SUPREME COURT OF MISSISSIPPI

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

F. CHARLES PHILLIPS — APPELLANT

VERSUS — NO. 2007-CA-00227

MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY
AND MISSISSIPPI HIGHWAY SAFETY PATROL
AND JOSEPH W. SEALS AND THOMAS E. LITTLE — APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF FORREST COUNTY, MISSISSIPPI

BRIEF OF APPELLEES, MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY/ MISSISSIPPI HIGHWAY SAFETY PATROL, JOSEPH W. SEALS, AND THOMAS E. LITTLE

ORAL ARGUMENT REQUESTED

Respectfully submitted by:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following people have an interest in the determination of this case. These representations are made in order that the Justices of the Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. F. Charles Phillips, Appellant
2. Mississippi Department of Public Safety/Mississippi Highway Safety Patrol, Appellee
3. Joseph W. Seals, Appellee
4. Thomas E. Little, Appellee
5. Scott Phillips, Attorney for Appellant
6. William E. Whitfield, III, Attorney for Appellees
7. Kaara L. Lind, Attorney for Appellees
8. Honorable Robert B. Helfrich, Circuit Court Judge

Respectfully submitted, this the 24 day of September, 2007.

WILLIAM E. WHITFIELD, III
KAARA L. LIND

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STATEMENT OF THE ISSUES

I. Whether the trial court erred in finding that Mississippi Highway Patrolmen Joseph Seals and Thomas Little did not act with reckless disregard of the safety and well being of Charles Phillips.

II. Whether the trial court erred in finding that Charles Phillips was engaged in criminal activity at the time of his injuries.

STATEMENT OF THE CASE

A. Statement of Facts.

In 2001, Plaintiff Charles Phillips ("Phillips") graduated from the auxiliary deputy academy and became a Reserve Deputy Sheriff with the Forrest County Sheriff's Department [hereinafter "FCSD"]. (TT, pp. 161, 236).[1] In the early evening of October 15, 2003, Phillips was driving home in his personally owned vehicle [hereinafter, and known in the law enforcement community as, a "POV"] from a basketball meeting held in Laurel, MS. (TT, pp. 163-64). Phillips was driving a white, 2003 Ford Escape (SUV). (TT, pp. 9, 16). Phillips was not dressed in any type of a law enforcement uniform, but did have his Sheriff's identification badge in his possession. (TT, p. 250). While driving home, Phillips was monitoring (apparently simply out of curiosity) Hattiesburg Police Department transmissions on his personal police scanner, and heard that a pursuit involving a white, 1992 Ford Explorer (SUV) was underway through the City of Hattiesburg. (TT, pp. 163-64). The vehicle being driven by Phillips and the individual being pursued, were substantially similar and the proof demonstrated that they were nearly identical in the midst of a "hot pursuit." The suspect in question was accused of domestic violence in Covington County, where the chase began. (TT, p. 255). The proof at trial and

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[1] All references to "TT" is to the Trial Transcript.

Phillips agreed this was a dangerous type of call to take from a law enforcement standpoint. (TT, p. 256). Based on the transmissions he heard from the Sheriff's department and the Hattiesburg Police Department ["HPD"] on his personal police scanner, Phillips knew that the HPD was aware of the pursuit, but apparently chose not to intervene, other than to protect various intersections in furtherance of getting it through their City. (TT, p. 253). Phillips also knew based on transmissions he heard through his scanner that the Mississippi Highway Patrol ["MHP"] was engaged in the pursuit. (TT, p. 254). Phillips had no way of communicating with either the HPD or the MHP. (TT, p. 252).

During the same time that Phillips was monitoring the HPD transmissions on his scanner, MHP Troopers Joseph Seals, Thomas Little and Donnie Rayborn had been dispatched from Highway 98 in Lamar County and were in route to intercept what they had been told was a white, 1992 Ford Explorer, and that the suspect had been involved in a domestic dispute. (TT, p. 19, 56-59). They positioned themselves along three separate areas of Highway 49 north of the Hattiesburg city limits. (TT, pp., 19-21, 56-59). Somehow, the suspect vehicle got past both Trooper Little (who had positioned himself most northward on Highway 49) and Trooper Seals (who had positioned himself next southward of Little) without being identified. (TT, pp. 19-21, 56-59). However, Trooper Rayborn, who was positioned furthest south on Highway 49 (and closest to the City limits of Hattiesburg), spotted the suspect vehicle and engaged himself in pursuit toward the Hattiesburg city limits. (TT, pp. 20-21, 58-59). Trooper Rayborn reported his pursuit of the suspect to Little and Seals, who both had substantial ground to make up. (TT, pp. 20-21). The MHP dispatcher then reported that fact to all units and monitored the pursuit from

that point forward. (D-10).[2] Troopers Seals and Little proceeded southbound on Highway 49 in an attempt to catch up with and assist Trooper Rayborn. (TT, pp. 21, 136).

