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

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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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.

The City of Ruleville and its insurers.

The Estate of Lakeshia Denise Carr through Minnie Macfield, Administratrix.

Rodnequa Carr, the sole heir of the Estate of Lakeshia Denise Carr.

Respectfully submitted this day of December, 2007.

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BRIEF OF APPELLANT

STATEMENT OF ISSUES

1. The Trial Court erred by applying the wrong legal standard to the conduct of the City of Ruleville.

STATEMENT OF THE CASE

This wrongful death action was brought pursuant to the Mississippi Tort Claims Act (MTCA), §11-46-1, *et seq*, Mississippi Code Annotated (1972) in the Circuit Court of Sunflower County on behalf of the Estate of Lakeshia Denise Carr (Lakeshia) against the City of Ruleville (the City) and, originally, against the City of Drew. A voluntary dismissal as to the City of Drew was entered following the completion of discovery.

Lakeshia died from a gunshot wound inflicted by Rodney White (Rodney) eight (8) days after a warrant had been obtained for Rodney's arrest for pointing a gun at Lakeshia and threatening to kill her and himself--eight (8) days in which no good faith effort was made to apprehend Rodney under the dictates of the warrant, the City's Policies and Procedures Manual or the applicable statutes.

Following a full round of discovery, cross motions for summary judgment were

denied; and, a two-day trial resulted in a bench verdict in favor of the City. This appeal ensues.

Statement of Facts

Lakeshia and Rodney began dating sometime in 2000. Their first child, Rodnequa, was born in February 2001. In 2002, Lakeshia moved from her mother's residence in Drew into a rented home in Ruleville, which she occupied with Rodney and their daughter. (Tr. 9)

During the year or so that Lakeshia and Rodney lived together, the stormy relationship resulted in an intervention by the Ruleville Police Department on four separate occasions. (Tr. 147) Because of continued abuse by Rodney (Tr. 11-12), in the early part of August 2003, Lakeshia and her daughter began staying with Lakeshia's mother (Minnie Macfield) and stepfather (Thomas Macfield) at night, with Lakeshia returning to Ruleville each morning to dress for work. (Tr. 14-15)

Approximately a week later, on August 18, 2003, Lakeshia's stepfather drove her to the Police Department in Ruleville to file a complaint against Rodney. Once there, they were interviewed by Larry Mitchell, the then acting Chief of the Ruleville Police Department (the Chief). They told him Rodney had held Lakeshia hostage in her home, had pointed a gun at her and threatened to kill Lakeshia and himself. (Tr. 41) At the time Lakeshia reported these threats, the Chief knew (1) Lakeshia and Rodney; (2) knew that they lived together; (3) knew that they had a child together; (4) knew that the pair had a

history of domestic disturbances, which on more than one occasion necessitated the involvement of the Ruleville Police Department (Tr. 137); and (5) knew that Rodney had a history of assaults. (Tr. 147) The Chief had Lakeshia write out a statement of her complaint (R.E. Exhibit P-7) and sign an Affidavit for the issuance of an arrest warrant. *(Ibid)*

Although the facts reported to and already known by the Chief constituted a classic domestic violence situation, the Chief had his dispatcher prepare an Affidavit charging Rodney with a violation of §97-3-107, Mississippi Code Annotated (1972), the "Stalking" statute *(Ibid.)*, and a warrant charging Rodney with "threatening" and "simple assault." *(Ibid.)* It is of particular significance here to note that the signature of the Honorable Jessie Edwards, Ruleville Municipal Judge, was placed on the warrant with a rubber stamp. No officer of the Ruleville Police Department actually undertook to discuss the facts of the Complaint with Judge Edwards for his determination of probable cause or for guidance in framing the charge. (Tr. 144) [1]

Lakeshia told the Chief that Rodney normally would show up in the mornings when she came home to get ready for work. (Tr. 157) That is when Chief Mitchell formulated his simple plan. He would use Lakeshia as bait to capture Rodney. In fact, Chief Mitchell volunteered as much, *i.e.*, "So that's what we were gonna -- that's how we

---

[1]The validity, *vel non*, of the warrant is of no consequence here because the relevant statute makes no distinction regarding the duty of law enforcement officers to arrest either with or without a warrant. "Probable cause" is the determining factor and everyone concedes that probable cause for the arrest of Rodney existed, and all officers treated the warrant as if it had been properly issued.

were gonna trap him there, you know, with her coming in the morning time." (Tr. 157-58)

