IN THE SUPREME COURT OF MISSISSIPPI

MINNIE MACFIELD — **APPELLANT**

Vs.

CAUSE NO. 2007-CA-00007

THE CITY OF RULEVILLE — **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF SUNFLOWER COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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Statement Regarding Oral Argument

Appellant requests oral argument of the issues presented by this appeal. In support thereof, Appellant respectfully suggests that oral argument presents an opportunity for a dialogue between the Court and counsel for the parties who have been intimately familiar with the facts of this case for more than four years. It will also provide a better opportunity to fully explore and develop the language to be employed in defining with more certainty the minimum conduct necessary in the enforcement of our laws relating to domestic abuse and violence. Officers need be advised of exactly what is expected of the officers in attempting to locate and apprehend subjects of arrest warrants generally and warrants based on violations of the domestic violence laws in particular. The public policy issues to be affected by the decision in this case are not fully identified in the narrow legal issue stated in Appellant's Statement of Issues.

Facts

Although seemingly innocuous at first glance, there are several misstatements of the facts in Appellee's Brief which could have a significant impact on this Court's policy

considerations in resolving the issue raised by this appeal. For instance, Appellee challenges the Appellant's assertion that Chief Mitchell was told that Rodney held Lakeshia hostage in her home on August 13, 2003, the day he threatened to kill her and himself while pointing a pistol at her.

The testimony of Thomas MacField leaves little doubt that Chief Mitchell was informed of the hostage situation.

> A. She told me that Rodney had threatened her, held her hostage up in the house. I had dropped her off that morning to her house so she can get ready for work, and she said Rodney had held her hostage in the house and when he held her hostage he went on and --I can't recall anymore.
>
> * * * *
>
> Q. Okay. Did Lakeshia tell you that he had pulled a gun on her?
>
> A. Yes, sir.
>
> Q. Did Lakeshia tell you that he held her hostage?
>
> A. Yes, sir.
>
> Q. Did you tell Larry Mitchell what Lakeshia had told you?
>
> A. Yes, sir.
>
> * * * *
>
> A. Yes, sir. No. Her -- I told -- I told -- I told what she had told me.
>
> Q. Okay. So you told Mitchell. You kind of summarized things for Mitchell.

A. Yes, sir.

Q. And then Mitchell talked to Lakeshia --

A. Yes, sir.

Q. --is that right?

* * * *

Q. And did Lakeshia tell Chief Mitchell everything that had happened?

A. Yes, sir.

Q. Did everybody appear to understand what was going on here?

A. Yes, sir.

(Tr. 40-41, 52)

Another important error in Appellee's statement is the representation that Chief Mitchell had Lakeshia's home under surveillance during the early morning hours when she could be expected to be present and when Rodney had been known to be present. Lakeshia explained to Chief Mitchell that she was staying with her mother and stepfather Thomas MacField and that she went home every morning around 6:30 so that she could get dressed to go to work. She had to clock in at work in Itta Bena by 7:46 each morning for her shift which began at 8:00 o'clock. (Tr. 14) She explained to the Chief that Rodney would already be in the house when she arrived home in the mornings. (Tr. 157)

When Thomas MacField was asked what, if any, steps Chief Mitchell intended to

employ for Lakeshia's protection, he said that the Chief mentioned surveillance on Lakeshia's home. The Chief told them that he would have an officer there waiting on her in the morning; but "that never happened." (Tr. 41-43) On August 19, the morning after Lakeshia made the complaint and the warrant was issued, Mr. MacField took Lakeshia to her house and even went inside to see if Rodney was there. Since there was no officer on the scene upon their arrival, Mr. MacField called the police station to inquire. No one there knew what he was talking about; but an officer was sent. (Tr. 41-43)

Although the Chief indicated that his intent was to have an officer present at the time Lakeshia arrived each morning (Tr. 155)[1], that is not what happened. Officer Blair described the plan in different terms.

> A. Right before my shift --whenever my immediate supervisor -- most time he would come in about 7:30 and he would say, "Well, Officer Blair, I need you to go over and put the residence under surveillance and report back to me by radio if anything suspicious is going on, especially a male trying to make contact with that particular residence."

