No. 2007-CA-00007

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

MINNIE MACFIELD

Appellant

v.

THE CITY OF RULEVILLE

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.

1. Minnie Macfield, who is the Appellant. Ms. Macfield initiated this action in her capacity as Administratrix of the Estate of Lakeshia Denise Carr, Deceased.

2. Rodnequa Carr, who is the sole heir and wrongful death beneficiary of Lakeshia Denise Carr.

3. Nick Crawford (Crawford Law Firm) and J. Murray Akers, who are attorneys of record for Minnie Macfield.

3. The City of Ruleville, a Mississippi municipal corporation, which is the Appellee.

4. Jeffrey S. Dilley (Henke-Bufkin, P.A.), who is attorney of record for the City of Ruleville.

SO CERTIFIED on this, the 18th day of February, 2007.

Jeffrey S. Dilley
Attorney for the City of Ruleville

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

STATEMENT REGARDING ORAL ARGUMENT

Oral argument need not be permitted in this case, as the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

STATEMENT OF THE CASE

A. Nature of the Case

On August 18, 2003, Lakeshia Denise Carr ("Lakeshia") filed a criminal complaint with the Ruleville Police Department based upon a threat that she had received from her estranged boyfriend, Rodney White ("Rodney"). On the same day, the Ruleville Municipal Court issued an arrest warrant for Rodney on charges of threatening and simple assault. As Rodney's whereabouts were not known, the Ruleville Police Department made several attempts to find him so that the warrant could be executed. Rodney was never found, and, as a result, the arrest warrant was never executed. On August 26, 2003, Lakeshia was alone in the home of her mother and step-father, located just outside Drew, Mississippi. Rodney entered the home, shot and killed Lakeshia, and then took his own life.

The present action centers around the conduct of the Ruleville Police Department's acting chief, Larry Mitchell ("Mitchell"), over the course of the eight-day period following issuance of the arrest warrant. The Appellant contends that the efforts of Mitchell in attempting to locate and arrest Rodney were inadequate and amounted to reckless disregard for Lakeshia's safety and well-being. The Appellant further contends that the actions and alleged omissions of Mitchell proximately caused Lakeshia's death and thus seeks an award of damages against his employer, the City of Ruleville, pursuant to the wrongful death statute, MISS. CODE ANN. § 11-7-13.

As the City of Ruleville is a political subdivision of the state of Mississippi, this action is governed by the Mississippi Tort Claims Act ("MCTA"). Pursuant to the MTCA, the City of Ruleville has immunity for any claims based upon its employees' exercise or performance, or failure to exercise or perform, discretionary functions or duties. Mitchell's actions and decisions in attempting to locate and arrest Rodney were clearly discretionary. Since Mitchell was at all times engaged in police protection activities, the MTCA further provides immunity to the City of Ruleville in the absence of proof that Mitchell acted in reckless disregard for Lakeshia's safety and well-being. The Appellant has failed to establish that Mitchell's conduct, even if negligent, arose to the level of reckless disregard. Hence, the City of Ruleville has immunity for the claims herein asserted under both the discretionary function provision and the police protection activities provision of the MTCA.

B. Summary of the Proceedings Below

On August 11, 2004, the Appellant initiated this action by filing her Complaint against the City of Ruleville and the City of Drew. [C.P. at 6-13][1] Upon completion of discovery, the City of Drew was dismissed by agreement of the parties. [C.P. at 68] Both sides moved for summary judgment on the issue of liability, and these motions were denied. [C.P. at 332-334] A bench trial was conducted by the circuit court on August 22-23, 2006, at the conclusion of which the case was taken under advisement. On November 20, 2006, the court issued detailed Findings of Fact and Conclusions of Law. [C.P. at 358-362; R.E. at III] The court concluded that the actions of Mitchell in connection with the attempted execution of the warrant were discretionary in nature and thus found that the City of Ruleville was entitled to discretionary function immunity pursuant to the

[1]In all citations to the record contained in this brief, "C.P." shall reference the clerk's papers, "R.E." shall reference the record excerpts filed by the Appellant,"Tr." shall reference the transcript of the bench trial conducted in the court below, and "Ex." shall reference the trial exhibits.

MTCA. [C.P. at 361-362; R.E. at III] The court made no findings as to whether Mitchell was negligent or acted with reckless disregard, since the conclusion that the City of Ruleville had discretionary function immunity was dispositive of all issues. [C.P. at 362; R.E. at III] In accordance with the court's Findings of Fact and Conclusions of Law, a Final Judgment was rendered in favor of the City of Ruleville on November 20, 2006. [C.P. at 363; R.E. at II] The Appellant filed a motion for reconsideration, which was denied by order entered on December 11, 2006. [C.P. at 364-367] This appeal followed.

