IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-CA-00071

ROBIN LEE VO — APPELLANT

vs.

HANCOCK COUNTY, MISSISSIPPI — APPELLEE

BRIEF OF APPELLEE, HANCOCK COUNTY, MISSISSIPPI

APPEAL FROM THE CIRCUIT COURT OF HANCOCK COUNTY, MISSISSIPPI

(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.

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TABLE OF CONTENTS

1. Certificate of Interested Persons i

2 Table of Contents ii

3. Table of Authorities iv

4. Statement of the Issues vi

5. Statement of the Case 1-3

6. Summary of the Argument 3

7. Argument 4

I. WHETHER THE TRIAL COURT CORRECTLY RULED THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT REGARDING DEPUTY RUSSELL'S CONDUCT AS NOT AMOUNTING TO RECKLESS DISREGARD 4

A. STANDARD OF REVIEW 4

B. LEGAL ARGUMENT 5

1. Deputy Russell's conduct at the time of the accident did not rise to a level of reckless disregard. 5

2. While issues of fact may exist in this case, there is not one genuine issue of material fact that will defeat Defendant's Motion for Summary Judgment. 11

3. The trial court did not err in granting summary judgment even though Deputy Russell had not been deposed. 13

II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MISSISSIPPI TORT CLAIMS ACT, CODIFIED AT MISS. CODE ANN. §11-46-1 *ET SEQ.* PROVIDES HANCOCK COUNTY IMMUNITY FROM SUIT THEREBY ENTITLING IT TO JUDGMENT AS A MATTER OF LAW. 15

8. Conclusion 15

9. Certificate 16

TABLE OF AUTHORITIES

Cases

Brown v. Credit Ctr., Inc., 444 So. 2d 358 (Miss. 1983) 4

City of Jackson v. Brister, 838 So. 2d 274 (Miss. 2003) 6

City of Jackson v. Perry, 764 So. 2d 373 (Miss. 2000) 7

City of Jackson v. Sutton, 797 So. 2d 977 (Miss. 2001) 5

Davis v. Latch, et al., 873 So. 2d 1059 (Miss. 2004) 6, 7

Grisham v. John Q. Long V.F.W. Post, No. 4057, 519 So. 2d 413 (Miss. 1988) 5, 11

Joseph v. City of Moss Point, 856 So. 2d 548 (Miss. Ct. App. 2003) 7, 8

Maldonado, v. Kelly, 768 So. 2d 906 (Miss. 2000) 7

Maye v. Pearl River County, 758 So. 2d 391 (Miss. 1999) 7, 8, 9, 10, 11, 12

McGrath v. City of Gautier, 794 So. 2d 983 (Miss. 2001) 6

Miss. Dep't of Pub. Safety v. Durn, 861 So. 2d 990 (Miss. 2003) 6, 10

Nationwide Mutual Ins. Co. v. Garriga, 636 So. 2d 658 (Miss. 1994) 5

Owens v. Thomas, 759 So. 2d 1117 (Miss. 1999) 13

Palmer v. Biloxi Reg'l Med. Ctr., Inc., 564 So. 2d 1346 (Miss. 1990) 4

Saucier v. Biloxi Reg'l Med. Ctr., 708 So. 2d 1351 (Miss. 1998) 4

Shaw v. Birchfield, 481 So. 2d 247 (Miss. 1985) 5, 11

Terrell v. Rankin, 511 So. 2d 126 (Miss. 1987) 14

Townsend v. Estate of Gilbert, 616 So. 2d 333 (Miss. 1993) 4

Turner v. City of Ruleville, 735 So. 2d 226 (Miss. 1999) 7

Van v. Grand Casinos of Miss., Inc., 767 So. 2d 1014 (Miss. 2000) 4

Webster v. Miss. Publishers Corp., 571 So. 2d 946 (Miss. 1990) 5

Willing v. Estate of Richard Benz, No. 2005-CA-00470-COA, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007) 6, 7, 8, 9,10