(Tr. 97-98)

To Officer Blair's knowledge, there never was any surveillance conducted as early as 7:00 o'clock and he was the only one who conducted any surveillance between August 19 and August 21. (Tr. 98) After three days of watching the house at 8:00 o'clock, the time when Lakeshia was already at work (Tr. 14), and seeing no activity at the house, Officer Blair terminated the surveillance on his on. (Tr. 98)

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[1] This was part and parcel of Mitchell's plan to use Lakeshia as bait to try to trap Rodney. (Tr. 157-58)

Argument

As was stated in the Brief of Appellant, it is necessary to address the City's liability from the standpoints of both subsections (b) and (c) of Mississippi Code Annotated (1972), §11-46-9, in order for the Plaintiff to prevail. Even though not addressed by the Trial Court, it is addressed here because of its potential impact on any policy considerations related to resolution of the issue of the exercise of discretion.

Reckless Disregard: Chief Mitchell and the two experts, both experienced police officers, who testified for the respective parties agreed that failure to take seriously a death threat involving a firearm was reckless. (Tr. 178; 268-69, 277; 208) Chief Mitchell even acknowledged that such situations were volatile and unpredictable.

> Q. Would you agree that they're really not very predictable? [referring to domestic violence cases]
>
> A. Well, in most cases, not. I mean, in a lot of cases I think the police officer might get hurt in that situation.
>
> Q. Do people tend to hold a grudge --
>
> A. Yes.
>
> Q. --over a long period of time?
>
> A. Yes.
>
> Q. And you really never know when they're going to erupt again, do you?
>
> A. Well, not really.

(Tr. 127-28)

Despite the volatile nature of the problems between Lakeshia and Rodney, despite the report of a death threat accompanied by the then present ability to carry out the threat by pointing a pistol at her, despite the Chief's knowledge of the history of past problems between Lakeshia and Rodney, and despite the unpredictable nature of persons in such a situation, Chief Mitchell made no serious, good-faith attempt to locate and apprehend Rodney.

Why he did nothing is best explained in his own words:

Q. Okay. Now, you're encouraged in his worksheet to allow the victim to tell the story uninterrupted, right?

A. Yes.

Q. Okay. Because they're going to say every bad thing they can think of and get it all off their chest at one time normally.

A. Right.

Q. Would you agree that you then as an investigator have the duty of going back and asking specific questions to get the detailed information you need?

A. Yes.

Q. Okay. Because people don't always know what information you as a police officer need.

A. Right.

Q. Okay. Did you do that with Lakeshia Carr?

A. Basically, Lakeshia Carr's situation was different. Lakeshia Carr came into the police department with her stepfather, and I told them to come on into the office and she wrote me a

> statement that Rodney White had said something about killing her and himself. And due to the fact that we had dealt with Ms. Carr and them previously and the situation had never been physical, you know what I'm saying, I just thought that it was just another one of those times. That's what I thought, that it was just going to be another situation like that, and the last time she didn't even show up for court.

(Tr. 128-29)

Even by putting the best spin possible on Chief Mitchell's conduct, the Appellee could come up with only seven (7) actions which the Chief took. It is significant to note that the Appellee states that these actions were taken "in response to Lakeshia's initial complaint," (Brief of Appellee, p. 18) not that they were taken in an effort to locate and apprehend Rodney. Actions numbered (1) through (3) were part of the process of determining that actionable conduct had occurred and number (7) was too little and too late.

The fourth action enumerated by Appellee was the telephone call to the home of Rodney's grandmother. Upon being informed that Rodney was not present, the Chief hung up. This was purely perfunctory, what members of the military would call "eye wash." Action number (6) was mentioned for the first time at trial, not during his comprehensive deposition. That, of course, allowed no time to investigate the veracity of the statements.

This leaves only action number (5), *i.e.* setting up surveillance on Lakeshia's home during the time that it was "most likely that Rodney would be present." (*Ibid.*) The surveillance did not happen the way the Chief said, perhaps not even the way he imagined

that it would.