C. Summary of Facts Relevant to the Issue Presented for Review

Beginning in 2002, Lakeshia and Rodney lived together in a rental house located at 515 Sanders Lane in Ruleville, Mississippi. [Tr. at 8-9, 25] On the afternoon of August 18, 2003, Lakeshia, accompanied by her stepfather, Tommy Macfield, came to the police station in Ruleville to register a complaint against Rodney.[2] [Tr. at 41-42, 50-52, 137-138] The complaint was taken by Acting Chief Mitchell, who interviewed Lakeshia and had her prepare a written statement. [Tr. at 50-52, 178-180; Ex. P-7; R.E. at V] The substance of the complaint was that Rodney had pointed a gun at Lakeshia and threatened to kill both Lakeshia and himself.[3] [Tr. at 50-52, 178-180; Ex. P-7; R.E. at V] At Mitchell's request, the Ruleville Municipal Court Clerk, Rolanda Ratliff, prepared an affidavit charging Rodney with threatening in violation of MISS. CODE ANN. § 97-3-107. [Tr. at 180;

---

[2]From the testimony, it appears that the confrontation between Lakeshia and Rodney occurred earlier on August 18 at the Sanders Lane residence that the two had been sharing. [Tr. at 17-19] After Rodney made his threat, Lakeshia was given a ride to her mother's home in Drew by Rodney and his aunt. [Tr. at 17, 27-18] Rodney's whereabouts between the time that he left Lakeshia in Drew on August 18 and the time that he entered the Macfield home on August 26 are unknown. [Tr. at 30, 53-54, 102, 186-187]

[3]The Appellant makes the assertion that Lakeshia was "held hostage" by Rodney. [Tr. at 17, 40-41] There is no mention of being held hostage in the written statement prepared by Lakeshia. [Ex. P-7; R.E. at V] Likewise, there is no indication that Lakeshia ever advised Mitchell that she had been held hostage. [Tr. at 130]

Ex. P-7; R.E. at V] Lakeshia signed the affidavit, and a warrant was issued for Rodney's arrest.[4] [Tr. at 181; Ex. P-7; R.E. at V] All of this transpired on the afternoon of August 18, 2003. [Tr. at 51]

In response to questions by Mitchell as to where Rodney might possibly be found, Lakeshia indicated that she and Rodney had both moved out of the house on Sanders Lane but that she still had personal effects in the house and usually went there in the early morning to dress for work. [Tr. at 141, 157-159, 184-185] Lakeshia stated that Rodney sometimes came by the house on Sanders Lane when she was there in the morning. [Tr. at 141, 157-159, 184-185] Lakeshia also stated that it was possible that Rodney could be found at the home of his grandmother in Drew, and she provided Mitchell with a telephone number for this residence. [Tr. at 140-141, 148-150]

Following up on the leads provided by Lakeshia, Mitchell first telephoned the residence of Rodney's grandmother in Drew. [Tr. at 149, 183] The person with whom Mitchell spoke indicated that Rodney was not there. [Tr. at 149, 183] Since there was no indication that Rodney was at the residence in Drew, Mitchell arranged for a patrol officer, Roosevelt Blair, to monitor the Sanders Lane address during the early morning hours, when, according to Lakeshia, Rodney had shown up there in the past. [Tr. at 157-160, 184-186] Mitchell also provided a copy of the arrest warrant to Tommy Daves, the evening shift supervisor, who was coming on duty. [Tr. at 182-183]

Officer Blair kept watch of the house on Sanders Lane during the early morning hours of August 19, 20 and 21, 2003. [Tr. at 95-97] He was told by Mitchell to be on the lookout for a black male, and if any such person was seen, to call for backup. [Tr. at 95-97] Blair did not see anyone fitting this description. [Tr. at 95-97] The surveillance was suspended on August 21 due to the fact

---

[4]Due to a clerical error, the date set forth on the arrest warrant is *September* 18, 2003. However, it is undisputed that the warrant was actually issued on *August* 18, 2003. [Tr. at 82-83, 181-182]

that Blair had not observed any activity at the Sanders Lane residence over a three-day period. [Tr. at 184-185] Mitchell also went by the house on Sanders Lane and found no one present. [Tr. at 185, 191] Additionally, Mitchell interviewed one of Lakeshia's neighbors, who indicated that Rodney had not recently been seen in the area. [Tr. at 191]

On the morning of August 26, 2003, Mitchell received a telephone call from Lakeshia, who indicated that Rodney had been calling her from the home of his grandmother in Drew. [Tr. at 183-184] Based upon this information, Mitchell requested his dispatcher to fax a copy of the arrest warrant to the Drew Police Department. [Tr. at 183-184] After the fax was sent, Officer Shelia Pointer of the Drew Police Department went to the residence of Minnie Lee White (Rodney's grandmother); however, Rodney was not present at this location. [Tr. at 80-82, 88-89]