Statutes

Mississippi Code Annotated § 11-46-1 , et. seq. ..... vi, 1, 4, 5, 15

Mississippi Code Annotated § 11-46-5(2) 12

Mississippi Code Annotated § 11-46-7(2) 12

Mississippi Code Annotated §11-46-9 ..... 5, 6

Mississippi Code Annotated § 11-46-9(1)(c) 15

Mississippi Code Annotated §11-1-65(1)(a) 11

Rules

Mississippi Rules of Appellate Procedure 10(b)(4) 2

Mississippi Rules of Appellate Procedure 28(a)(3) 13

Mississippi Rules of Civil Procedure 56(c) 4

Mississippi Rules of Civil Procedure 56(e) 4

Mississippi Rules of Civil Procedure 56(f) 14

STATEMENT OF THE ISSUES

I. Whether the trial court correctly ruled that there is no genuine issue of material fact regarding Deputy Russell's conduct as not amounting to reckless disregard.

II. Whether the trial court erred in finding that the Mississippi Tort Claims Act, codified at Miss. Code Ann. §11-46-1 *et seq.* provides Hancock County immunity from suit thereby entitling it to judgment as a matter of law.

STATEMENT OF THE CASE

On July 6, 2004, Plaintiff filed this action pursuant to Mississippi Code Annotated § 11-46-1, *et. seq.* against Hancock County, ("the County"), alleging that on July 8, 2003, Christopher Russell ("Deputy Russell"), a deputy with the Hancock County Sheriff's Department, while acting within the course and scope of said employment, acted with reckless disregard when he backed out of a parking space at Blue Meadow Apartments in Bay St. Louis, Mississippi, and struck Plaintiff's vehicle. (Record, herein "R.," 3-7); (County's Record Excerpts, herein "R.E.," 3-7). Plaintiff alleges that Deputy Russell failed to look for approaching traffic before entering the roadway. (R. 4); (R.E. 4). In response to an Interrogatory requesting that Plaintiff describe the accident, Plaintiff simply refers to the Mississippi Uniform Accident Report, which describes the accident as follows:

> Driver of vehicle (1) [Russell] stated his [sic] was backing up from a parked position. Looked left. Continued to back and collided with vehicle (2). Driver vehicle (2) [Vo] stated she was driving through the parking lot and her vehicle was hit by vehicle (1).

(R. 235, 243-44); (R.E. 36, 44-45). The diagram/narrative continuation attached to the Accident Report shows how vehicle "1" simply backed from a parked place in the parking lot of the apartment complex. (R. 243-44); (R.E. 44-45). In his affidavit, Deputy Russell states that he remembers looking to the left prior to pulling his vehicle out of the parking space but cannot definitively state that he looked to the right, although to do so would have been consistent with his normal routine. (R. 227-28); (R.E. 34-35). In Plaintiff's recorded statement, she states that her vehicle was traveling at or below five miles per hour at the time of impact. (R. 254); (R.E. 55).

Deputy Russell's and Plaintiff's depositions were originally scheduled for June 1, 2005; however, due to Plaintiff's original counsel's own scheduling conflict, the depositions were postponed and re-noticed for June 23, 2005. See Exhibit "A" to Brief of Appellant. On June 23, 2005, Plaintiff's deposition commenced but was terminated prematurely when Plaintiff's counsel was compellted to withdraw from the case due to a potential and unanticipated conflict. (R. 323-26); (R.E. 119-122). Therefore, Deputy Russell was not deposed, and the parties spent the next eight months in a dispute over whether Plaintiff's foreign attorney should be admitted *Pro Hac Vice*. By opinion and order dated March 13, 2006, the Court denied Plaintiff's Motion to Enroll Foreign Attorney *Pro Hac Vice*. (R. 196-201); (R.E. 8-13).