Unknown to the MHP, the HPD, and his own FCSD dispatch, Phillips had decided to take up a position in his POV, a white Ford Escape, in the approximate area of Eddie Street and Highway 49, and was going to attempt to block the suspect from getting through the intersection. (TT, pp. 164-65). Phillips testified he saw in his rear view mirror the first MHP trooper (Rayborn) and the suspect coming up behind him through the intersection. (Id.). The suspect proceeded through the intersection by driving in between Phillips' POV in the right hand lane and another unidentified vehicle occupying the left hand lane. (Id.). Rayborn followed the suspect on through the intersection. (Id.). Using his hand held walkie-talkie assigned to him by his Reserve unit, Phillips for the first time contacted the FCSD dispatcher and advised that he was 10-8, 10-94, meaning he was entering the pursuit. (TT, pp. 165-66). Phillips decided to do so in clear and acknowledged violation of the FCSD policies and procedures and in violation of Miss. Code Ann. § 63-3-517, which requires the use of an actual emergency vehicle equipped with a siren to be engaged in emergency operations. (TT, pp. 243-44, 281-83). Phillips admits at trial that no one told him to get involved in this pursuit. (TT, p. 221). In fact, Phillips admits that he failed to advise David Jones, the FCSD Shift Commander on duty that evening, of his intent to intervene – an express pre-condition for becoming involved in such an operation. (TT, pp. 243, 247). The policies and procedures of the FCSD specifically requires that any deputy, whether regular, duty or auxiliary, who engages in pursuit, must immediately notify the dispatcher and shift commander of same, and requires the vehicle pursuit to be conducted with a

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[2] References to "D" are to defense exhibits, followed by the particular exhibit number.

siren, blue lights and headlights. Commander Jones testified at trial that he did not authorize Phillips to engage in the pursuit and had he known Phillips was in his POV, he would have told him to discontinue his pursuit. (TT, pp. 356-57, 359).

Even though he had absolutely no way of communicating or coordinating his actions with the MHP, Phillips involved himself in the pursuit because he "thought he could help out." (TT, p. 165, 251). It never occurred to Phillips that his POV could be (and ultimately was) confused for the vehicle that was being pursued that evening. (TT, p. 257). Phillips claims the FCSD dispatcher asked to be informed of each intersection proceeded through as the chase made its way southbound on Highway 49. (TT, p. 166). Phillips testified that he did so, including the intersection of West Pine Street and southbound Highway 49. (TT, pp. 166-67). However, Phillips' testimony was not corroborated by the testimony of Jeff Byrd, the FCSD dispatcher on duty that evening. Rather, Dispatcher Byrd testified that Phillips only advised dispatch that he was currently at the intersection of Highway 49 and Pine Street and that he was going to be involved in a chase led by the MHP. (TT, p. 363). Byrd testified that he heard nothing again until after Phillip's encounter with the MHP that is the subject of this lawsuit. (TT, p. 364).

Phillips testified he continued to follow the MHP trooper and suspect until about the "Multi-Purpose Center," located just south of Hattiesburg. (TT, p. 167). Phillips claims at that point, someone radioed and commanded "Forrest-124,[3] cease 10-94", meaning cease his pursuit. (TT, p. 168, 220-21). Phillips claims he did so by pulling off to the right side of southbound Highway 49, just before the Highway 98 exit. (TT, p. 169). Again, Phillips' testimony is absolutely uncorroborated. Dispatcher Byrd testified he never advised Phillips to cease his

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[3] "Forrest-124" is the FCSD identification of Charles Phillips.

pursuit. (TT, p. 364). Likewise, Shift Commander Jones testified he never advised Phillips to cease his pursuit because he had no idea Phillips was even involved. (TT, p. 359).

One only needs to review the video footage taken from Trooper Seals' patrol car (admitted into evidence) to know what happened. (D-20). It shows that when Seals finally caught up to the pursuit around the Multi-Purpose Center, Rayborn was in the left lane passing a white Ford SUV and the vehicles were approaching the Highway 49/Highway 98 intersection. (TT, pp. 21-25, 76). Because Seals believed that Rayborn was passing the suspect vehicle in question and did not see any another white Ford SUV in front of Rayborn, he radioed Rayborn about performing a "rolling roadblock" maneuver.[4] (TT, pp. 21-25, 37, 76-77). Rayborn responded 10-4. (TT, p. 21; D-10). Seals advised Rayborn to move ahead to block the exit ramp to Highway 98 West. (TT, pp. 21-22, 76-77). As Rayborn pulled ahead of the white Ford SUV driven by Phillips and away from Seals, Seals testified that he stayed focused on the white Ford SUV. (TT, pp. 21-22, 78). Seals came along side of this white Ford SUV driven by Phillips, rolled down his passenger side window, and commanded him to pull over to the right hand shoulder. (TT, pp. 22, 79). The white Ford SUV began to slow down and Seals began the rolling roadblock maneuver to get it to roll to a stop on the right shoulder. (TT, pp. 22, 79). Seals testified and the video shows that the white Ford SUV came to a stop while Seals was next to it. (TT, p. 79). Seals prepared to exit his vehicle, but the white Ford SUV again began to accelerate, as if to leave the scene. (TT, p. 22, 79). Seals then pulled his patrol car in front of the white Ford SUV to make it stop. (TT, pp. 22, 79). As Seals attempted to exit his patrol car a

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[4] The rollback procedure is a low speed channeling type intervention technique where the suspect vehicle is maneuvered off the road.

second time, the white Ford SUV attempted to go around the front of his car again. (TT, pp. 22-79). Seals re-entered his patrol car and pulled up a short distance to restrict the white Ford SUV from traveling any further on the shoulder of the road. (TT, pp. 22, 79). Trooper Little, who was not far behind Seals, witnessed and corroborated these events. (TT, p. 138). Both Troopers Seals and Little truly believed that the occupant of this white Ford SUV was the one that attracted all of the law enforcement attention and was reported to have committed a domestic assault in Covington County that led police on a high speed chase through a populated area at dangerous speeds for in-town travel. (TT, p. 39).