After the arrest warrant for Rodney was "issued,"[2] the Chief gave a copy to the patrolman whose shift ended at midnight, and also told Officer Roosevelt Blair, the officer who was on duty from midnight until 8:00 A.M. (Tr. 156) Officer Blair was not familiar with Rodney (Tr. 95), so he was instructed to watch Lakeshia's house each morning around the time Lakeshia was expected to be there getting ready for work. In the event Blair observed a male entering or leaving Lakeshia's residence, his instructions were to call the Chief to advise him. (Tr. 95-96) When questioned about the time delay for the Chief to reach Lakeshia's house under those circumstances, the Chief expanded his explanation of his instructions to Blair:

> Q. Officer Blair is going to call for backup and wait for you to get there because he didn't know Rodney, did he?
>
> A. No, No, No. It ain't the fact you got to know Rodney. If it's a male involved, I don't care who he is, you shoot - - he's going to deal with that.

(Tr. 160)

These were the Chief's instruction to a member of his Police Force who was not a certified officer. At the time of these events, Blair had been in law enforcement for eight (8) years and had not been certified by the Academy (Tr. 94), because the first time he

[2]Although the warrant bears the date of "September 18, 2003," it was actually issued on "August 18, 2003," and there is no issue concerning the date.

attended, he flunked out. (Tr. 167) He was not legally authorized to perform the duties of a police officer, including carrying a weapon and making arrests. (Tr. 211-12)

Since Lakeshia's complaint involved the use of a firearm in connection with the death threat, the Chief went what he considered to be the "extra mile."[3] He called the Drew home of Rodney's grandmother and asked for Rodney. (Tr. 149, 160-61) The female who answered the telephone denied that Rodney was there. Since it was then 5:30 P.M., the Chief went home. (Tr. 157)

Officer Blair had no recollection of patrolling Ruleville looking for Rodney and would not have known Rodney if he had seen him. (Tr. 97) To his knowledge, there was no surveillance on Lakeshia's house prior to the time he arrived in the morning. (Tr. 98) Lakeshia was home from around 6:00 A.M. and left with the car pool around 7:00 A.M. Officer Blair conducted his surveillance from 7:30 A.M. until 8:45 A.M. (Tr. 98, 102-03) The surveillance occurred on the mornings of August 19, 20 and 21. He was then off for two days and upon returning to duty was not reassigned to continue the early morning surveillance. (Tr. 99) The Chief gave this explanation:

> A. Because wasn't no one staying at the house. Like I said, Officer Blair said didn't nobody come to the house past that second day. He said nobody come back to the house.

(Tr. 175)

The Offense Report prepared by the Chief after Lakeshia's death (Tr. 170), reflects

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[3]The chief's characterization of this telephone call as being an "extra" effort was repeated and cannot be considered a "slip of the tongue."

that Ruleville officers learned that Rodney no longer lived in Ruleville, although he was still considered a threat to Lakeshia. It also indicates that the Chief and members of the Department continued to "monitor" Lakeshia's home for any "suspicious" activity. In reality, after three days of "surveillance"[4] the sole effort to locate and apprehend Rodney consisted of occasionally driving by Lakeshia's home to see if anyone was there--a continuation of the plan to use Lakeshia as bait.

A major problem with the last paragraph of the Offense Report is the assertion that the Chief sent the warrant to Drew "according to procedure." (R.E. Exhibit P-7) The official, but unwritten, policy of the Ruleville Police Department regarding forwarding warrants to other jurisdictions was stated as follows: "If the Ruleville Police Department receives information that the subject of an arrest warrant is in another jurisdiction the warrant is forwarded to that jurisdiction." Chief Mitchell agreed that this is a correct statement of the Department's policy. (Tr. 176) When asked why he did not act "according to procedure" on August 18, the Chief could only speculate that it was because whoever answered the telephone at the home of Rodney's grandmother denied that Rodney was there. (Tr. 161) In addition to the unwritten policy, the Defendant's Policies and Procedures Manual also provided for notification of other agencies. (R.E. Exhibit P-8, Ch. 7, P. 1, ¶7)

The Chief knew as early as August 20, that Rodney was not in Ruleville or Drew,

[4]All of which took place after Lakeshia left for work.

and really didn't know where he was. Nevertheless, even though he still considered Rodney to be a threat to Lakeshia (R.E. Exhibit P-7) he did not even consider

a. contacting the Drew Chief about known associates of Rodney;

b. contacting the Sunflower County Sheriff's office to see if they had any new, updated information on Rodney;

c. checking to see if either had any new history of Rodney's involvement with guns;

d. contacting the City of Cleveland;

e. checking Rodney's driving record for additional information on a possible residence; or

f. contacting the Sunflower County Crime Stoppers.