On May 8, 2006, the County moved for summary judgment on the ground that there is no genuine issue of material fact as to whether Deputy Russell's conduct rose to the level of reckless disregard. (R. 202-16); (R.E. 14-28). Plaintiff opposed the motion, arguing that issues of fact were present. (R. 240-64); (R.E. 41-65). On December 7, 2006, the Court found as follows:

> Plaintiff bears the burden of establishing that Officer Russell backed into the roadway with reckless disregard. **Even if there is a genuine issue of fact as to whether Officer Russell failed to 'look both ways', there is nothing which cre creates an issue of reckless disregard.** The facts presented create nothing more than issues of simple negligence and Hancock County and its employee are immune from such claims.

(emphasis added) (R. 266); (R.E. 67). Accordingly, the Court granted the County's motion for summary judgment. *Id.* Plaintiff filed her Notice of Appeal from the Order granting the motion for summary judgment on January 5, 2007. (R. 267); (R.E. 68). Plaintiff did not file a Statement of the Issues in accordance with Mississippi Rule of Appellate Procedure 10(b)(4), but designated the record on January 5, 2007, as follows:

1. The Complaint

2. The Answer and Defenses

3. All other pleadings, including all motions

4. All memoranda

5. Certified copy of the Judgment

(R. 269); (R.E. 70). Due to Plaintiff's failure to submit a Statement of the Issues on Appeal, the County filed a Supplemental Designation of the Record, designating Plaintiff's Answers to Interrogatories, Plaintiff's Deposition, Defendant's Itemization of Facts and Amended Itemization of Facts, Defendant's Motion for Summary Judgment and Exhibits attached thereto, along with Memorandum Brief of Defendant in Support of Motion for Summary Judgment and the transcript from the hearing on Appellee's Motion for Summary Judgment. (R. 271); (R.E. 71).

SUMMARY OF THE ARGUMENT

There is no evidence before the Court that Deputy Russell acted with reckless disregard for the safety of others when he backed his law enforcement vehicle out of its parking spot at Blue Meadow Apartments prior to striking Plaintiff's vehicle. In particular, there is no evidence that Deputy Russell was speeding, distracted or otherwise improperly driving his vehicle prior to the accident. There is also no evidence that prior to pulling out of the parking spot, Deputy Russell knew that Plaintiff's vehicle was behind him. While Plaintiff argues that summary judgment was inapproprate because Deputy Russell had not been deposed, the reality is that no amount of discovery would show that Deputy Russell acted with reckless disregard. Even *if* Deputy Russell failed to look in both directions before pulling out of the parking space, as the lower court noted, his actions were merely negligent and were not of such a nature as to indicate

an indifference to the consequences that followed. While there may be issues of fact in this case, there is not one genuine issue of "material" fact. Therefore, the County is entitled to retain its immunity under the Mississippi Tort Claims Act, as codified at §11-46-1 *et seq.* of the Mississippi of 1972, as Amended (herein "Miss. Code Ann."), and the trial court ruling should be affirmed.

ARGUMENT

I. WHETHER THE TRIAL COURT CORRECTLY RULED THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT REGARDING DEPUTY RUSSELL'S CONDUCT AS NOT AMOUNTING TO RECKLESS DISREGARD.

A. STANDARD OF REVIEW

The appellate courts employ a *de novo* standard of review when reviewing a lower court's grant of summary judgment. *See Saucier v. Biloxi Reg'l Med. Ctr.*, 708 So. 2d 1351, 1354 (Miss. 1998). Therefore, our appellate courts decide whether there is a genuine issue of material fact, and if not, whether the legal conclusions drawn from the undisputed facts are correct. *See Townsend v. Estate of Gilbert*, 616 So. 2d 333, 335 (Miss. 1993).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Miss. R. Civ. P. 56(c). A party moving for summary judgment bears the initial burden of demonstrating the absence of a material fact. *Van v. Grand Casinos of Miss., Inc.*, 767 So. 2d 1014, 1017-18 (Miss. 2000). Once a motion for summary judgment is made and properly supported, the non-movant must "go beyond the pleadings and designate specific facts showing [a] genuine issue for trial." Miss. R. Civ. P. 56(e); *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 364 (Miss. 1983); *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So. 2d 1346, 1356 (Miss. 1990).