Despite all of these events up to this point being captured on video (as viewed from Seals' patrol car), and despite the testimony of Dispatcher Byrd and Shift Commander Jones that neither told Phillips to commence or cease the pursuit, Phillips still claims he was already stopped on the side of the road due to a command he received to cease the pursuit when Seals pulled up next to him in his patrol car. (TT, p. 170, 222-26, 231-34). Phillips' version is that Seals pulled beside him and motioned for Phillips to pull forward. (TT, p. 169-71). Phillips claims that Seals motioned a second time for him to pull forward, which he testified he did. (TT, p. 171). Phillips claims that just after this second action is when Seals exited his vehicle. (TT, p. 171). Of course, Phillip's testimony is not corroborated by either the video, the testimony of Seals, or the testimony of Little.

The events that occurred once Seals exited his patrol car are likewise in sharp contrast.[5]

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[5] Unfortunately, the events following Trooper Seals exiting his vehicle were not captured by his patrol car video. (TT, p. 83). The video camera is in a fixed, forward-facing position. (TT, p. 54). Because Seals' patrol car was in a somewhat perpendicular position to Phillips' vehicle, the video camera was facing the opposite direction of the events in question. (TT, p.83).

Phillips version is extremely difficult to believe or comprehend, given his complete inability to explain why he did not immediately shout "Forrest-124" or show his deputy badge to Trooper Seals upon being pulled over, especially when he should and is expected to know the appropriate law enforcement protocol. Instead, Phillips testified that once Seals pulled the patrol car in front of his POV, Seals got out of his patrol car, came to his car door, and ordered him out of the car. (TT, pp. 171-73, 262). Surprisingly, Phillips admits he did not follow Seals' command. (TT, pp. 172-73). Nor did he identify himself as a reserve deputy to Seals. (TT, pp. 266-67). Phillips testified that at that point, Seals opened the car door, grabbed him, threw him to the ground, and began to mercilessly beat him. (TT, p. 172). Phillips claims that within seconds, his left hand was in handcuffs. (TT, p. 172). Phillips claims he was then commanded to give his right arm, to which he responded that he could not because Seals was on top of him. (TT, p. 172). Even though he could speak, Phillips still did not identify himself as a reserve deputy. (TT, pp. 266-67). Phillips claims that Seals rolled him over, moved his right arm out from under him, and placed it in handcuffs. (TT, p. 173). Phillips denies seeing any other MHP trooper up to that point. (TT, p. 173). Phillips claims that after he was handcuffed, someone grabbed the back of his hair and thrust his head into the gravel surface two times. (TT, p. 174). Phillips then claims that someone put their hand on his throat and choked him until he went unconscious. (TT, p. 174). Phillips claims he next remembers someone commanding him to get up. (TT, p. 175). He responded that he could not. (TT, p. 175). Phillips claims there were now two people there and they both helped him up. (TT, p. 175). Phillips claims he was un-handcuffed, but was not told why. (TT, p. 175). Only then did Phillips identify himself as "Forrest-124." (TT, pp. 175, 267). Phillips claims that Seals identified himself, assisted Phillips to his car, and told him to go to the hospital to get his face checked. (TT, p. 179). Phillips claims that no one offered to call an

ambulance. (TT, p. 179). Phillips claims he then inquired where his glasses were. (TT, p. 179). Phillips claims that Seals helped him retrieve his glasses and then left. (TT, p. 179). Phillips claims that he never resisted being handcuffed. Even though Phillips fully admits that Seals thought Phillips was the suspect in question, Phillips unconvincingly claims he was never given a chance to identify himself before he was handcuffed. (TT, p. 261). This obviously makes little sense given that Phillips admits his driver's side window was down and there was time to yell his identification or show his badge when Seals was making his way over to Phillip's vehicle. (TT, p. 260-62).

Trooper Seals, on the other hand, testified that when he finally got the white Ford SUV to stop, he exited his patrol car and went to the driver's side door of the suspect vehicle. Seals noted that the "suspect" (Phillips) was unrestrained and his hands were up near his face. (TT, p. 24-25). Seals opened the door to the vehicle and commanded the "suspect" to get out of the car. (TT, p. 25). The "suspect" turned and looked at Seals and remained mute, prompting Seals to give a second command for the "suspect" to get out of the car. (TT, p. 25, 40). At that point, the "suspect" dropped his hands to his lap. (TT, p. 25). Because Seals did not know the "suspect's" intentions, Seals performed a straight arm bar maneuver to remove the "suspect" from the vehicle. (TT, p. 25). Seals explained he reached in with his left hand and grabbed the "suspect's" shirt near his chest, placed his right hand between the "suspect's" left elbow and shoulder, and pulled the "suspect" from the vehicle and took him to the ground. (TT, p. 25). Seals recalls the "suspect" landing on his right shoulder. (TT, p. 25).