(Tr. 175-76)

The callous indifference of Chief Mitchell and the City of Ruleville to the sworn allegation of a gun-based death threat can only be explained, but not excused, when analyzed in light of the Chief's attitude at the time of Lakeshia's complaint. Having worked in law enforcement for a number of years, the Chief was familiar with cases in which one party would charge another with assault on Saturday night and kiss and make up before court on Monday. He likened Lakeshia's complaint to that type of situation, and assumed that if Rodney was arrested and charged that he and Lakeshia would make up and Lakeshia would not show up for court. (Tr. 129, 135-36) From a reading of the Chief's entire testimony, it is obvious that he did not take Lakeshia's complaint seriously and he thought the entire matter would go away. Of little consolation to anyone was the

Chief's assertion that once he picked up Rodney "I would have tried to hold him long enough to get this gun situation settled." (Tr. 145, 166)

The Chief stated that he had to believe Lakeshia because her complaint was under oath and that he still considered Rodney to be a threat to her. (Tr. 159, 168; R.E. Exhibit P-7) Notwithstanding this voiced concern, the Chief gave the warrant to the officer on duty in the afternoons, asked the late-night officer to watch Lakeshia's house when she would likely be there in the mornings and made one telephone call to the home of Rodney's grandmother. He did nothing else. The only reason the Chief made the telephone call was because the allegation included use of a weapon, and he considered the call to be an "extra" step toward Rodney's apprehension. (Tr. 149, 160-61) The Chief did nothing because he assumed they would catch Rodney the next morning. (Tr. 161)

On August 26, 2003, eight (8) days after issuance of the warrant, and six (6) days after the last documented attempt to locate Rodney, as a direct and proximate result of the City's[5] careless and reckless disregard of the threat posed by Rodney, a complete disregard of the domestic violence statutes and a complete disregard of the Policies and Procedures of the Ruleville Police Department, Lakeshia died from a gunshot wound inflicted by Rodney, who then took his own life. (Tr. 46) The Chief admitted the reckless nature of the City's approach to Rodney's arrest in the following exchange:

> Q. . . . .Chief, would you agree that any time a threat of injury by

[5]"The Ruleville police officers in question, including Chief Mitchell and Officer Blair, were acting within the course and scope of their employment at all relevant times." (R.E. III)

a firearm is involved it's reckless not to take it seriously?

A. Yes.

(Tr. 178)

Both experts agreed. (Tr. 208; 268-69, 277)

SUMMARY OF THE ARGUMENT

In this action brought pursuant to the Mississippi Tort Claims Act, the immunity of the City is waived only if the police officers acted with "reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;" and the conduct complained of did not involve a discretionary function.

Reckless Disregard: This provision of the MTCA was not addressed by the Trial Court because its opinion was grounded solely on an application of the discretionary nature of the conduct. The Acting Chief of the Ruleville Police Department took a complaint from Lakeshia, then pregnant with her second child by Rodney White, in which she reported that Rodney had pointed a gun at her and threatened to kill both her and himself. At that time the Chief had personal knowledge of facts which were more than ample to bring Lakeshia's complaint well within the provisions of the Domestic Abuse laws.

The Chief did not invoke the stringent requirements of statutes related to domestic violence because he substituted his own personal definition of domestic violence in lieu of the statutory definition. He saw no signs of physical violence, therefore, it was not domestic violence. Despite his profession that he considered Rodney to constitute a

threat to Lakeshia, he also assumed that if Rodney was arrested on the warrant which the Chief caused to be issued, Lakeshia and Rodney would reconcile and that she would not come to court to further prosecute the matter. Ostensibly because of this assumption on the Chief's part, he made only a token showing of an effort to capture Rodney. His total disregard of the statutes and the Policies and Procedures of his own Police Department amounted to a reckless disregard which resulted in the death of Lakeshia and her unborn baby.