As stated earlier, Lakeshia was gone from her home by 7 o'clock each morning because she had to clock in at work in Itta Bena by 7:46 for her shift which started at 8:00 o'clock. (Tr. 14) Officer Blair, the only officer on duty between midnight and 8:00 A.M., testified that he went to Lakeshia's home when instructed each morning by Chief Mitchell. He also stated that those instructions normally came after the Chief came to work around 7:30 A.M. (Tr. 97-98)

When viewed in the best light possible and giving the Chief the benefit of the doubt, it remains patently obvious that Chief Mitchell patronized Lakeshia and her stepfather by having a rubber-stamped warrant issued for Rodney and making one meaningless telephone call while they were present--all because of the Chief's insouciant attitude. As the Chief put it

> A. . . . . I mean, just so something was done about it. As long as the victim is satisfied when they leave, that's the way I look at it.

(Tr. 146)

Not only was the Chief's attitude callously indifferent, it exhibited the ultimate in careless disregard for Lakeshia and the peril with which she was confronted. As the Court of Appeals said in 2005:

> "We find reckless disregard when the 'conduct involved evinced not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved." *Mississippi Dept. of Public Safety v. Durn, 861 So.2d 990, 995(¶ 13) (Miss.2003) (quoting Maldonado v. Kelly, 768*

> *So.2d 906, 910- 11(¶ 11) (Miss.2000)). "For an officer to be found reckless, the actions must be 'wanton or willful.' " Kelley v. Grenada County, 859 So.2d 1049, 1053(¶ 12) (Miss.Ct.App.2003) (quoting City of Jackson v. Lipsey, 834 So.2d 687, 691-92(¶ 16) (Miss.2003)). . . .*(Citations omitted)

City of Jackson vs. Calcote, (No. 2003-CA-01318-COA) 910 So. 2d 1103, 1110, (¶22) (Miss. App. 2005)(Emphasis in original)

In *Calcote*, the Court of Appeals might very well have been writing about Chief Mitchell in the case at bar when it said

> **The evidence suggests that Officer Moore meant to act as he did, but did not intend the results.** But there was ample evidence to suggest that Officer Moore's conduct showed an appreciation of the risk that is involved when one exerts pressure onto another's face as they lay face down on a concrete floor. It is not a foreign concept that such behavior involves a high probability of harm-- and that proceeding accordingly involves a deliberate disregard of that risk.

Id. at 1110-11, (¶23)(Emphasis added)

To make the *Calcote* rationale apply with equal vigor to this case one needs only to change the name and harm cited, *i.e.*, "But there was ample evidence to suggest that [Chief Mitchell's] conduct showed an appreciation of the risk that is involved when one [ignores the threat to cause harm with a firearm]. It is not a foreign concept that such behavior involves a high probability of harm-- and that proceeding accordingly involves a deliberate disregard of that risk."

Chief Mitchell professed that he believed Lakeshia and considered Rodney to be a threat to her. (Tr. 159, 168; R.E. Exhibit P-7) Obviously, he just did not care. He intended to do just what he did; he just did not expect what happened. (Tr. 168) As this

Court has said, the proper focus is on whether or not the officer intended to do what did, not whether he intended harm to be caused thereby. *See*, *Turner vs. City of Ruleville*, (No. 95-CA-00880-SCT) 735 So. 2d 226, 230, (¶20) (Miss. 1999); and *Maye vs. Pearl River County*, (No. 98-CA-00023-SCT), 758 So. 2d 391, 395, (¶24) (Miss. 1999)

Discretionary Function: The City would have this Court hold that the imperative language of the arrest warrant (R.E. Exhibit P-7), the express directive of The City's own Manual of Policies and Procedures (R.E. Exhibit P-8, Ch. 8, P. 4), and the strong language of the statute (Miss. Code Ann.(1972), §99-3-7) are simply suggestions which law enforcement officers are free to follow in their own unfettered discretion. Since it is unlikely that any court would accept this proposition, the question becomes one of degree. At what point does the mandatory language of the warrant, the City's policy manual and the statute impose an affirmative duty on a law enforcement officer to do something other than go home because it is past quitting time? (Tr. 157)