Trooper Little was able to stop his patrol car at the very moment that Seals was extricating the "suspect" from the vehicle. (TT, p. 121, 140). Meanwhile, Seals stood over the suspect and gave a command for the "suspect" to give him his hands. (TT, p. 25). No response

was given. (TT, p. 25). Seals gave a second command for the "suspect" to give him his hands and this time, the "suspect" responded that he could not. (TT, p. 25). Seals kneeled over and rolled the "suspect" onto his stomach, and began to secure the "suspect's" left hand. (TT, p. 26). Trooper Little observed Seals having trouble handcuffing the "suspect", so he immediately ran over to provide assistance. (TT, pp. 122, 142-44). Seals placed the handcuffs on the "suspect's" left hand. (TT, p. 28). Little was able to get the "suspect's" right hand, after having to tell the "suspect" two or three times to stop resisting. (TT, pp. 29-30, 142-44). Seals then placed the handcuffs on his right hand. (TT, p. 30). Both Seals and Little testified that the "suspect" was uncooperative and would not voluntarily surrender his hands. (TT, pp. 144, 146).

After the "suspect" was handcuffed, Seals and Little stood up, rolled the "suspect" onto his right shoulder, and observed a small amount of blood on the ground and around the "suspect's" eyebrows and face. (TT, pp. 30-31). It was at that point that the "suspect" made the statement: "Forrest-124". (TT, pp. 30-31, 92). Seals asked the "suspect" to repeat himself. (TT, pp. 31-32). The "suspect" then advised he was a reserve deputy with the Forrest County Sheriff's Department and was trying to help. (TT, p. 32). At the same time, Trooper Rayborn asks for assistance on the radio as he was still in pursuit of the original suspect. (TT, p. 146). Seals and Little, realizing that they have pulled over the wrong suspect, assisted Phillips to his feet and removed the handcuffs. (TT, p. 37, 146-47). Seals commented to Phillips that he was bleeding and that he needed medical attention. (TT, pp. 100, 130-31). Seals inquired as to whether he needed an ambulance, but Phillips indicated he was fine. (TT, p. 44). Phillips then found his hand-held walkie-talkie, called his dispatch, and reported "Forrest-124 ... I'm okay." (TT, pp. 96, 147). Trooper Little then left to assist Rayborn, who was calling for help on the radio, and who was still in pursuit and alone to deal with the actual dangerous suspect. (TT, pp.

100, 148-49). Seals momentarily remained to provide Phillips with his name and his supervisor's name so that contact could be made. (TT, p. 100). Seals then left to assist Trooper Rayborn. (TT, p. 100). Both Seals and Little testified that Phillips' injuries occurred during either the takedown or handcuffing process. (TT, pp. 41, 128). However, neither Seals nor Little hit, beat, or choked Phillips. (TT, pp. 94, 128, 140). Nor did they observe any period of unconsciousness by Phillips. (TT, p. 95). Seals testified that if Phillips had simply identified himself when Seals got out of his patrol car, none of this would have happened. (TT, p. 102).

B. Course of Proceedings.

This cause of action was originally filed by the plaintiff on September 23, 2004 in the Circuit Court of Forrest County. In his Complaint, Phillips alleges that the Defendants were negligent and not entitled to immunity under the Mississippi Tort Claims Act ["MTCA"], Miss. Code Ann. § 11-46-1 *et seq.* due to their alleged "reckless disregard" of the Plaintiff's safety and well being. The Plaintiff further contended that he was not engaged in criminal activity at the time of the incident in question.

On or about August 28, 2006, the Defendants filed a Motion to Dismiss and/or for Summary Judgment on two separate grounds. First, it was argued that Plaintiff could not sue Defendants Seals and Little in their individual capacity pursuant to Miss. Code Ann. § 11-46-7(2). Second, all Defendants asserted that they were entitled to immunity pursuant to Miss. Code Ann. § 11-46-9(c), because Plaintiff could not show (1) that the Defendants were not engaged in police protection, (2) that the Defendants acted in reckless disregard during the October 15, 2003 encounter, and/or (3) that Plaintiff was not engaged in criminal activity at the time of his injury.

On October 12, 2006, the trial court entered an Order granting the Motion to Dismiss and/or for Summary Judgment as to the individual claims filed against Troopers Seals and Little.

The trial court, however, denied the Motion to Dismiss and/or for Summary Judgment as to the Mississippi Department of Public Safety/Mississippi Highway Safety Patrol. As such, the case proceeded to a bench trial as to that Defendant before the Honorable Robert B. Helfrich on October 30, 2006. The trial court heard all testimony and received all the evidence over the course of two days. At the conclusion of the trial, Judge Helfrich requested that both parties submit findings of fact and conclusions of law. Both parties complied. On December 27, 2006, Judge Helfrich issued Findings of Fact and Conclusion of Law in favor of the Mississippi Department of Public Safety/Mississippi Highway Safety Patrol. Said Findings of Fact and Conclusions of Law appear to be an adoption, in large part, of those submitted by the Defendant. On January 5, 2007, a Judgment was entered in favor of the Defendant. The Plaintiff filed his Notice of Appeal on February 5, 2007.

SUMMARY OF THE ARGUMENT

The trial court appropriately entered a Final Judgment in favor of the Mississippi Highway Patrol. Phillips had the burden of proving that the agents of the Mississippi Highway Patrol were negligent and not entitled to immunity under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1, *et seq.* To do so, the trial court correctly determined that for Phillips to recover, he had the burden of proving (1) that Troopers Seals and Little were "negligent" and acted in reckless disregard of his safety and well-being by using excessive force during the course of the stop that he alleges resulted in his alleged injuries, and (2) that Phillips was not engaged in "criminal activity" at the time of his injuries.