When a motion for summary judgment is made, "the burden of production rests on the party who, at trial, would have the burden of proof on that issue." *Webster v. Miss. Publishers Corp.*, 571 So. 2d 946, 948-49 (Miss. 1990). The Court can grant summary judgment only where, viewing the evidence in the light most favorable to the non-movant, the movant establishes there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Nationwide Mutual Ins. Co. v. Garriga*, 636 So. 2d 658, 661 (Miss. 1994). The Mississippi Supreme Court has held that, "in order for summary judgment to be inappropriate, there must be genuine issues of material fact; the existence of a hundred contested issues of fact will not thwart summary judgment where none of them is material." *Grisham v. John Q. Long V.F.W. Post, No. 4057*, 519 So. 2d 413, 415 (Miss. 1988) (citing *Shaw v. Birchfield*, 481 So. 2d 247, 252 (Miss. 1985)).

B. LEGAL ARGUMENT

1. Deputy Russell's conduct at the time of the accident did not rise to a level of reckless disregard.

The Mississippi Tort Claims Act, codified at Miss. Code Ann. § 11-46-1 *et seq.* ("MTCA") is the exclusive route for filing suit against a governmental entity and its employees. *See City of Jackson v. Sutton*, 797 So. 2d 977 (Miss. 2001). A governmental entity and its employees acting within the course and scope of their employment are free of liability for a claim based upon any of the acts or omissions enumerated therein as excepting to the waiver of sovereign immunity. *Id.* Miss. Code Ann. §11-46-9 provides, in pertinent part:

> A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
>
> > . . . 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 the injury . . . .

(emphasis added). The Mississippi Supreme Court has stated that "apparent in the language [of Miss. Code Ann. § 11-46-9] is that those officers who act within the course and scope of their employment, while engaged in the performance of duties relating to police protection, without reckless disregard for the safety and well being of others, will be entitled to immunity." *City of Jackson v. Brister*, 838 So. 2d 274, 278 (Miss. 2003) (citing *McGrath v. City of Gautier*, 794 So. 2d 983, 985 (Miss. 2001)). Plaintiff has the burden of proving reckless disregard by a preponderance of the evidence. *See Willing v. Estate of Richard Benz*, No. 2005-CA-00470-COA, 2007 Miss. App. LEXIS 191, *14 (Miss. Ct. App. 2007).

The controlling case law on the subject of reckless disregard is clearly established. Reckless disregard is more than ordinary negligence, but less than an intentional act. *See Brister,* 838 So. 2d at 280. This Court has further defined "reckless disregard" as the voluntary doing of an improper or wrongful act, with" heedless indifference to results which may follow and the reckless taking of chance of an accident happening." *See Davis v. Latch, et al.*, 873 So. 2d 1059, 1061 (Miss. 2004). Reckless disregard is a higher standard than gross negligence by which to judge the conduct of others. *See Miss. Dep't of Pub. Safety v. Durn*, 861 So. 2d 990, 994 (Miss. 2003).

In the context of the statute, reckless must connote "wanton or willful," because immunity lies for negligence. *Id.* at 994-95. This Court has held that "wanton" and "reckless disregard" are just a step below specific intent in that "reckless disregard" embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act. *Id.* "The terms 'willful', 'wanton', and 'reckless' have been applied to that degree of fault which lies

between intent to do wrong and the mere reasonable risk of harm involved in ordinary negligence." *Maldonado, v. Kelly*, 768 So. 2d 906, 910-11 (Miss. 2000). The conduct must be so far from a proper state of mind that it is treated in many respects as if harm was intended." *Id.*

