873 So.2d 1059 (Miss. 2004).

- Maintenance and inspection of police vehicle were activities related to police protection, so that city and police officer were immune from liability resulting from accident in which police vehicle's brakes failed, causing officer to rear-end another car. McGrath v. City of Gautier, 794 So.2d 983 (Miss. 2001), rehearing denied.

- **Although deputy sheriff may have been negligent, his actions did not rise to level of reckless disregard**, and thus he and the county were entitled to immunity under the Mississippi Tort Claims Act (MTCA) **for deputy's collision with another motorist** after deputy stopped at a two-way stop, looked both ways, saw nothing, and proceeded into intersection; there was no indication that deputy acted with deliberate disregard to consequences of attempting to cross intersection, which both parties agreed was extremely dangerous because a water tower partially blocked deputy's

view of traffic approaching from one direction. Maldonado v. Kelly 768 So.2d 906 (Miss. 2000).

- **Though he failed to anticipate that another vehicle might be pulling out from the blind spot in front of the truck in front of him, county sheriff's deputy's decision to steer around that turning truck did not exhibit a wilful or wanton disregard for the safety of others**, but, rather, showed negligence; therefore, officer and county were entitled to immunity under Tort Claims Act with respect to tort action brought by motorist who was injured when deputy steered around turning truck and collided with motorist; deputy was not speeding and was responding to call from fellow officer, and he did not sound his siren because he did not want there to be any accidents resulting from motorists coming to abrupt stop. Kelley v. Grenada County, 859 So.2d 1049 (Miss. 2003).

Per Kelley, the argument that Chief Carmicle should have *anticipated* that an unmarked jogger/pedestrian might be in the opposite lane when passing at nighttime is insufficient. At best, it is negligence, and the standard herein is higher than negligence; it is even higher than gross negligence. Id. Per Joseph, it is not enough for Plaintiffs to merely allege that Chief Carmicle should have paid better attention to his surroundings since in Joseph, **reckless disregard was not found for an officer who was attempting to read while driving**. Id.

Without having any additional proof to offer other than the mere fact that Defendant Carmicle's vehicle struck Morton, and since the conclusory allegation in Plaintiffs' Complaint that Defendant Carmicle was "reckless" in hitting the pedestrian Plaintiff is not sufficient to present an actual claim of reckless conduct, Plaintiffs' claims herein fall short, and the lower court's decision granting summary judgment [R. 103-13, 195-201] should be affirmed per §11-46-9(1)(c).

2. The "Discretionary Conduct" Exemption: §11-46-9(1)(d)

As an entirely separate and distinct ground, the Plaintiffs' claims against Defendants Carmicle and City of Shelby can and should be dismissed because the claims alleged in the Complaint relate to the failure to perform a discretionary function. As noted above, the Tort Claims Act exempts from liability any claim against a governmental entity and its employees who are acting within the course and scope of their employment "**[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . ., *whether or not the discretion is abused.***" MISS. CODE ANN. §11-46-9(1)(d). Again, the exception from liability created by subsection (d) is distinct from the exception created by subsection (c). Thus, the Defendants may be exempt from liability pursuant to the Tort Claims Act under either subsection (c) or (d).[6]

It is obvious that the acts and/or omissions alleged by the Plaintiffs relate to matters of discretion as it concerns the conduct of Defendant Carmicle. In Mosby v. Moore, 716 So. 2d 551 (Miss. 1998), the Mississippi Supreme Court recognized, for example, that police pursuit of a vehicle

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[6] Defendants must acknowledge the recent decision of Giles v. Brown, 2006 WL 3593407 (Miss. App. 2006), wherein Robert Giles and Robert Brown, a Leake County constable, were involved in a car accident that left Giles and his sons injured. Giles, 2006 WL at *1-2. The Plaintiffs argued that only section 11-46-9(1)(c) applied, while Brown and Leake County argued -- as do the Defendants herein -- that both sections 11-46-9(1)(c) and 11-46-9(1)(d) apply. Id. at *3. The Plaintiffs' rationale was that it was illogical to apply §11-46-9(1)(d) since §11-46-9(1)(c) specifically applies to claims arising out of an act committed by an employee of a governmental entity while that employee was performing a law enforcement function. Id. The Court of Appeals agreed with the Plaintiffs that §11-46-9(1)(c) was the applicable section based on the specific facts presented. Id. Defendants would state that such a holding appears to contradict prior case law in that the Court seemingly disallowed the use of multiple statutory exemptions where it found one exemption to be *more applicable* than another. This also seems contrary to the maxim known as "Frasier's octopus" which stands for the proposition that where one Tort Claims Act exemption applies, no further immunity is necessary, as that immunity in and of itself is sufficient to defeat a claim. Thus, a corollary to "Frasier's octopus" must be the contemplation that multiple immunities *can* be applicable -- and thus would be examined by the court -- to defeat one cause of action.