On the afternoon of August 26, 2003, Tommy Macfield came to the police station in Drew and reported that Rodney was at his house beating on Lakeshia. [Tr. at 89-90; Ex. D-5] As the Macfield home is located in the county and not within the Drew city limits, the Drew dispatcher contacted the Sunflower County Sheriff's Department and requested that deputies be sent to the Macfield home. [Tr. at 89-90] By the time deputies and Drew officers arrived on the scene, Rodney had shot Lakeshia and himself; both were dead at the scene. [Ex. P-6]

SUMMARY OF THE ARGUMENT

The rather narrow presented on appeal is whether the circuit court erred in concluding that Mitchell's actions in attempting to locate and apprehend Rodney were discretionary in nature for purposes of the MTCA so as to cloak the City of Ruleville with immunity. The Appellant maintains that Mitchell failed to use reasonable diligence in pursuing Rodney following the issuance of the arrest warrant. The circuit court concluded that the function of determining when and how to

execute an arrest warrant is a discretionary function because such conduct involves choices and judgments grounded in policy considerations. The circuit court applied the appropriate legal standard in its analysis, and its factual findings are supported by substantial, credible and reasonable evidence. As such, the lower court decision should be affirmed.

The crux of the Appellant's case is that Mitchell should have done more in an effort to locate and apprehend Rodney. While no testimony was presented regarding Rodney's whereabouts between August 18 and 26, the Appellant contends that, had Mitchell taken different or additional steps to find Rodney, there is a greater chance that Rodney could have been found and arrested. Mitchell's actions and decisions regarding the pursuit of Rodney were clearly discretionary. Under Mississippi law, an activity is discretionary if it involves an element of choice or judgment and the choice or judgment involves social, economic or political policy. Mitchell's actions and decisions involved choices and judgments, since it was up to Mitchell to decide how best to execute the warrant, including the tactics and strategies most likely to result in Rodney's capture. Moreover, the choices and judgments involved considerations of social policy (whether and to what extent a particular course of action provided for the protection of the public at large, the officers executing the action, Lakeshia, and Rodney), economic policy (whether and to what extent a particular course of action was feasible in light of budgetary constraints and/or staffing issues), and political policy (whether and to what extent a particular course of action was in the best interests of the citizens of Ruleville). It goes without saying that a police department cannot dedicate all of its resources to one case all the time. Likewise, there is no guarantee that any one strategy will ultimately prove effective. In this instance, Mitchell, in his capacity as acting chief, chose to pursue certain actions

that ultimately proved unsuccessful in locating Rodney. Because these actions were discretionary, the City of Ruleville has immunity.

The Appellant has also dedicated a substantial portion of her brief to the police protection activities provision of the MTCA, which provides immunity for police protection activities in the absence of proof that the officers in question acted in reckless disregard of the safety and well-being of a person not engaged in criminal conduct. As noted, the circuit court made no findings as to whether the Appellant had proven reckless disregard, concluding that the existence of discretionary function immunity was dispositive of all issues. However, assuming for the sake of argument that the circuit court was obligated to consider the reckless disregard standard, the end result would be the same. Based upon the evidence, and considering well established Mississippi law, there is no basis for a determination that Mitchell acted in reckless disregard for Lakeshia's safety and well-being. Thus, the police protection activities provision of the MTCA provides an additional basis for immunity.

ARGUMENT

A. Standard of Review

A trial judge's findings of fact following a bench trial will not be disturbed on appeal as long as those findings are supported by substantial, credible and reasonable evidence. City of Jackson v. Brister, 838 So.2d 274, 277-78 (Miss. 2003). Issues of law, including proper application of the MTCA, are reviewed on appeal under a *de novo* standard. Id.

B. Applicability of the MTCA

The City of Ruleville is a political subdivision of the State of Mississippi. See MISS. CODE ANN. § 11-46-1(i). Further, the events giving rise to this action occurred after October 1, 1993. See

MISS. CODE ANN. § 11-46-5. As such, the MTCA provides the Appellant's exclusive remedy against the City of Ruleville based upon any tortious acts or omissions. MISS. CODE ANN. § 11-46-7(1); see also Jackson v. City of Booneville, 738 So.2d 1241, 1243 (Miss. 1999).