Further, "reckless disregard has consistently been found where the conduct at issue demonstrated that the actor appreciated the unreasonable risk at stake and deliberately disregarded 'that risk and the high probability of harm involved.'" *Id.* This Court has held that the common thread running among the cases where reckless disregard was found is "an appreciation of the unreasonable risk of danger involved coupled with a conscious indifference to the consequences that were certain to follow." *See Davis*, 873 So. 2d at 1062; *see generally City of Jackson v. Perry*, 764 So. 2d 373, 378 (Miss. 2000) (finding reckless disregard when police officer was speeding without purpose but not using lights or siren); *Maye v. Pearl River County*, 758 So. 2d 391, 395 (Miss. 1999) (finding reckless disregard because police officer backed out of a parking space with a blind spot and "[knew] he could not be sure the area was clear"); *Turner v. City of Ruleville*, 735 So. 2d 226, 230 (Miss. 1999) (finding reckless disregard when officer pulled over a driver who was visibly intoxicated but allowed the driver to continue driving); *compare Joseph v. City of Moss Point*, 856 So. 2d 548 (Miss. Ct. App. 2003) (summary judgment appropriate because officer guilty only of simple negligence when he moved forward in his lane while reading a warrant and without confirming that the traffic in his lane was moving); *Maldonado*, 768 So. 2d at 911 (finding no indication that officer acted with deliberate disregard to the consequences of attempting to cross an intersection after stopping and looking both ways).

In *Willing v. Estate of Richard Benz*, the Mississippi Court of Appeals developed a framework which a plaintiff must follow in order to prove that an officer acted with reckless disregard. The *Willing* Court, *supra*, held that in order to establish "reckless disregard," a

plaintiff must prove (1) an unreasonable risk existed, (2) the risk created a high probability of harm, (3) the officer appreciated the unreasonable risk, and (4) the officer deliberately disregarded that risk, evincing "almost a willingness that harm should follow." *Willing*, 2007 Miss.App.LEXIS 191, *15.

Plaintiff in the case at hand has not introduced any evidence that Deputy Russell acted with reckless disregard in pulling out of his parking space. Plaintiff makes vague statements such as "Defendants have failed to show Deputy Russell acted with prudence," and "Deputy Russell did not act with due care." Plaintiff repeatedly argues that the County failed to show that Deputy Russell acted with prudence; however, Plaintiff fundamentally misunderstands the burden of proof in this case if she believes that the County must show prudence in order to prevail, or that a showing of lack of due care translates to a finding of reckless disregard. It is Plaintiff's burden to prove beyond a preponderance of the evidence that Deputy Russell acted with reckless disregard -- not the County's responsibility to show the Deputy's prudence. In order to withstand a motion for summary judgment, Plaintiff was required to submit specific facts evidencing a triable issue with regard to reckless disregard. Absent a showing of such specific facts, summary judgment for the County was appropriate. Plaintiff's argument that Deputy Russell was not exercising due care at the time of the accident is likewise inapposite. As *Maye, supra* illustrates, a failure to exercise due care is simply negligence, which is insufficient, as a matter of law, to hold the County liable for Deputy Russell's actions.

In support of her position that Deputy Russell acted with reckless disregard for her safety, Plaintiff relies heavily on *Maye v. Pearl River County. Id.* In *Maye*, this Court found that an officer acted with reckless disregard when he backed out of a parking space, even though he looked in both directions, because the officer knew there was a blind spot and that he would be

unable to see oncoming cars. *Maye*, 758 So. 2d at 394. Plaintiff urges this Court to accept the notion that if the officer's conduct in *Maye* was tantamount to reckless disregard, even though he looked in both directions, Deputy Russell's conduct was certainly reckless disregard since he *may* have only looked in one direction. Brief of Appellant, Page 12. However, the facts in *Maye* are clearly distinguishable from the case *sub judice*, in that the *Maye* Court found the officer's conduct in *Maye* to be reckless disregard because he had backed his vehicle *knowing* he could not see the traffic behind him. *Maye*, 958 So. 2d at 394. The *Maye* Court stated,

> . . . [the officer] did not just carelessly back out of a space. With conscious indifference to the consequences, he backed out knowing he could not see what was behind him. This Court has held that 'wantonness is a failure or refusal to exercise any care, while negligence is a failure to exercise due care.'