With regard to the "reckless disregard" prong, the trial court correctly looked at the totality of the circumstances with regard to the conduct of Troopers Seals and Little. As the record and testimony reflect, Phillips, an "off duty" auxiliary deputy without any means of communicating with the Mississippi Highway Patrol, involved himself in the chase led by that law enforcement agency while he was in his personally owned vehicle. Phillips' white, 2003 Ford Escape (an "SUV") bore a striking resemblance to the white, 1992 Ford Explorer (also an "SUV") being operated by the suspect. Troopers Seals and Little took Phillips into custody believing him to be the suspect who had prompted law enforcement officials to chase him through two counties and through a highly populated are of the City of Hattiesburg at dangerous speeds. Given the suspect's profound disregard for the safety of others and the fact that he had "allegedly" been involved in domestic violence, Troopers Seals and Little had every reason to believe that he would be a danger to them if cornered and stopped and were on a high state of alert. In fact, the law enforcement officers that actually did stop the correct suspect were engaged in a dangerous standoff.

The trial court correctly determined that the mindset of Troopers Seals and Little clearly justified an approach in handling this "suspect" that was quick and decisive for their own protection and the protection of the suspect and public. Due to his unannounced involvement in the pursuit and his personal vehicle being similar to that driven by the suspect in question, Phillips was regrettably mistaken for the suspect. Regardless, based on the testimony and evidence submitted at trial, and based on the law of Mississippi, the trial court correctly determined that while the actions of Troopers Seal and Little may have amounted to a "mistake," their actions certainly did not amount to reckless disregard or even "negligence." For these reasons, the trial court determined, and correctly so, that the Mississippi Highway Patrol is immune from suit for this occurrence.

Likewise, the trial court correctly determined that even if the actions of Troopers Seal and Little could be considered reckless disregard, the trial testimony and evidence show that Phillips was engaged in "criminal activity" at the time of his injuries. The trial testimony and evidence make clear that Phillips impeded the pursuit of the correct suspect by his unannounced involvement in the chase, failed to yield to the law enforcement officer that attempted to pull him over, refused to peaceably exit his vehicle, and resisted placement of handcuffs. By all accounts, Phillips suffered injuries because he was uncooperative and unsubmissive to the multiple attempts of Troopers Seals and Little in securing one whom they believed to be a dangerous suspect. As a result, the trial court correctly determined that Phillips cannot be said to be free of criminal behavior at the time of the occurrence that resulted in his injuries such that the Mississippi Highway Patrol is entitled to immunity.

For all the foregoing reasons, the Judgment of the Forrest County Circuit Court should be affirmed.

ARGUMENT

Standard of Review

It is well settled that "[a] circuit judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor, and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence." City of Clinton v. Smith, 861 So. 2d 323, 326 ¶ 16 (Miss. 2000) (quoting Maldonado v. Kelly, 768 So. 2d 906, 908 ¶ 4 (Miss. 2000)). The Mississippi Supreme Court has also held that "when the trial judge is sitting as the finder of fact, and chooses to adopt in toto a party's proposed findings of fact and conclusions of law, [it] will conduct a *de novo* review of the record." Miss. Dept. of Transp. v. Johnson, 873 So. 2d 108 ¶8 (Miss. 2004) (citing Holden v. Frasher-Holden, 680 So. 2d 795, 798 (Miss. 1996)). See also Greenwood Utilities v. Williams, 801 So. 2d 783, 787-88 (Miss. Ct. App. 2001). In the present action, the trial court requested each party submit proposed findings of fact and conclusions of law, a long-accepted practice. The trial court rendered Findings that adopted the proposed findings of fact and conclusions of law submitted by counsel for the Mississippi Highway Patrol. In this situation, the Court reviews the record *de novo*, as opposed to a deferential standard of review, to determine whether the trial court's findings of fact are based on substantial, credible, and reasonable evidence. Miss. Dep't of Transp. v. Johnson, 873 So. 2d 108, 111 ¶8 (Miss. 2004). Only if manifestly wrong will the Court set aside such findings of the trial court. Id. (citing Holden, 680 So. 2d at 798). The standard of review for questions of law, which include the proper application of the Mississippi Tort Claims Act, is *de novo* as well. Maldonado v. Kelly, 768 So. 2d 906, 907 (¶4) (Miss. 2000).

I. TRIAL COURT DID NOT ERR IN FINDING THAT TROOPERS SEALS AND LITTLE DID NOT ACT IN RECKLESS DISREGARD OF THE SAFETY AND WELL-BEING OF PHILLIPS.

The Mississippi Tort Claims Act is the exclusive remedy for filing a lawsuit against governmental entities and their employees. City of Jackson v. Brister, 838 So. 2d 274, 278 (¶13) (Miss. 2003). In addition, the Mississippi Tort Claims Act, Section 11-46-9(1), provides immunity to governmental entities and their employees acting within the course and scope of employment duties. Id. (¶14). As it relates to the performance of police protection, the Mississippi Tort Claims Act states as follows:

> 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 the injury . . . .

Miss. Code Ann. § 11-46-9(1)(c).

The Mississippi Supreme Court has noted that the purpose of Section 11-46-9(1)(c) is to "'protect law enforcement personnel from lawsuits arising out of the performance of their duties in law enforcement, with respect to the alleged victim.'" Brister, 838 So. 2d at 278 (¶15) (quoting Maldonado, 768 So. 2d at 909). Therefore, and "'[a]pparent 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.'" Id. (quoting McGrath v. City of Gautier, 794 So. 2d 983, 985 (Miss. 2001)).