constitutes a "discretionary" task for purposes of the Tort Claims Act. Mosby, 716 So. 2d at 553. The Court explained as follows:

> **The act of driving for police officers is a major part of their jobs.** It is something that they must do in order to fulfill their duties. They do not drive simply to get from one place to another, instead they patrol. This type of driving does involve a discretionary, decision-making process.

Id. at 558. Although this is admittedly not a police pursuit case, it is a case which involves discretionary driving by Officer Carmicle in handling the Ruleville team bus's police caravan. Carmicle had to predetermine the procession order, the route from the school to the highway, the manner in which to follow, when to pass the bus, how and where to pass it, how fast to pass it, etc.; and he had to do all of this in a safe and timely fashion so that four-lane 61 could be temporarily closed to allow for the bus's safe passage out of Shelby.

Since the claims against Defendants Carmicle and the City of Shelby relate to the performance of a discretionary function, this Court should also find an exemption from liability and affirm the lower court's holding based upon §11-46-9(1)(d).

C. Plaintiffs' Motion to Strike the Deposition of Tyrone Morton Is Baseless, Untimely, and Without Support

Defendants readily admit to this Court that they do not understand why Plaintiffs desire for Tyrone Morton's deposition testimony to be stricken. Defendants recognize that the alleged basis for said request is the contention that Mr. Morton was not allowed to "read and sign" his deposition, but throughout this entire confusing process, Plaintiffs have never indicated any portion of the transcript they believe to be inaccurate or which portions they *would have* made corrections to if done in timely fashion.

Additionally, why are Plaintiffs not complaining and asking to be stricken the deposition of Plaintiff Annie Morton who was deposed at the same time and place, and whose deposition was in the same C.O.D. package from the court reporter that Plaintiffs' counsel refused to accept.[7] Also, if Plaintiffs were that concerned about the depositions, why did they not make a single inquiry about the status of the same from June 1, 2005, when Tyrone Morton was deposed until October 31, 2005, at which time Defendants had already moved for summary judgment? [E-48]. Again, five months had passed since Mr. Morton was deposed. Thereafter, Plaintiffs waited more than another month until the summary judgment hearing where they moved *ore tenus* to have the deposition stricken.

Nowhere in Rule 30(e), M.R.C.P., does it provide a remedy which includes striking deposition testimony when a deponent fails to read and sign his deposition. This should be especially true in a situation such as this when the deponent does not make *any* effort to do the same. Here, Plaintiffs took no action for nearly half a year, then continued to refuse to simply *buy* the

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[7] Although the record is void of any reference to the same, Plaintiffs' counsel admitted to undersigned counsel that they refused to accept the C.O.D. package of the court reporter which contained the subject depositions and the letter of Patricia Marinelli which accompanied the same. [R. 159].

deposition transcripts (*i.e.*, Tyrone Morton's and Annie Morton's) once they were aware they were ready.

Defendants do not interpret Rule 30(e) as placing the burden upon them to provide an adverse party with a deposition transcript. If that is how the rule is meant to be read, *then what happens when the party noticing and taking the deposition does not purchase a copy*? The logical answer is that if you want your client to read and sign his/her deposition, you either 1) buy a copy, or 2) make an appointment with the court reporter (as was offered and rejected by Plaintiffs' counsel herein) to accomplish this.

Again, the Plaintiffs should not be allowed to benefit from their attorneys' own dilatory and negligent conduct. There was no conspiracy against the Plaintiffs. This argument is nothing but a "Red Herring," and this Court should reject it as such.