Id. at 395. The Court also noted that the officer had been driving at an excessive rate of speed. *Id.*

Contrary to Plaintiff's assertion, the *Maye* decision does not support her position that a failure to look in both directions is evidence of reckless disregard. To summarize, the *Maye* Court held, under the facts established in that case, that backing a vehicle *knowing* there was no way to see traffic behind it amounted to reckless disregard. *Id.* Such facts are not present in this case. To the contrary, there is no evidence that Deputy Russell had anything but a clear view when he proceeded to back up at a slow rate of speed. Clearly, Deputy Russell did not exhibit the same type of *knowing* behavior or indifference to the consequences as the officer in *Maye*. The *Maye* Court even distinguished its facts from the type of case where one "just carelessly backs out of a space." *Id.* at 394.

Simply put, Plaintiff has failed to meet the standard outlined in *Willing* that (1) an unreasonable risk existed, (2) the risk created a high probability of harm, (3) the officer

appreciated the unreasonable risk, and (4) the officer deliberately disregarded that risk, evincing "almost a willingness that harm should follow." 2007 Miss. App. LEXIS 191, *15. The only evidence before this Court is that Deputy Russell backed out of his parking space and struck the Plaintiff's vehicle after looking to the left and possibly the right. There is no evidence that Deputy Russell was driving at an excessive rate of speed, distracted, or was otherwise improperly operating his vehicle at the time the accident occurred. Moreover, there is no evidence that Deputy Russell knew or suspected that Plaintiff's car was behind him. Plaintiff's testimony confirms, at most, that Deputy Russell's actions just prior to the accident amounted to simple negligence. There is absolutely no evidence that Deputy Russell deliberately disregarded the risk of an accident in such a manner as to evince a willingness that harm should follow. Even *if* Deputy Russell failed to look to his right before backing, which granted would be tantamount to ordinary negligence, this is not evidence of gross negligence, much less the higher standard of reckless disregard. *See Miss. Dep't of Pub Safety v. Durn*, 861 So. 2d 990 (Miss. 2003). No one disputes that an accident occurred, and Deputy Russell does not dispute that his actions at least contributed to the accident, but his actions were hardly indicative of a conscious indifference to the consequences or a willingness that harm should follow. At worst, Deputy Russell "carelessly back[ed] out of a space," which the *Maye* Court indicated does not rise to the level of reckless disregard.

Although this particular case involves whether the MTCA provides immunity for Deputy Russell's actions, Plaintiff's argument, if persuasive to the Court, would create a dangerous precedent for non-MTCA cases as well. If Deputy Russell is found to have acted in reckless disregard of Plaintiff's safety, then any similar actions of civilians must be found reckless as well. A driver who simply backs from a parking space without adequately determining if a car or

pedestrian was in the path, could be said to have acted with reckless disregard, thus creating a situation ripe for the imposition of punitive damages.[1] Certainly, such conduct alone, particularly given the facts herein, would not justify punitive damages. Accordingly, the County urges affirmance of the Circuit Court's determination that Deputy Russell's actions were consistent with simple negligence, and did not rise to the level of reckless disregard.

2. While issues of fact may exist in this case, there is not one genuine issue of material fact that will defeat Defendant's Motion for Summary Judgment.

Plaintiff attempts to create a genuine issue of material fact regarding reckless disregard by noting the existence of unrelated issues of fact, among them: 1) whether Deputy Russell looked to the right before he pulled out of the parking space; 2) whether Deputy Russell was acting within the course and scope of his employment at the time of the accident; 3) whether the accident occurred in a parking lot or a road; and 4) whether Deputy Russell maintained a proper lookout. At the outset, the County notes that the existence of a hundred contested issues of fact will not thwart summary judgment where none of them is material. *Grisham*, 519 So. 2d at 415 (citing *Shaw*, 481 So. 2d at 252). Moreover, even if all of these so-called issues of fact were resolved in Plaintiff's favor, there still would not be a single genuine issue with regard to reckless disregard. The County will address each of Plaintiff's "issues of fact" in turn.