There is no dispute that Troopers Little and Seals were acting within the course and scope

of their employment duties with the Mississippi Highway Patrol at the time of their October 15, 2003 encounter with Phillips. What remains hotly contested is whether the Mississippi Highway Patrol is entitled to immunity for the actions of Troopers Seal and Little when they mistook Phillips for the actual suspect in question.

A. Meaning of "Reckless Disregard."

"Reckless disregard" is not defined by Miss. Code Ann. § 11-46-9(1)(c). However, the standard for reckless disregard has been succinctly discussed by the Mississippi Supreme Court and the Court of Appeals as follows:

> Reckless disregard is a higher standard than gross negligence. Miss. Dept. of Pub. Safety v. Durn, 861 So. 2d 990, 994 (¶10) (Miss. 2003). This standard "embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act." Id. at 995 (¶10) (quoting City of Jackson v. Lipsey, 834 So. 2d 687, 691-92 (¶16) (Miss. 2003)). "Reckless disregard usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow." Id. (quoting Maye v. Pearl River County, 758 So. 2d 391, 394 (¶16) (Miss. 1999)). 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. at 995 (¶13) (quoting Maldonado v. Kelly, 768 So. 2d 906, 910-11 (¶11) (Miss. 2000)). "The plaintiff has the burden of proving 'reckless disregard' by a preponderance of the evidence." Titus v. Williams, 844 So. 2d 459, 468 (¶37) (Miss. 2003) (citing Simpson v. City of Pickens, 761 So. 2d 855, 859 (Miss. 2000)).

Willing v. Estate of Benz, 958 So. 2d 1240, 1247 (¶ 16) (Miss. Ct. App. 2007).

This standard was appropriately followed by the trial court. Nevertheless, Phillips erroneously asserts that the trial court wrongly concluded that the conduct of Trooper Seals and Little had to be intentional to rise to the level of reckless disregard of his safety and well-being. It is apparent that Phillips has misconstrued the trial court's cite to Turner v. City of Ruleville, 735 So. 2d 226 (Miss. 1999), a case in which it was alleged that an officer failed to arrest a motorist whom he knew to be intoxicated. In Turner, the Court held that a plaintiff need not

specifically plead that the actor intended the harm that follows, only that he "knowingly and intentionally do [] a thing or wrongful act." Id. at 230 (¶18). Therefore, when the plaintiff pled facts alleging that the police officer wrongfully and intentionally allowed a visibly intoxicated driver to continue driving, these alleged actions showed a reckless or wanton or willful disregard for the safety of other drivers, including the plaintiff. Id. at 230 (¶20). At no point did the Turner court's holding "disturb the requirement that a plaintiff prove wantonness, which 'is a failure or refusal to exercise any care, while negligence is a failure to exercise due care.'" Id. (citing Maldonado, 768 So. 2d at 912 (¶8)).

Based on Turner and the Mississippi Supreme Court's discussion of the meaning of "reckless disregard" contained therein, the trial court correctly looked at the totality of the circumstances to determine whether Troopers Seals and Little failed to exercise any care when they pulled over and secured the individual who they mistakenly believed was the suspect in question. City of Jackson v. Brister, 838 So. 2d 274, 279 (¶20) (Miss. 2003).

B. "Reckless Disregard" in Context of Arresting Wrong Suspect.

Appellant cites to two cases to support his argument that reckless disregard should be found on the part of the Mississippi Highway Patrol for the actions of Troopers Seal and Little. In particular, Appellant cites Maye v. Pearl River County, 758 So.2d 391 (Miss. 1999) and City of Jackson v. Perry, 764 So. 2d 373 (Miss. 2000). These cases involve vehicular accidents that are of little benefit to the resolution of this case. However, on at least two prior occasions, the Mississippi Supreme Court has discussed the issue of whether a law enforcement officer acted with reckless disregard in arresting the wrong suspect. Both cases are obviously relevant to the present issue.

The first such case is Foster v. Noel, 715 So. 2d 174 (Miss. 1998). In Foster, Kirby, a

grocery store manager, was carrying a customer's groceries to the car when he noticed a man with two packages of rib-eye steaks under his shirt. Id. at 175 (¶2). Kirby followed the male to a truck and observed him place the steaks under the driver's seat of the truck and also observed another black male in the passenger seat, who Kirby recognized by name. Id. Kirby confronted the shoplifter, retrieved the steaks, and directed the man to wait until the police arrived. Id. The men refused and drove off, but not before Kirby was able to write down the tag number. Id. When the police officers arrived, Kirby gave the officers the license plate information and also informed the officers that the truck was occupied by two black males, one of whom Kirby identified by name. Id. (¶3). A few days later, Kirby went to the police station where he met with Officer Luckett and provided the details of the shoplifting incident, as well as the truck's tag number. Id. at 176 (¶3). Based on the tag number, Luckett determined that the owner of the truck was a female named Jacqueline Noel. Id. Even though Luckett knew that the suspects were two males, one of which was named Robert Kyles, he filled out an affidavit for an arrest warrant, listing Jacqueline Noel, a female, as the person who stole the steaks. Id. (¶4). Several months later, Jacqueline Noel received a letter from the Yazoo City Police Department advising her there was an outstanding warrant for her arrest for petit larceny. Id. Upon her arrival to the police station to inquire about this letter, Officer Foster advised her there was a warrant for her arrest for shoplifting. Id. Then, pursuant to the warrant, Officer Foster placed Noel under arrest and detained her at the station for approximately ninety minutes. Id. Noel sued the City of Yazoo under the Mississippi Tort Claims Act, alleging false arrest and emotional and mental distress. Id. (¶6).