C. Discretionary Function Immunity

The MTCA provides that "[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]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the governmental entity or employee thereof, whether or not the discretion be abused[.]" MISS. CODE ANN. §11-46-9(1)(d). This provision grants absolute immunity to governmental entities and their employees relating to the exercise or performance, or the failure to exercise or perform, discretionary functions or duties, regardless of whether due care was exercised in relation therewith. See Collins v. Tallahatchie County, 876 So.2d 284, 289 (Miss. 2004); Willingham v. Mississippi Transportation Commission, 944 So.2d 949, 952 (Miss.App. 2006). In defining "discretionary" in the context of the MTCA, the Supreme Court has held that, "when an official is required to use his own judgment or discretion in performing a duty, that duty is discretionary." Harris v. McCray, 867 So.2d 188, 191 (Miss. 2003). On the other hand, a duty or activity is deemed ministerial and not discretionary if it "is one which has been positively imposed by law and its performance required at a time and in a manner or under conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." Stewart ex rel. Womack v. City of Jackson, 804 So.2d 1041, 1048 (Miss. 2002).

The Supreme Court has adopted a two-pronged analysis, commonly referred to as the public policy function test, to determine if an activity is discretionary so as to qualify for immunity under

the MTCA. This test requires a determination of: (1) whether the activity in question involved an element of choice or judgment; and, if so, (2) whether the choice or judgment involved social, economic or political policy. Jones v. Mississippi Department of Transportation, 744 So.2d 256, 260 (Miss. 1999). In adopting the public policy function test, the Court recognized that the purpose of discretionary function immunity is "to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Id. at 260 (citing U.S. v. Gaubert, 499 U.S. 315, 323, 111 S.Ct. 1267 (1991)). Discretionary function immunity applies to policy decisions whether made at the operational or planning level and is thus applicable to the day-to-day decisions of police officers and other governmental actors. Willing v. Estate of Benz, 958 So.2d 1240, 1253 (Miss.App. 2007). See also U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797, 813, 104 S.Ct. 2755, 2764 (1984) ("[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.").

The claims herein presented are based solely upon the actions and alleged omissions of Mitchell in attempting to execute an arrest warrant. The Appellant asserts that Mitchell's activities in this regard were not discretionary because the Ruleville Police Department had a positive duty, imposed by statute (MISS. CODE ANN. § 99-3-7), its policy and procedure manual (Ex. P-8) and the terms of the subject arrest warrant (Ex. P-7), to arrest Rodney. However, in making this argument, the Appellant confuses the *ministerial* act of taking a person into police custody under command of a warrant with the *discretionary* act of executing the warrant. The latter involves numerous decisions of when, where and how to execute the warrant. The testimony of Tom Long, who was

accepted by the court as an expert in the fields of law enforcement practices, procedures, and administration, is instructive in this regard.

Q. Is there discretion involved in that, in actually serving the warrant? Not in the decision to arrest –

A. Right.

Q. -- but in actually serving the warrant. Does that involve the exercise of discretion?

A. Oh, yes, sir. I mean, a police department is -- operates on call responses, response to crossing guards, auto accidents, calls all day long. A typical day at the Southaven Police Department is, we have sent out today maybe 42 warrants we're going to attempt to be served. You let us get busy answering calls and answering wrecks and bank robbery or something like that, there won't be no warrants served today. And that's in that discretion. What you're trying to do is arrive at the serve, and you do have a duty to serve and you will make every effort to serve it within the discretion of doing your daily duties.

Q. How does -- how does the police department or other law enforcement agency go about locating a subject to serve a warrant on?

A. Well, ideally, it's always at the last known address. That is usually where someone has established a residence. They come in. You're going to take their last known address. You're going to make an effort to find them at their last known address. If you receive any calls or information that tells you another area, you will call, check out that area, you know. Number one, you know, we're going to make an effort to first call you. I know it's like when Mitchell said he made a phone call, and there is nothing unusual about that. We serve half our warrants, Your Honor, on the phone. We have the warrant. You call. You ask for an individual. Most of the time if they're there, they'll answer. You tell him, "Sir, I have a warrant for your arrest. Would you make arrangements to come by and surrender so we do not have to come arrest you?" They'll make arrangements for their bond. They'll make arrangements for their attorney to accompany them. They'll come to the station. They'll surrender. We'll serve it. It's -- again, it's a discretionary thing that you -- that's -- you know, I'm trying to use my manpower to the best of our abilities. The town next door to us has started a volunteer program at night where they're using citizen volunteers to come in at night to help them with their backlogs of warrants, to actually get on the phone and

> call as many people as they can. So a phone call is an excellent way of getting someone to come in and surrender. [Tr. at 259-161]

To the extent that a warrant directs an officer to arrest a subject, the officer has no discretion to ignore the command of the warrant. Thus, if the subject is in the presence of an officer holding a valid warrant, the officer is obligated to take the subject into custody. However, where the location of the subject is not known, an officer must exercise judgment and decide how best to apprehend the subject. This is precisely what was done by Mitchell. Mitchell was furnished with information by Lakeshia that Rodney *might* be staying with his grandmother in Drew. Mitchell placed a call to this residence and determined that Rodney was not present. Mitchell was also advised by Lakeshia that Rodney would sometimes come by the Sanders Lane residence during the morning as she was preparing to go to work. Based upon this information, Mitchell elected to place an officer nearby to monitor activity during those hours when Lakeshia would be present (and when Rodney was likely to arrive at the house). Mitchell also went to Lakeshia's residence and spoke with her neighbor in an effort to find Rodney.[5] Despite these efforts, Rodney was never found.