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Miss. Code Ann. §11-1-65(1)(a) states: "Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud."

Admittedly, the burden of proof for punitive damages is clear and convincing, rather than preponderance of the evidence as in the MTCA. However, it is the action, i.e., backing from a parking space at a low rate of speed without a clear lookout, which Plaintiff maintains equates to reckless disregard.

First, Deputy Russell provided a sworn affidavit that he looked to the left, and possibly to the right, before backing from the parking space. He stated that although he could not specifically recall if he looked to the right, to do so would have been consistent with his training and routine practice. (R. 227-228);(R.E. 34-35). If he did, in fact, fail to the look to the right, such an omission merely rises to the level of negligence and does not support a finding that Deputy Russell acted with a conscious indifference to the consequences or a willingness that harm should follow. Unlike the officer's conduct in *Maye*, Deputy Russell's conduct did not demonstrate a reckless disregard for the safety of others. Thus, a determination of whether Deputy Russell neglected to look to the right has no bearing on the Court's decision with regard to reckless disregard.

Second, the County is confused as to Plaintiff's reason for claiming that there is an issue of fact regarding whether Deputy Russell was acting within the course and scope of his employment at the time of the accident. Not only did Plaintiff allege in her Complaint that Deputy Russell was acting within the course and scope of his employment with the County at the time of the accident and proceed upon that notion in her response and memorandum brief in opposition to the motion for summary judgment, but she did not indicate disagreement with Defendant's Itemization No. 3, which stated that Deputy Russell was acting within the course and scope of employment at the time of the accident. In addition, if Deputy Russell was not acting within the course and scope of employment at the time of the accident, then the MTCA will not afford Plaintiff relief. *See* Miss. Code Ann. §§ 11-46-5(2) and 11-46-7(2). Regardless, such a determination has no bearing on Deputy Russell's level of care at the time of the accident, and, therefore, cannot create a genuine issue of material fact with regard to reckless disregard.

Third, contrary to Plaintiff's argument, there is not a dispute over the location of this accident. The County attached a photograph of the accident scene as an exhibit to its Rebuttal, which clearly shows that the accident occurred in a parking lot. (R. 234)(R.E. 129). Nonetheless, regardless of where the accident occurred, the Plaintiff's burden does not change. She must still introduce evidence that Deputy Russell acted with reckless disregard or the County is entitled to retain its immunity.

Lastly, Plaintiff argues that there is a triable issue with regard to whether Deputy Russell maintained a proper lookout. While this issue is disputed, it is immaterial at the summary judgment level because the County is entitled to retain its immunity unless there is evidence that Deputy Russell acted with reckless disregard. In sum, while Plaintiff may be correct that there are issues of fact, the reality is that none of Deputy Russell's actions amounted to reckless disregard, a condition precedent to Plaintiff's surviving the County's Motion for Summary Judgment.

3. The trial court did not err in granting summary judgment even though Deputy Russell had not been deposed.

Plaintiff's primary argument in her brief is that summary judgment was inappropriate because Deputy Russell had not been deposed prior to the Court's ruling. However, this argument is without merit for several reasons. First, Plaintiff is estopped from making the argument because she failed to include the issue in her Statement of the Issues. Rule 28(a)(3) of the Mississippi Rules of Appellate Procedure specifically states that no issue not distinctly identified shall be argued by counsel, except upon request of the court. While Plaintiff provided five extremely broad issues in her Statement of the Issues, she did not specifically identify an

issue of whether summary judgment was appropriate in light of the fact that Deputy Russell had not been deposed. Brief of Appellant, Page 1.