D. Plaintiffs' Motion to Compel -- with Regards to the Medical Records of James Carmicle -- Is Without Merit as Carmicle Never Placed His Medical Condition at Issue in this Litigation

Much like the prior issue on appeal, this seems like both a "Red Herring" and a moot point in that the lower court *did require* Defendant Carmicle to produce certain information concerning his treatment received following the accident. [R. 183-86]. That is, over the objection of Defendants, Plaintiffs *prevailed* as to drug and/or alcohol screening conducted upon Carmicle after the accident, and Defendants produced the information in line with the lower court's order [R. 195-201]. Thus, what else is left to obtain but Defendant Carmicle's medical records for treatment on his injured eye which are the only documents the lower court did not order Defendants to produce? And how would that be relevant to this suit? More importantly, what authority have Plaintiffs presented which would warrant Defendants having to produce the same?

To be clear, this issue is nothing more than a fishing expedition by Plaintiffs. They don't have one iota of proof (nor do they even make an allegation in their Complaint or elsewhere) that Defendant Carmicle was in any way under the influence at the time of this accident. [R. 1-6]. Instead, Plaintiffs have asked for all of the medical records of an individual whose medical condition has not been placed at issue in this litigation. As such, this request should be denied.

Discovery of Defendant Carmicle's medical records would appear to be governed by Rule 503, Mississippi Rules of Evidence. The general privilege rule as between physicians and patients may be found at Rule 503(b), which states as follows:

> **General Rule of Privilege.** A patient has a privilege to refuse to disclose and to prevent any other person from disclosing (A) knowledge derived by the physician or psychotherapist by virtue of his professional relationship with the patient, or (B) confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or

> treatment under the direction of the physician or psychotherapist, including members of the patient's family.

R. 503(b), MISS. R. EVID. While there are exceptions to the general rule[8], none appear to be applicable to the subject dispute. Relevant to this dispute is part (f) to R. 503, which states:

> Any party to an action or proceeding subject to these rules who by his or her pleadings places in issue any aspect of his or her physical, mental or emotional condition thereby and to that extent only waives the privilege otherwise recognized by this rule.

R. 503(f), MISS. R. EVID. Defendant Carmicle has not waived his right to claim the privilege herein. He has not filed any counter-claims or otherwise made any pleadings, admissions, or other that would place any aspect of his physical or mental condition at issue. Thus, Plaintiffs' request for his medical records herein should be rightly denied.

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[8] One exception involves a court-ordered examination wherein the privilege would be lost "with respect to the particular purpose for which the examination is ordered unless the court orders otherwise." MISS. R. EVID. 503(d)(2).

VI. CONCLUSION

The Plaintiffs' claims are barred because Defendant James Carmicle's conduct does not rise to the level of reckless disregard. Further, Defendant Carmicle was acting with discretion when providing the police escort at issue. For both of these independent reasons, immunity exists for all Defendants herein.

As to the "Red Herring" issues of striking Tyrone Morton's deposition and obtaining the medical records of James Carmicle, Plaintiffs have shown no legitimate basis for said requests; more importantly, they have demonstrated no legal authority to this Court to support such requests.

This Court should uphold the decision of the lower court as it was not in error to grant summary judgment.

Respectfully submitted this the 26th day of January, 2007.

CITY OF SHELBY, MISSISSIPPI,
AND JAMES CARMICLE

BY: _____
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CERTIFICATE OF FILING

I, R. Jeff Allen, attorney for Defendants City of Shelby, Mississippi, and James Carmicle in the above styled and numbered cause, pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure do hereby certify that the original and three (3) copies of the foregoing Brief of Appellees were this day forwarded via first class mail, postage prepaid, to the Clerk of the Supreme Court, and accordingly, such Brief is deemed filed as of today.

This the 26th day of January, 2007.

R. JEFF ALLEN

CERTIFICATE OF SERVICE

I, R. Jeff Allen, attorney for Defendants City of Shelby, Mississippi, and James Carmicle in the above styled and numbered cause, do hereby certify that a true and correct copy of the foregoing instrument has been this day forwarded by U.S. Mail to:

Hon. Charles E. Webster
Circuit Court Judge
P.O. Drawer 998
Clarksdale, MS 38614-0998

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This the 26th day of January, 2007.

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