Discretionary Function: The only legal authority on which the Trial Court relied in applying the discretionary function prohibition against a waiver of immunity was the opinion of a U.S. District Court in Florida. That Court considered the similar provision of the Federal Tort Claims Act as it applied to the execution of a *search* warrant--not an arrest warrant. The Trial Court did not consider this Court's opinion in *City of Jackson v. Powell*, 917 So. 2d 59 (Miss. 2005), or the opinion of the United States Supreme Court in *United States v. Gaubert,* 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991).

Likewise, the Trial Court failed to consider the mandatory compliance dictated by both the relevant statutes and the City's Policies and Procedures Manual. Under *Gaubert*, the subject of discretion must be "based on considerations of public policy" before immunity attaches. In this case, almost everything the Chief did violated both public policy as determined by the Legislature and as adopted by the City in the Policies and Procedures Manual. In this instance, a grant of immunity based upon the discretionary

function was erroneous.

ARGUMENT

> (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;
>
> (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 be abused;

Mississippi Code Annotated (1972), §11-46-9

The liability of the City may be determined only by the application of this section to the facts of the case at bar. Even though the Trial Court based its judgment exclusively on subsection (d), and an erroneous application of the federal law relating to a similar provision of the federal tort claims act, it is necessary to address the City's liability from both standpoints in order for the Plaintiff to prevail. This analysis begins with consideration of the concept of subsection (c)--"reckless disregard" which was not considered by the Trial Court, and ends with consideration of the discretionary nature of the Defendant's duty to Lakeshia under subsection (d), and the correct application of the federal law to the similar provision the federal statute, as well as the application of Mississippi law to the similar provision in the MTCA.

Reckless Disregard: The first key to the City's liability lies in an interpretation of "reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of the injury." There never has been even a suggestion that Lakeshia was engaged in any criminal activity at the time she filed the complaint against Rodney or at the time of her death. This leaves the focus solely on the term "reckless disregard"as it applies to the conduct of the City.

Perhaps the most impelling evidence of the reckless disregard of the Defendant for the safety and well-being of Lakeshia is the total absence of the City's giving so much as lip service to the laws of this State or to their own Policies and Procedures Manual (R.E. Exhibit P-8, Ch. 8) as it relates to Domestic Abuse (§93-21-1, *et seq*, Mississippi Code Annotated (1972), or the related statute dealing with arrests for acts of domestic violence. (Miss. Code Ann. (1972), §99-3-7) The Manual fairly well tracks the statutes dealing with Domestic Abuse and mandates conduct on the part of the Police in certain instances, as does §99-3-7.

In pertinent part, the arrest statute reads as follows:

> (3) Any law enforcement officer **shall** arrest a person **with or without a warrant** when he has probable cause to believe that the person has, within twenty-four (24) hours of such arrest, knowingly committed a misdemeanor which is an act of domestic violence . . . .
>
> * * *
>
> (5) As used in subsection (3) of this section, the phrase "misdemeanor which is an act of domestic violence" shall mean one or more of the following acts between family or household members who reside together or formerly resided together, current or former

spouses, persons who have a current dating relationship, or persons who have a biological or legally adopted child together:

(a) Simple assault within the meaning of Section 97-3-7; . . .

Miss. Code Ann., §99-3-7 (Emphasis added)

The City's Policies and Procedures Manual tracks the statutes very closely.

* * *

12. **Shall, will and may**- "Shall and Will" are mandatory, "May" is permissive. (R.E. Exhibit P-8; p. A7) (Emphasis in original)

* * *

2. Where the officer is aware of a past history of assaults committed by the abuser and there is probable cause to believe another assault has occurred.

4. Where any weapon was used to inflict the injury or was used to intimidate or threaten the victim.

5. Where an assault has occurred and, if the officer takes no action, there is a strong likelihood that further violence or injury might occur. (Id. at Ch. 8, p. 4)

The Chief knew of past assaults by Rodney on Lakeshia and others, knew that a new assault had occurred, believed that a weapon was involved and considered Rodney to be a threat to Lakeshia. (Tr. 147, 159; R.E. Exhibit 7)

The Chief did not apply the Domestic Violence standard to Lakeshia's complaint because her complaint did not match his definition of domestic violence or abuse. As simply and clearly as he could put it, the Chief stated that Rodney was charged with simple assault rather than domestic violence because he (Chief Mitchell) personally saw no physical abuse. (TR. 134, 164) Even as of the date of trial, over three (3) years after

not learning from his mistakes, the Chief's standard remained the same. (Tr. 164) If he does not see some sign of physical injury he does not treat it as domestic violence.