The Court of Appeals came close to resolving the issue in *Ladner vs. Stone County*, (No. 2004-CA-00999-COA), 938 So. 2d 270 (Miss. App. 2006). There the Court noted that this Court earlier adopted the interpretation of the federal courts involving immunity for discretionary functions as follows:

> Furthermore, Mississippi has adopted federal courts' interpretation of discretionary function immunity. *L.W. v. McComb Sep. Mun. Sch. Dist.*, 754 So.2d 1136, 1143(¶ 28) (Miss.1999); *Jones,* 744 So.2d at 263-64(¶ 23); *Miss. Dep't of Transportation v. Trosclair,* 851 So.2d 408, 416(¶ 23) (Miss.Ct.App.2003). Specifically, this interpretation comes from *Wright v. United States,* in which it was held:

> The discretionary function exemption is intended to protect public policy objectives. It would run counter to the discretionary function exemption to second-guess or micro-manage the kinds of steps appropriate to maximize safety in government facilities, even where the decisions are made below the policy level. *Within that broad discretion, reasonable steps of a type determined by management to minimize risks of personal injury are necessary. Failure to take any such steps where feasible is negligent and not within the discretionary function exemption, even though the particular nature of the appropriate steps is discretionary.* 866 F.Supp. 804, 806 (S.D.N.Y.1994) (citations omitted) (emphasis added).

938 So. 2d at 274-75 (¶18)(Emphasis in original)

It can be argued that as a matter of public policy, police officers should be given wide latitude in the performance of their duties. Appellant agrees that, as a general proposition, this is true; but, the proposition presumes that they will **perform** their duties. That brings us back to the burden to be placed upon a police department in carrying out the mandates of the domestic abuse statutes and the dictates of judicially issued arrest warrants.

The laws pertaining to Domestic Abuse are reasonably simple, yet rigid. They were enacted to attempt a de-escalation of the growing number of injuries and deaths which were occurring as a result of the increased number of domestic partners who lacked the sophistication to resolve disputes through deliberative and non-violent means. They were also designed to provide otherwise helpless partners, *i.e.*, Lakeshia, with the bigger stick--the might and power of the State. Having utterly and miserably failed to provide the assistance and protection which Lakeshia had a right to expect, the City

should now be ordered to contribute to the cost of providing for the health, education and well-being of her surviving minor daughter; and every other Chief Mitchell in Mississippi should be made to understand that the Legislature's definition of domestic violence (Miss. Code Ann.(1972), §99-3-7) is not subject to their personal whim, *i.e.*, "discretion."

Even Chief Mitchell acknowledged the importance of the domestic violence laws.

> Q. Based on your experience as a law enforcement officer, tell me, if you would, why you think priority is supposed to be given to domestic relations cases -- domestic violence cases.
>
> A. Well, like I said earlier, if you've got a domestic violence case, you've got someone in a real serious situation, and that's your job to protect peoples and to not allow bad things to happen to individuals.

(Tr. 127-28)

It might be argued that imposing stricter standards of action on police officers involved with the enforcement of domestic violence laws is not in the public interest. It is precisely the public interest which necessitates those stricter standards. *Ladner* was not the first case in which this Court has been faced with the question of exemption versus public protection argument.

In *Mississippi Power & Light Company vs. Shepherd*, 285 So. 2d 725, 82 A.L.R.3d 86 (Miss. 1973), this Court had an opportunity to discuss the duty to be imposed upon providers of electrical energy. There can be little question that the consistent and predictable availability of electrical energy is essential to practically every phase of our

modern-day existence. Yet, this Court recognized that, as essential as it is, electrical energy is also dangerous and the public at large needs protection from it.