Based on these facts, the Mississippi Supreme Court found there was ample evidence that Officer Luckett, the police officer who filled out the affidavit for an arrest warrant, acted in

reckless disregard of Noel's safety and well-being because he was well aware that there was no allegation that Noel committed this crime based on Kirby telling him that two black men stole the steaks, one of whom was named Robert Kyles. 715 So. 2d at 179 (¶28). At trial, Officer Luckett admitted he should have investigated whether Noel was involved in the shoplifting incident prior to ever obtaining a warrant for her arrest. Id. The Court found that Officer Luckett's disregard to the information provided by Kirby led to Noel being falsely arrested and detained at the police station. Id. at 183 (¶57).

A case in which the Mississippi Supreme Court found no reckless disregard with regard to arresting the wrong individual is City of Greenville v. Jones, 925 So. 2d 106 (Miss. 2006). In Jones, four bomb threat calls were placed to the Greenville Police Department (GPD) over the period of two days in August 1999. Id. at 107 (¶2). The GPD traced the 911 calls and determined that all four calls were placed from a cell phone served by Cellular South, a division of Telepak, Inc. Id. (¶3). In compliance with a subpoena duces tecum, Telepak researched the phone records and found that all four calls had been placed from a particular cell phone number. Id. at 108 (¶3). However, when the Telepak employee entered the phone number into the Telepak system to determine the owner's name, he transposed two of the numbers. Id. The transposed phone number belonged to John H. Jones, and his name was revealed on page 2 of 6 of the packet Telepak provided to the GPD. Id. Pages 3 through 6 of the packet, however, contained the correct phone number, although said pages were filled with bizarre computer acronyms and abbreviations. Id. After interviewing the 911 operators and reading John H. Jones' name on page 2, the GPD sought and received a warrant for his arrest. Id. (¶4). Jones was arrested on felony offenses. Id. Jones' public defender, after reviewing the discovery materials, discovered the transposed cell phone number, such that his criminal prosecution was ended. Id.

Jones thereafter sued the GPD, alleging it acted in reckless disregard of his safety and well-being. Id. (¶6).

The Mississippi Supreme Court noted there was no dispute that at all relevant times, the police officers were lawfully engaged in the performance of their duties relating to police protection and that Jones was not engaged in criminal activity at the time of his arrest. 925 So. 2d at 110 (¶11). Therefore, the case turned on whether the actions or inactions of the police officers rose beyond the level of mere negligence to that of reckless disregard. Id. Jones asserted that if the police officers had carefully reviewed the entire Telepak packet of information, the true cell phone number from which the bomb threat calls were made would have been revealed. Id. (¶12). At trial, it was revealed that the GPD had the inconsistent information in its possession for approximately five days prior to applying for the arrest warrant. Id. (¶13). In addition, the police officers did not present the entire Telepak document to the County Court Judge who issued the arrest warrant. Id. The police detectives admitted their investigation was inadequate, as they did not determine Jones' whereabouts on the days and at the times of the 911 calls, did not determine who had access to his cell phone, and did not determine whether his cell phone had been stolen. Id. However, the main police detective in question did attempt to engage Jones in conversation when he was arrested to listen to his voice long enough to determine if it was the voice on the 911 tape. Id. at 114 n.6 (¶19). This police detective firmly believed that Jones' voice was on the 911 tapes and that he was the guilty party. Id. at 114 n.7 (¶19). Based on their review of the entire record, **the Court concluded that the inadequate investigation on the part of the GPD may have been negligence, but certainly was not reckless disregard.** Id. at 118-19 (¶26) (emphasis added). The Court explained that unlike Officer Luckett in Foster v. Noel, the GPD police officers went through an actual investigative process to determine who had made

the threatening phone calls, including appearing before three different judges, obtaining phone records, listening to the 911 tapes, and conducting interviews. Id. at 121 (¶31). The Court found that at most, the Jones' proved the GPD police officers were negligent, exempting the GPD from liability. Id.

C. Conduct of Troopers Seals and Little Did Not Amount to Reckless Disregard for the Safety and Well-Being of Charles Phillips.

Applying the rationales of Foster and Jones, one need only look to the information actually known by Troopers Seals and Little to realize that they acted appropriately under the circumstances. The testimony and evidence submitted at trial is that when MHP Troopers Seals, Little, and Rayborn were dispatched at approximately 7:00 p.m. on October 15, 2003, they were advised to be on the lookout for a white, 1992 Ford Explorer (an SUV) involved in a high speed pursuit with the Covington County Sheriff's Office, and that the suspect had been involved in a domestic crime earlier that day. (TT, pp. 19, 56-59). Armed only with these basic and evolving facts, the MHP Troopers were dispatched to Highway 49, just north of Hattiesburg. (TT, pp. 19-20, 56-59). Only Trooper Rayborn, who positioned himself most southward (of the 3 officers) on Highway 49, caught sight of and engaged in the pursuit of the suspect. (TT, pp. 20-21, 58-59).