One of the more recent cases dealing with this issue came from the Court of Appeals: *City of Jackson vs. Calcote*, 910 So. 2d 1103 (Miss. App. 2005). There, the Court of Appeals affirmed a judgment for the Plaintiff against the City of Jackson arising out of the conduct of two of its officers:

> ¶ 22. Conversely, the City is liable if officer Moore acted in reckless disregard of Chad's safety and well-being. "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 ... 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) (Rev.2002) (emphasis added). "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)).* Willful and wanton conduct indicates degrees of fault somewhere between intent to do wrong and the mere reasonable risk of harm involved in ordinary negligence. *Maye v. Pearl River County,* 758 So.2d 391(¶ 19) (Miss. 1999) (Citations omitted)

Calcote, 910 So. 2d at 1110.

Stripped of the clumsy citations, this Court held this way:

1. 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.

2. For an officer to be found reckless, the actions must be wanton or willful.

3. Willful and wanton conduct indicates degrees of fault somewhere between intent to do wrong and the mere reasonable risk of harm involved in ordinary negligence.

The Court analyzed the conduct of the officer involved in terms of reckless disregard and intended consequences.

> ¶ 23. The circuit court found that Officer Moore's actions were willful and wanton, intentional, and in reckless disregard of Chad's safety and well-being. A circuit court's findings are safe on appeal if they are supported by substantial, credible and reasonable evidence. Perry, 764 So.2d at (¶ 9) (citations omitted). Here, Chad presented evidence that Officer Moore shoved Chad's face into a concrete floor, pressed his fingers into Chad's eyes and rolled Chad's face back and forth across the concrete floor, causing three of Chad's front teeth to break. However, Officer Moore completely denied that Chad's teeth broke during the incident. Officer Moore never testified that he set out to break Chad's teeth. In fact, no one ever testified that Officer Moore maliciously broke Chad's teeth or caused him injury. **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. Accordingly, this issue is without merit.

Id. at 1110-11 (Emphasis added)

Like the officer in *Calcote*, Chief Mitchell did what he intended to do. He just did not expect the outcome he got. (Tr. 168) By his own admission, the Chief treated the

warrant absolutely no differently than if Lakeshia had walked in and said that Rodney threatened to beat her up. (Tr. 169)

All the requisites of the statute were there for Lakeshia's complaint to be treated as the domestic violence matter that it was. Had Chief Mitchell been familiar with his own Department's Policies and Procedures and the laws he was sworn to uphold, he would have known that he, not Lakeshia, was supposed to maintain control of the prosecution and see it through, at least to the extent of holding him long enough to determine why his level of danger had suddenly escalated and long enough to bring him before a court.

> When the officer makes the decision to arrest based on probable cause, **he shall** obtain the arrest warrant for the assailant. To reduce the element of intimidation by the abuser to pressure the victim into withdrawing the warrants, the complaining victim should not be instructed to obtain the warrants.

(R.E. Exhibit P-8, Ch. 8, P. 5) (Emphasis added)

Chief Mitchell, the Defendant's expert Tom Long, Southaven Chief of Police, and Plaintiff's expert Ken Winter all agreed that failure to take seriously a threat to cause harm with a firearm was reckless. (Tr. 178; 268-69, 277; 208)

The Exercise of Discretion: Mississippi Code Annotated (1972), §11-46-9 (d) deals with the performance or failure to perform a discretionary function. In this instance, the imprimatur for the execution of the arrest warrant on Rodney arises from both the language of the warrant itself and the statute.

The warrant says: " TO ANY LAWFUL OFFICER OF THE STATE OF MISSISSIPPI: You are hereby **ordered to take the body** of Rodney White. . ." (R.E. Exhibit P-7)(Emphasis added) The language obviously is imperative rather than discretionary. Even more compelling is the language of the statute dealing with arrests for an act of domestic abuse:

> (3) Any law enforcement officer **shall** arrest a person **with or without a warrant** when he has probable cause to believe that the person has . . .knowingly committed a misdemeanor which is an act of domestic violence . . . .

Miss. Code Ann.(1972), §99-3-7 (Emphasis added)

The language of the statute is in the imperative, *i.e.* "shall arrest;" and our Attorney General certainly agrees. While not binding on the Courts, an official opinion of our Attorney General is important as a guidepost for all political subdivisions of the State, including law enforcement. On the subject of discretion, the Attorney General had this to say:

> Once probable cause has been established, there are no alternatives to arrest, as the officer is mandated to make an arrest if they find probable cause pursuant to Section 99-3-7(3)(a). Sufficient documentation of the law enforcement officers consideration of the statutory factors and any other factors considered should be contained in the offense report supporting the arrest or arrests.