> The degree of diligence which a distributor of electricity must observe in the distribution of the dangerous agency of electricity is a very high degree of care. **When human life's at stake, due care under the prevailing circumstances requires that everything that gives reasonable promise of preserving life must be done regardless of difficulty or expense. Moreover, the degree of care increases as the danger increases.**

285 So. 2d at 729, 82 A.L.R.3d at 93 (Emphasis added)

The City's Police Chief and both experts, themselves experienced police chiefs, all agreed that it was reckless to ignore a reported gun-based death threat. Establishment of the limits, if any, on an officer's discretion and the minimum performance necessary to meet those obligations will have to be delineated by this Court. It is imperative that the Court establish clear guidelines regarding the minimally acceptable conduct expected of an officer charged with execution of an arrest warrant so that no other Chief Mitchell can claim the benefit of governmental immunity because he exercised his discretion to take no action. The courts have a right to expect the exercise of due diligence in the execution of their arrest warrants. Appellee's expert, Chief Tom Long of the Southhaven Police Department, explained one of the reasons that Courts should be able to expect prompt and serious attempts to serve arrest warrants:

> Q. How does the existence of the warrant protect a potential victim?
>
> A. Well, when a potential victim comes in, signs the affidavit in

this case, and the warrant is issued, then we are all counting on the fact that once we can get that person arrested and then to court, then he will fear punishment. It's what our entire society is based on.

Q. So it's not the issuance of the warrant, it's the service of the warrant.

A. Exactly.

Tr. (289)

The public has a right to expect that law enforcement officers will be held accountable for their malfeasance in not exercising good-faith efforts to serve warrants. The public also has a right to expect that laws enacted by their elected representatives are not subject to corruption through the application of personal standards and interpretations by officers who claim the benefit of exemption from accountability and liability. This case provides the perfect opportunity for this Court to ensure that the legitimate expectations of the courts and the public are met. All officers must be made to understand that they ignore court-ordered arrest warrants at their peril, especially warrants based on violations of the domestic violence laws. Domestic disputes are well known to be volatile and unpredictable and the parties are known to harbor deep-seated animosities. (Tr. 127-28, 198-99) The precise language of this policy enunciation can be better explored during oral presentation of this case before the Court.

> Within that broad discretion, reasonable steps of a type determined by management to minimize risks of personal injury are necessary. Failure to take any such steps where feasible is negligent and not within the discretionary function exemption, even though the

particular nature of the appropriate steps is discretionary.

Ladner, 938 So. 2d at 274-75 (¶18)

CONCLUSION

The Mississippi Tort Claims Act was not intended to provide a total exemption from liability for all of government, not even all of law enforcement. The Legislature saw fit to provide some exemptions. Both this Court and the Court of Appeals have dealt with precisely defining the nature of activities which fall within and without the exemptions in various areas. It is respectfully submitted that the Court will now have to more clearly define the minimum conduct expected of officers in their attempts to accomplish the mandates of arrest warrants issued by the courts, at least in domestic violence cases. It is further respectfully submitted that this case serves as the perfect example of what can be expected when an officer substitutes his own definitions for those of the statutes and claims the protection of the discretionary function exemption when his total lack of action results in the death of a young, pregnant mother. Lakeshia Carr's minor daughter needs to know that the loss of her mother has some meaning and that Chief Mitchell and the City are not the dogs who get one free bite. This Court should reverse and render on the question of liability of the City and render judgment here for the statutory maximum, or, at least, remand for a determination of damages.

Respectfully submitted, this 7th day of March, 2008.

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CERTIFICATE OF SERVICE

I, J. Murray Akers, one of the attorneys for Appellant, hereby certify that I have this day served the above and foregoing Appellant's Reply Brief upon the Appellee by mailing, postage pre-paid, a true copy thereof to its attorney of record Jeffrey S. Dilley, Esquire, P. O. Box 39, Clarksdale, MS 38614, and, pursuant to the provisions of M.R.A.P. 25(b), a copy has today been provided, postage pre-paid, to the Trial Judge, Honorable Ashley Hines, Circuit Judge, P. O. Box 1315, Greenville, MS 38702-1315.

This 7th day of March, 2008.

J. Murray Akers