The circuit court considered this evidence and found as follows:

> Clearly, the manner in which Chief Mitchell elected to execute the arrest warrant involved the exercise of a discretionary function. The decision of how to execute a warrant includes an analysis of basic investigative decisions, including, the decision of what type of investigation to conduct prior to the execution of the warrant, considerations of resources, risk, and danger, the urgency of capturing the subject, and whether to execute the warrant at night or during the day, inside or outside of a house, and with or without force. All of which involve profoundly difficult policy or judgment considerations.

---

[5]Tom Long, who was accepted by the court as an expert in the fields of law enforcement practices, procedures, and administration, testified that each of these actions by Mitchell was reasonable, appropriate and in accord with established law enforcement methods. [Tr. at 259-265]

Findings of Fact and Conclusions of Law, ¶ 28 [C.P. at 361-62; R.E. at III]. Thus, the circuit court found that the actions of Mitchell involved elements of choice or judgment and that the elements of choice or judgment involved policy considerations. While the court did not specify whether these policy considerations were social, economic or political in nature, the specific examples pertain to all three. The social policy considerations include whether and to what extent a particular course of action provided for the protection of the public, the police personnel involved in pursuing the course of action, Lakeshia, and Rodney; the economic policy considerations include whether and to what extent a particular course of action was feasible in light of budgetary constraints and/or staffing issues; and the political policy considerations include whether and to what extent a particular course of action was in the best interests of the citizens of Ruleville. Thus, the type of investigation involves economic, social, and political policy; considerations of resources involve economic and political policy; risk and danger, the urgency of capturing the subject, whether to execute the warrant at night or during the day or inside or outside, and with or without force involve social and political policy.

In support of its finding that the activities of Mitchell were discretionary, the circuit court cited Mesa v. United States, 837 F.Supp. 1210 (S.D.Fla. 1993). The Appellant is critical of the trial court's reliance on this case, erroneously asserting in her brief that Mesa involved a search warrant. In fact, Mesa involved the question of whether discretionary function immunity under the Federal Tort Claims Act applied to claims for negligence and recklessness in connection with the execution of an *arrest* warrant. The federal district court in Mesa considered the public policy function test as applied by the United States Supreme Court in Gaubert (the same decision that was cited by the

Mississippi Supreme Court when it adopted the public policy function test in Jones v. Mississippi Department of Transportation) and concluded as follows:

> We hold as a matter of law that the function of determining when and how to execute an arrest warrant is quintessentially a discretionary function, involving choices and judgments that are grounded in policy considerations. In making such a decision, the agents must answer such basic questions rooted in the investigative process as these: shall the warrant be executed at day, or at night? Shall it be executed inside a house, or only when the subject is found outdoors? How much investigative effort shall be expended prior to executing a warrant? Which resources shall be devoted to the task? Profoundly difficult policy and judgment choices are often attendant to the process of executing a warrant. Plaintiffs' suggestion that the execution of an arrest warrant is simply a ministerial act is plainly wrong.

Mesa, 837 F.Supp. at 1213. The standards utilized by the federal district court in Mesa, which are derived from Gaubert, are clearly consistent with Mississippi law, which is likewise based directly on Gaubert. See Jones v. Mississippi Department of Transportation, 744 So.2d at 260.

The Appellant also cites Couzado v. United States, 883 F.Supp. 691 (S.D.Fla. 1995), as a basis for discounting the validity of the holding in Mesa. The Couzado decision involved a claim that federal agents failed to comply with DEA Guidelines and a Letter of Instruction from the White House to U.S. Ambassadors, which specifically prescribed a course of action that government agencies and their agents were required to follow. Couzado, 883 F.Supp. at 695. Since the agents in question were bound by these standards, the court found that the government was not entitled to discretionary function immunity, noting:

> The issue here is whether the Government has discretion to not adhere to the standards and mandates set forth in the DEA Guidelines and the Letters of Instruction to U.S. Ambassadors when conducting operations involving both the United States and a foreign country. The answer, set forth in detail above, is that no such discretion exists.