Attorney General Opinions: NO. 2002-0421 (August 2, 2002)(Copy attached)

Likewise, the language of the Defendant's own Manual of Policies and Procedures is couched in imperative terms, not discretionary terms. (R.E. Exhibit P-8,

Ch. 8, P. 4)

The Defendant certainly cannot escape liability for three needless deaths because it maintains that it had discretion in whether or not to make all reasonable efforts to locate and apprehend Rodney. Should the Court rule that officers have discretion in whether or not to serve warrants issued by judges, the entire system is in danger.

The Trial Court relied solely on the authority of *Mesa v. United States*, 837 F. Supp. 1210, 1216 (S.D. Fla. 1993), which held that the question of when and how to execute a *search* warrant is a "quintessential" discretionary function. The Court did not consider the later opinion of the same Court in *Couzado v. United States*, 883 F.Supp. 691 (S.D. Fla. 1995) which clearly distinguished the ruling in *Mesa* from matters involving whether or not the "Government has discretion to not adhere to the standards and mandates set forth in the DEA Guidelines and the Letters of Instructions to U.S. Ambassadors" in matters involving both the United States and a foreign country. *Id. at* 695-96. In overruling the Government's motion for a judgment as a matter of law, the District Court found that

> The decision, or inadvertence, of the United States to fail to comply with "fixed or ascertainable standards" set forth in the DEA guidelines and the Letter of Instruction neither implicates public policy, nor lends itself to policy analysis. *See Autery,* 992 F.2d at 1529,1531.

883 F. Supp. at 696.

In *Padilla v. United States*, 2007 WL 2409792, p. 12, (W.D. Tex. 2007), the

District Court analyzed the Supreme Court's two-part test for applying the discretionary exemption of the Federal Tort Claims Act, 28 U.S.C. §2680(a) which is identical with the language of subsection (d) of §11-46-9(1), and held

> The Supreme Court set forth a method for the discretionary exception analysis in *United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). In *Gaubert*, the Supreme Court promulgated a two-part test to determine whether the FTCA's discretionary exception applies. 499 U.S. at 319-20. First, the exception applies when the challenged actions involved an element of judgment or choice. *Id.* "In other words, the conduct did not involve mandatory compliance with a particular federal statute, regulation or policy." *Crenshaw v. United States*, 959 F.Supp. 399, 402 (S.D.Tex.1997). Second, if the challenged actions involve the element of choice as described in the test's first prong, the court should make certain the conduct is "based on considerations of public policy" before applying the exception. *Gaubert*, 499 U.S. at 323. The latter inquiry must center "not on the agent's subjective intent in exercising the discretion ..., but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325.

By the same token, this Court has held

> ¶51 . . . .This Court has used a two-part test to determine if a function is discretionary: "(1) whether the activity involved an element of choice or judgment, and if so; (2) whether the choice or judgement in supervision involves social, economic or political policy alternatives." *Bridges*, 793 So.2d at 588 (citing *Jones*, 744 So.2d at 260). Conversely, conduct will be considered ministerial; and therefore, immunity will not apply, if the obligation is imposed by law leaving no room for judgment. *Doe v. State ex rel. Miss. Dep't of Corr.*, 859 So.2d 350, 356 (Miss.2003) (citing *Leflore County v. Givens*, 754 So.2d 1223, 1226 (Miss.2000)).

City of Jackson v. Powell, 917 So. 2d 59, 73 (Miss. 2005)

The Legislature left no room for judgment regarding an arrest when it declared the

public policy of this State to be that "any law enforcement officer **shall** arrest a person **with or without a warrant** when he has probable cause to believe that the person has, within twenty-four (24) hours of such arrest, knowingly committed a misdemeanor which is an act of domestic violence . . . ." Miss. Code Ann.(1972), §99-3-7 (Emphasis added) The City of Ruleville did the same thing when it adopted the Policies and Procedures for the Police Department. "Officers **will** effect an arrest, based on probable cause supported by the statements of the victim or witnesses, of abusers in domestic violence situations in the following circumstances: . . ." (R.E. Exhibit P-8, Ch. 8, p. 4)