Further, Plaintiff attempts to rely on Rule 56(f) of the Mississippi Rules of Civil Procedure for the proposition that a court *should* deny a motion for summary judgment if there is a good faith reason for additional discovery. Brief of Appellant, Pages 8-9. However, Plaintiff completely misunderstands Rule 56(f)'s application. Rule 56(f) allows a non-movant to file an affidavit or other writing *prior* to a hearing on a motion for summary judgment setting forth specific reasons why the non-movant is unable to respond to the motion and asking that the matter be continued until the non-movant has had an opportunity to conduct additional discovery. The Court's decision to allow or disallow a continuance in this regard is *discretionary*, contrary to Plaintiff's claims. *See Terrell v. Rankin*, 511 So. 2d 126, 129 (Miss. 1987); *Owens v. Thomas*, 759 So. 2d 1117, 1120 (Miss. 1999).

Plaintiff herein neither filed an affidavit nor otherwise indicated a need for additional discovery prior to the hearing on Defendant's Motion for Summary Judgment, despite filing a response in opposition to the Motion. Nowhere in Plaintiff's response did she indicate that she was having difficulty responding to the motion in light of not having deposed Deputy Russell. In fact, Plaintiff's appellate brief contains the first reference to her claim that summary judgment was inappropriate because Deputy Russell had not been deposed. Notwithstanding, nothing that Plaintiff now wishes to obtain from Deputy Russell, as discussed above, would create a genuine issue of material fact. Plaintiff's arguments to the contrary are disingenuous, particulary since the Circuit Court and the Plaintiff, prior to the hearing on the Motion for Summary Judgment, had the benefit of Deputy Russell's sworn affidavit describing the accident.

Even *if* Plaintiff deposed Deputy Russell and even *if* he stated that he may not have looked in both directions prior to backing, this was a low-impact collision, and one in which we know Deputy Russell looked to his left and perhaps to his right which would have been "typical of [his] actions and consistent with [his] training." (Affidavit of Deputy Russell, R. 227, R.E. 34-35). In light of the fact that there is *no* evidence that Deputy Russell was speeding, distracted or otherwise improperly driving at the time of the accident, there is nothing that Deputy Russell's deposition would yield in terms of helping Plaintiff meet her burden on reckless disregard. Therefore, there is no good faith reason to allow Plaintiff to conduct Deputy Russell's deposition before a final determination on the County's Motion for Summary Judgment.

II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE MISSISSIPPI TORT CLAIMS ACT, CODIFIED AT MISS. CODE ANN. §11-46-1 *ET SEQ.*, PROVIDES HANCOCK COUNTY IMMUNITY FROM SUIT THEREBY ENTITLING IT TO JUDGMENT AS A MATTER OF LAW.

Since there is no evidence that Deputy Russell acted with reckless disregard when he backed out of the parking space, pursuant to Miss. Code Ann. § 11-46-9(1)(c), the County is not liable for Plaintiff's injuries. Therefore, the County is entitled to judgment as a matter of law.

CONCLUSION

Hancock County, Mississippi prays that this Court affirm the lower Court's decision granting judgment as a matter of law in favor of Hancock County.

RESPECTFULLY SUBMITTED, this the 31ST day of July, 2007.

HANCOCK COUNTY, MISSISSIPPI

BY: DUKES, DUKES, KEATING & FANECA, P.A.

BY: _____

WALTER W. DUKES, MSB No. [redacted]
AMANDA M. SCHWARTZ, MSB No. [redacted]

CERTIFICATE

Pursuant to M.R.A.P. Rule 25(a), I hereby certify that I forwarded, for filing, the original and three (3) true and correct copies of the above and foregoing Brief of Appellee, via overnight delivery (Federal Express), to:

Hon. Betty W. Sephton
Clerk, Supreme Court of Mississippi
P.O. Box 249
Jackson, Mississippi 39205-0249

I further certify that, pursuant to M.R.A.P. Rule 28(m), that I have also mailed an electronic copy of the above and foregoing on an electronic disk and state that this brief was written on WordPerfect 12® format.

I further certify that I have mailed a true and correct copy of the above and foregoing Brief of Appellee via First Class U.S. Mail, to:

Honorable Stephen B. Simpson
Circuit Court Judge
Hancock, County, Mississippi
P.O. Drawer 1570
Gulfport, MS 39502

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THIS, the 31st day of July, 2007.

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