Id. at 695-696. The activities at issue in Couzado, contrary to the activities at issue in Mesa, did not involve elements of choice or judgment.[6] Thus, Couzado is inapposite.

There are no reported Mississippi state or federal court decisions addressing the applicability of discretionary function immunity to the decisions of police officers in connection with the execution of arrest warrants.[7] However, discretionary function immunity has been applied in numerous other contexts based upon an application of the public policy function test. See, e.g., Dotts v. Pat Harrison Waterway Dist., 933 So.2d 322 (Miss.App. 2006) (operation of public swimming area held to be discretionary function); Dancy v. East Mississippi State Hosp., 944 So.2d 10 (Miss. 2006) (supervision of mental patients found to be a discretionary activity); Suddith v. University of Southern Mississippi, 2007 WL 2178048 (Miss.App. July 31, 2007) (decisions regarding hiring of faculty members found to be discretionary); Harris v. McCray, 867 So.2d 188 (Miss. 2003) (supervision of football players by high school coach found to be a discretionary activity); Barrentine v. Mississippi Department of Transportation, 913 So.2d 391 (Miss.App. 2005) (placement or non-placement of traffic control devices or signs found to be a discretionary governmental function). Moreover, as previously noted, discretionary function immunity clearly applies to the day-to-day decisions of police officers so long as such decisions meet the public policy function test. The claims herein presented solely and exclusively involve Mitchell's decisions and activities in seeking to find and apprehend Rodney. These decisions and activities were discretionary because: (1) they involved elements of choice or judgment; and (2) the elements of choice or judgment involved

---

[6]It bears noting that the district court was not critical of the Mesa decision but rather criticized the government's *reliance* on Mesa, given the factual disparities between the two cases Id. at 695.

[7]In *dicta* the Supreme Court has noted that decisions made by law enforcement officers incident to the execution of a search warrant (such as the specific rooms to be searched) are discretionary. See Barrett v. Miller, 599 So.2d 559, 567 (Miss. 1992).

social, economic and political policy. Accordingly, the circuit court's judgment in favor of the City of Ruleville on the basis of discretionary function immunity should be affirmed.

2. Immunity for Police Protection Activities

Because it determined that the City of Ruleville is entitled to discretionary function immunity, the trial court did not consider whether the City of Ruleville is likewise immune under the police protection activities provision of the MTCA. Nevertheless, the plaintiff has addressed this immunity provision in her brief, and the City of Ruleville will do likewise.[8]

The police protection activities provision of the MTCA states that "[a] governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim ... [a]rising 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[.]" MISS. CODE ANN. §11-46-9(1)(c). Without question, the Appellant's claims herein arise solely from "the performance or execution of duties ... relating to police ... protection." Therefore, the City of Ruleville is entitled to immunity on the basis of this provision absent proof that Mitchell acted "in reckless disregard of [Lakeshia's] safety and well-being."

In Turner v. City of Ruleville, 735 So.2d 226 (Miss. 1999), the Supreme Court examined the meaning of the term "reckless disregard" in the context of the MTCA and found that:

> "Disregard" of the safety of others is at least negligence if not gross negligence. Because "reckless" precedes "disregard," the standard is elevated. As quoted ... from

[8]Since the circuit court did not rule against the City of Ruleville as to the applicability of the police protection exemption (it merely failed to consider this basis for immunity), the City of Ruleville has not cross-appealed on this issue.

> *Black's Law Dictionary*, "reckless," according to the circumstances, "may mean desperately heedless, wanton or willful, *or* it may mean only careless, inattentive or negligence." (citation omitted) In the context of the statute, reckless must connote "wanton or willful," because immunity lies for negligence. And this Court has held that "wanton" and "reckless disregard" are just a step below specific intent. (citation omitted)

Turner, 735 So.2d at 230. The Court concluded that the term "reckless disregard," as used in the MTCA, "embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act." Id. The Supreme Court has further defined "reckless disregard" as "conscious indifference to consequences, amounting almost to a willingness that harm should follow." Maye v. Pearl River County, 758 So.2d 391, 394 (Miss. 1999).

Turner involved a Rule 12(b)(6) dismissal. It was alleged in the complaint that a Ruleville police officer had pulled over a visibly intoxicated driver for operating his vehicle in an erratic manner. Id. at 227. Although the driver was incapable of operating his vehicle, the officer allowed him to continue driving. The driver was subsequently involved in an accident with the plaintiff. Id. The Supreme Court held that the complaint stated a claim sufficient to satisfy the MTCA because, based upon the facts alleged, the officer had intentionally allowed a visibly intoxicated person to continue driving, which would meet the standard of "reckless disregard." Id. at 230.