We are left to speculate as to what might have been the outcome had Chief Mitchell exercised a modicum of professional judgment or human decency in his treatment of Lakeshia and her plight. Had the warrant been issued by the Municipal Judge, rather than a clerk with a rubber stamp[6], had the Chief followed the dictates of his own Policies and Procedures Manual[7], had the Chief performed his sworn duty as defined by the statutes, are but three of the "what ifs" that lead only to speculation regarding possible outcomes. What is fact, however, is that the warrant was issued with the rubber-stamped signature of a judicial officer; no judicial officer was consulted for a determination of the correct charges and appropriate bond, the Chief did not take

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[6]"The complaint and warrant must be completed and signed by the proper authority." (R.E. Exhibit P-8, Ch. 7, P. 1, ¶5).

[7]"If the arrest is to take place outside the city limits of Ruleville, local authorities shall be notified and requested to serve the warrant and effect the arrest." (*Id.* at ¶8).

Lakeshia or his sworn duty seriously and three (3) people died. Since it is presumed that judges know and follow the law, it may be assumed that the Ruleville Municipal Judge would have ordered the issuance of a warrant charging Rodney with an act of domestic abuse and would have set bond accordingly.

There can be no serious suggestion that the total failure of the City of Ruleville to take any reasonable steps to locate and apprehend Rodney White was not a proximate contributing cause of the death of Lakeshia Denise Carr, her unborn baby and even Rodney, himself, on August 26, 2003. What might have happened on another day in another place is of no moment here and is not before the Court. The Complaint alleges that the Defendant acted with reckless disregard for the safety and well-being of Lakeshia and that as a result, she was shot to death by Rodney. The testimony of the Defendant's Chief of Police demonstrates beyond peradventure a reckless disregard for the safety of Lakeshia and a contumacious disregard for the language of the statutes of this State by the substitution of his own personal definitions and thoughts about how the legal process should work--all with catastrophic consequences. Rodnequa, Lakeshia's then two and one-half (2½) year-old daughter, deserved better than to have to grow up knowing that she lost her mother, father and sibling because the Defendant's Chief of Police preferred to substitute his own personal mores and notions of justice for the statutory law of this State. That, alone, is reckless disregard and it led directly to the death of Lakeshia Denise Carr and her baby under circumstances which did not allow for

the exercise of discretion as demonstrated by Chief Larry Mitchell.

CONCLUSION

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 (and Rodnequa) had a right to expect, the Defendant should now be ordered to contribute to the cost of providing for the health, education and well-being of Rodnequa. It is respectfully submitted that had the Trial Court applied the correct legal standard to the conduct of the City of Ruleville, that would have been the outcome of the trial. It is also respectfully submitted that this Honorable Court should reverse the Trial Court, enter judgment in this Court for the Plaintiff and award the statutory maximum in damages.

Respectfully submitted this 18th day of December, 2007.

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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 Brief of Appellant 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 18th day of December, 2007.

J. Murray Akers

- 2002-0421Attorney General Opinions: NO. 2002-0421
August 2, 2002
DOCN 000015156
DOCK 2002-0421
AUTH Heather Wagner
DATE 20020802
RQNM Jamie Hunter
SUBJ Criminal Law
SBCD 57
TEXT Captain Jamie Hunter
Pascagoula Police Department
Post Office Drawer 135
Pascagoula, Mississippi 39568-1385
Re: Senate Bill 2460 (2002) Amendments to Section 99-3-7, Mississippi Code of 1972

Dear Captain Hunter:

Attorney General Mike Moore has received your request for an official opinion and has assigned it to me for research and response. Your letter reads as follows:

I have some questions concerning the revisions to the arrest requirement in cases of domestic violence that went into effect July 1, 2002.

The principal aggressor is defined as the "most significant aggressor" rather than the first aggressor. Please further define the meaning of the most significant aggressor and give examples if possible.

How does a person acting in self-defense mitigate their role as principal aggressor?

In the event that two (2) or more persons commit acts that constitute a domestic violence offense and an officer cannot determine whom the principal aggressor is, should the officer arrest both parties or defer making an arrest? Are there any other options that the officer may take in this type situation?