City of Jackson v. Perry, 764 So.2d 373 (Miss. 2000), is also illustrative of the type of proof required to meet the standard of "reckless disregard." That case arose from an automobile accident involving a City of Jackson police officer who was speeding without use of his siren or blue lights. Perry, 764 So.2d at 375. Evidence was presented that the officer was not responding to an emergency call, but was going to dinner. Id. The Supreme Court concluded that the officer's conduct "showed a reckless disregard of the safety and well-being of others." Id. at 378.

In Collins v. Tallahatchie County, 876 So.2d 284 (Miss. 2004), the Supreme Court addressed a scenario that was strikingly similar to the facts herein. According to the Court's opinion:

> On or about August 31, 2000, Essie received threatening phone calls from her estranged husband, Robert, who threatened "to kill, maim and otherwise cause grievous bodily injury" to her. She reported the incident to the Tallahatchie County Sheriff's Department ("TCSD"), and asked that Robert be arrested. TCSD instructed Essie to swear out an affidavit at the justice clerk's office so that an arrest warrant could be issued.
>
> The next day, Essie went to the justice court and signed a criminal affidavit against Robert for domestic violence. Shortly thereafter, the judge signed the warrant, but never delivered it to TCSD. Essie testified that the judge called her on Saturday, September 2, but she failed to recall much about the conversation. The judge claims that he had a phone conversation with Essie and that she told him that she didn't want to see Robert in jail, but wanted to get him into court where the judge could tell him to stop threatening her. In any case, it is undisputed that Robert was never arrested.
>
> On Monday, September 4, 2000, Robert forced his way into Essie's home and shot her twice before turning the gun on himself and taking his own life.

Collins, 876 So.2d at 286. In Collins, the arrest warrant was never delivered to the TCSD. Id. However, as grounds for her claim against the TCSD, the plaintiff asserted that there was probable cause for the TCSD to make a warrantless arrest. Id. at 287. Thus, like in the present case, the issue presented was whether the TCSD could be held liable under the MTCA based upon its failure to make an arrest. The trial court entered summary judgment in favor of TCSD based in part on Section 11-46-9(1)(c). The Supreme Court affirmed, holding:

> Essie cites no authority for the proposition that the failure to arrest despite the presence of probable cause automatically rises to a level of reckless disregard. ... Through Essie's previous filing with TCSD and her latest complaint, there was ample probable cause to arrest... However, as stated above, reckless disregard requires that the person knowingly or intentionally commit a wrongful act. ... TCSD's conduct, even if negligent, cannot be said to have risen to the level of reckless disregard based upon the facts in this record. Therefore, §11-46-9(c) did provide immunity based upon TCSD's conduct, and summary judgment was proper as to TCSD.

Id. at 287-88.

The only significant distinction between Collins and the present case is the level of involvement by the law enforcement agency. In Collins, the TCSD, in response to Essie's complaint, did nothing other than to refer her to the Justice Court and make one attempted telephone call to Robert. Nevertheless, upon a review of the facts, the Supreme Court found:

> Through Essie's previous filing with TCSD[9] and her latest complaint, there was ample probable cause to arrest... However, as stated above, reckless disregard requires that the person knowingly or intentionally commit a wrongful act. ... TCSD's conduct, even if negligent, cannot be said to have risen to the level of reckless disregard based upon the facts in this record. Therefore, §11-46-9(c) did provide immunity based upon TCSD's conduct, and summary judgment was proper as to TCSD.

Id. at 287-88.

After considering the evidence presented in the present case, the circuit court expressly found that Mitchell took a number of actions in response to Lakeshia's initial complaint. Specifically, it was found that Mitchell: (1) interviewed Lakeshia and obtained her written statement; (2) prepared an affidavit for an arrest warrant; (3) secured the arrest warrant from the Municipal Court; (4) attempted to make contact with Rodney (in Drew) by telephone; (5) arranged for surveillance on Lakeshia's residence during the early morning (when it was most likely that Rodney would be present); (6) personally visited Lakeshia's residence and neighborhood in an effort to find Rodney; and (7) upon receiving confirmation that Rodney was in Drew (on August 26, 2003), forwarded the arrest warrant to the Drew Police Department. Thus, accepting the fact that Mitchell could have done more or approached the search differently, his conduct certainly does not rise to the level of reckless disregard.

---

[9]The Court's opinion indicates that at least one prior complaint had been filed on Robert. Id. at 286, fn. 3.

In Titus v. Williams, 844 So.2d 459 (Miss. 2003), the Supreme Court considered whether the evidence was sufficient to overcome the police protection exemption in the MTCA. The plaintiff alleged that Sardis police officers had not properly investigated a prior complaint and claimed that this led to the subsequent shooting of their decedent by the assailant involved in the prior incident. The Court considered only whether the proof was sufficient to establish that the officers had acted in reckless disregard of the plaintiff's safety and well-being, and found that it was not. Titus, 844 So.2d at 468-69.

Further, in Fair v. Town of Friars Point, 930 So.2d 467 (Miss.App. 2006), the Court held that where an arresting officer was unaware that he could have charged an accused with a more serious crime, which would have detained the accused longer, possibly preventing a subsequent murder and suicide, there was no reckless disregard. Fair, 930 So.2d at 471-72. In Fair, the aggressor, Terry Dukes, was arrested after a physical altercation with a woman he was dating, in which he pushed her through a glass coffee table. Fair, 930 So.2d at 469. When officers arrived on the scene, they apprehended Dukes and charged him with simple assault. Id. Dukes posted bond, paid his fine, and, less than two months later, stabbed the woman to death. Id. Her estate brought suit against the Town of Friars Point, asserting that had Dukes been charged with domestic violence, rather than simple assault, his parole stemming from a prior conviction of domestic violence would have been revoked, and he would have been in prison at the time he fatally stabbed the decedent. Id. Upon review, the Court maintained that the officers did not display reckless disregard in their investigation and reporting of the incident, and the Town of Friars Point was thus afforded immunity under the MTCA. Id. at 472. See also Bradley v. McAllister, 929 So.2d 377 (Miss.App. 2006) (failure of officer to adjust or loosen handcuffs despite subject's complaint and obvious distress did not

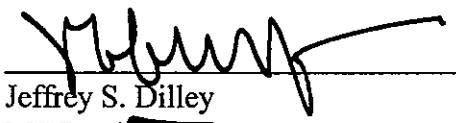
constitute reckless disregard); Chapman v. City of Quitman, 954 So.2d 468 (Miss.App. 2007) (decision by officer who was in the midst of crowd of angry teenagers to leave engine running and doors unlocked when exiting his vehicle did not constitute a "conscious indifference" to the possibility that the vehicle would be stolen); Reynolds v. Wilkinson County, 936 So.2d 395 (Miss.App. 2006) (deputy's decision to drive into obstructed intersection, while perhaps negligence, did not constitute reckless disregard); City of Greenville v. Jones, 925 So.2d 106 (Miss. 2006) (police officers did not act in reckless disregard of the safety and well-being of owner of cell phone who was wrongly arrested and prosecuted for making bomb threats); Willing v. Estate of Benz, 958 So.2d 1240 (Miss.App. 2007) (officer who failed to warn other motorists of icy patch on road but instead merely reported condition to MDOT did not act in reckless disregard of the safety of other motorists).

Based upon the evidence presented at trial, the Appellant failed to establish that Mitchell acted in reckless disregard of Lakeshia's safety and well-being. Thus, the City of Ruleville is further granted immunity on the basis of the police protection activities provision of the MTCA.

CONCLUSION

Based upon the authorities hereinabove set forth, the Appellee, City of Ruleville, respectfully requests that the circuit court's judgment in its favor be affirmed.[10]

Respectfully submitted,



Jeffrey S. Dilley
MS Bar #[redacted]
Attorney for the City of Ruleville

[10]In the "Conclusion" of her brief, Appellant requests this Court to reverse the trial court and render judgment in her favor for the statutory maximum in damages. As noted previously, the trial court entered judgment based upon a determination that the City of Ruleville has discretionary function immunity under the MTCA. The trial court made no determinations regarding liability, causation, or damages. Thus, should this Court conclude that the City of Ruleville does not have immunity for the claims presented, the sole remedy would be to reverse the judgment and remand the case to the circuit court for further proceedings.

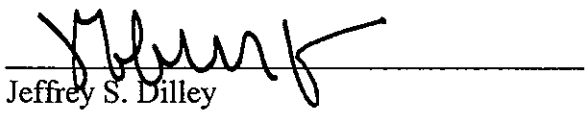
CERTIFICATE OF FILING AND SERVICE

I, Jeffrey S. Dilley, attorney of record for the Appellee, City of Ruleville, do hereby certify that, on February 18, 2008, I filed the original and three copies of the Appellees' Brief, along with a copy of the same on electronic disk, with the clerk of the Supreme Court and Court of Appeals by depositing the same in the United States mail and that I forwarded a true and correct copy of the Appellees' Brief by United States mail to each of the following persons:

Nick Crawford, Esq.
P.O. Box 1335
Greenville, MS 38702-1335

J. Murray Akers, Esq.
P.O. Box 1076
Greenville, MS 38702-1076

Hon. Ashley Hines
Circuit Court Judge
P.O. Box 1315
Greenville, MS 38702-1315



Jeffrey S. Dilley