* * * * *

Senate Bill 2460, Laws of 2002, became effective July 1, 2002, and amends the existing provisions of Section 99-3-7(3) as they relate to the mandatory warrantless arrest of a person who had committed a misdemeanor of domestic violence within twenty-four (24) hours of the report of such an incident. The requirement that an arrest be made if probable cause exists that such a crime did occur remains. The changes incorporated by Senate Bill 2460 affect situations in which the officer has probable cause that two or more individuals committed a misdemeanor which is an act of domestic violence. The relevant new language reads as follows:

(b) If a law enforcement officer has probable cause to believe that two (2) or more persons committed a misdemeanor which is an act of domestic violence

as defined herein, or if two (2) or more persons make complaints to the officer, the officer shall attempt to determine who was the principal aggressor. The term "principal aggressor" is defined as the most significant, rather than the first, aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the principal aggressor. If the officer believes that all parties are equally responsible, the officer shall exercise such officer's best judgment in determining probable cause. (c) To determine who is the principal aggressor, the officer shall consider the following factors, although such consideration is not limited to these factors: (i) Evidence from the persons involved in the domestic abuse; (ii) The history of domestic abuse between the parties, the likelihood of future injury to each person and the intent of the law to protect victims of domestic violence from continuing abuse; (iii) Whether one (1) of the persons acted in self-defense; and (iv) Evidence from witnesses of the domestic violence. (d) A law enforcement officer shall not base the decision of whether to arrest on the consent or request of the victim.

The statute lists the foregoing as factors law enforcement officers are to consider in making the determination as to who is a "principal aggressor," or the person primarily responsible for the most significant level of aggression. However, law enforcement officers are not limited to these factors alone. Other factors which are generally used in determining probable cause in any situation may also be considered. These factors may include the following:

*height/weight/physical condition of the parties *threats creating a fear of physical injury *criminal history of parties *level of violence used *seriousness of injuries *use of alcohol or drugs *existing court orders *who called 911 or others for help

Thus, when a law enforcement officer is presented with a scenario in which two or more individuals state that the other assaulted them, and the officer has probable cause to believe that both assaults occurred, the officer must look at the statutory considerations, and may look at any other relevant facts to assist them in determining which party is responsible for the more significant aggression.

The purpose for the statement in the law that the "principal aggressor" does not mean the first aggressor is to stress that an individual who may have initiated aggression is not necessarily the one most responsible for the aggression. Often, one person may be acting in response to some statement or action on the part of the other party, or one party's use of aggression is substantially more significant than the other's, resulting in more serious injury. Escalation to serious violence is only one example of the type of act this legislation was intended to address. Although more than one party may technically have committed an assault, and even perhaps committed the first physical act, in a domestic situation, law enforcement is to consider whether that person is the one who should be punished by arrest to carry out the

purposes of the law.

You also inquire as to considerations of whether a person is acting in self-defense in making a determination of "principal aggressor." Even though both parties may have committed an assault, the law does not intend for a victim to be arrested for protecting him or herself from further assault. Section 99-3-7(3)(b) specifically requires law enforcement to consider whether one party acted in self-defense. Therefore, as in non-domestic situations, the use of aggression in defense on oneself is a fact which must be considered in making decisions regarding arrest and appropriate charges.

In 99-3-7(3)(b) law enforcement is instructed that arrest is an inappropriate response for a person found not to be the "principal aggressor." However, if the law enforcement officer, after considering the statutory factors and any other relevant information, is unable to determine which party was the "principal aggressor," and has probable cause to believe that all parties are equally responsible, then arrest of all parties may be appropriate. Once probable cause has been established, there are no alternatives to arrest, as the officer is mandated to make an arrest if they find probable cause pursuant to 99-3-7(3)(a). Sufficient documentation of the law enforcement officer's consideration of the statutory factors and any other factors considered should be contained in the offense report supporting the arrest or arrests.

In a situation in which a law enforcement officer is unable to ascertain probable cause for any party and no arrests are made, the officer may still be able to provide assistance to the victim. Officers may ask victims whether they would like anyone contacted on their behalf. Section 93-21-28 requires law enforcement to provide assistance, including transportation if feasible, for persons alleging to be victims of domestic violence. This mandate to provide assistance is not contingent upon an arrest or criminal charges being filed. Officers may provide relevant information regarding shelters or other services to the victims. If no arrest is made, the law enforcement officer should thoroughly document why no arrest was made and the lack of probable cause; sufficient records may establish a history of disturbances which may help officers evaluate and make decisions in any future incidents involving the parties.

If our office may be of further assistance, please advise.

Sincerely,

MIKE MOORE, ATTORNEY GENERAL

By:

Heather P. Wagner

Assistant Attorney General