Troopers Little and Seals recoiled back down Highway 49 in an effort to catch up with and now assist Trooper Rayborn. (TT, p. 21). Trooper Seals testified that he had no visual contact of Trooper Rayborn until south of Hattiesburg on Highway 49 around the "Multi-Purpose Center."[6] (TT, pp. 21, 59-60). At that point in time, Trooper Rayborn was in the left lane next to

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Keep in mind that this "sight" involves the perception of a blue light "strobe" flashing in the distance along the terrain of an extending highway through the blackness of night, augmented by radio contact that often was fragmented and eclectic.

a white, Ford SUV driving in the right lane. (TT, pp. 21, 76). Trooper Seals saw no other white, Ford SUV around or in front of Trooper Rayborn. (TT, p. 37, 112). His focus is now fixed upon who he believes to the "perpetrator," for his safety and the safety of other highway users. He is not focused upon the whereabouts of Rayborn, Little, or anything other than securing this individual.

Having seen no other vehicle around Trooper Rayborn matching the description of the suspect vehicle,[7] Trooper Seals asks Rayborn if he wanted to conduct a rolling roadblock on the vehicle to his right. (TT, pp. 21, 36, 37, 76-77). Trooper Rayborn moved up and into the right hand lane, ahead of Phillips' vehicle. (TT, pp. 21-22, 77). Seals assumed Rayborn was moving into the position of blocking the exit ramp to Highway 98 West, which Seals had asked Rayborn to do. (TT, pp. 22, 36, 77). Appellant argues that if Seals had paid attention to Rayborn, he would have realized that Rayborn kept going past the Highway 98 West exit in pursuit of the actual suspect. Because Seals saw no other white, Ford SUV when Rayborn moved ahead into the right lane, Seals then focused his attention on the white, Ford SUV driven by Phillips, so as to not get too close or collide with it while conducting the rolling roadblock maneuver. (TT, p. 78). Seals actions were not unreasonable, especially given that there were no other indications that the vehicle being driven by Phillips was not the suspect vehicle.

Appellant also argues that if Troopers Seals had paid attention to the radio broadcasts, he would have been well aware that he had pulled over the wrong vehicle. Appellant's argument is not supported by the evidence. Prior to Seals ever catching up to the pursuit, Trooper Rayborn

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Seals is unaware that the actual white SUV of the perpetrator is well ahead of Rayborn and out of sight. Radio traffic exposing this fact is non-existent and even absent.

had been in contact with the MHP dispatch to provide information regarding the suspect vehicle, including the license tag number, and the suspect losing both front tires. (D-10). Seals testified he did not hear these radio communications. (TT, p. 104, 114). Seals explained that transmissions made on a car-to-station channel from a trooper in his patrol car to the substation can only be heard by another trooper in a patrol car if they are in close proximity. (TT, p. 71). Once a short distance is created between the patrol cars, the transmissions become inaudible. (TT, p. 71).

Seals' testimony is supported by the MHP transcript. (D-10). For example, when J-39 (Rayborn) advised dispatch of the suspect's license tag number, his transmission was cut in half. (D-10). After Rayborn gave the tag number, dispatch confirmed this with Rayborn and then asked J-42; i.e., Seals, whether he heard the radio traffic from Rayborn regarding the license tag number. (D-10). Seals responded: "Negative. Did not, Hattiesburg." (D-10). The transcript goes on to show that dispatch did not thereafter repeat the tag number to Seals. (D-10). It is clear from the MHP transcript that Seals was not hearing Rayborn's communications, including that the suspect vehicle lost both tires, all of which occurred prior to Seals catching up to Rayborn. And, when Seals finally did catch up, he asked dispatch to "Put me here with 39" so he could communicate with Rayborn. (D-10). Obviously, Seals was not intentionally avoiding radio broadcasts as Appellant erroneously asserts just so he could have an excuse to confront Phillips. To suggest such is ludicrous especially when this only puts the officer in more, as opposed to less, danger.

Appellant next argues that if Troopers Seals or Little had looked to see that the suspect they pulled over was white, instead of black, and that he was older than 35 years old, the incident would not have occurred. Again, Appellant makes erroneous assumptions that the MHP

troopers, including Troopers Seals and Little, knew that the suspect was black and 35 years of age. The evidence submitted at trial is to the contrary. While Phillips may have been aware that the suspect in question was a black male identified as Tyrone E. Jackson because he was listening to broadcasts on his police scanner from the Hattiesburg Police Department, the MHP transcript, as well as the testimony of Troopers Seals and Little, clearly show that they were unaware of the suspect's age and race. (TT, p. 19, 56-59; D-10), and had no ability to monitor or receive any of the radio traffic coming from either the FCSD or the HPD.

Appellant next asserts that if Troopers Seals and Little paid attention to the fact that Phillips was driving a white, 2003 Ford Escape that had its emergency flashers on, as opposed to a white, 1992 Ford Explorer, the incident in question could have been avoided.[8] However, the evidence submitted at trial shows that the 2003 Ford Escape and the 1992 Ford Explorer are nearly the same size. (D-18, D-19, D-21). In particular, the overall width of a 1992 4-door Explorer is 70.2 inches and the overall width of the 2003 Ford Escape is 70.1 inches, a difference of 1/10 of an inch. The height of a 1992 4-door Explorer is 67.3 inches and the height of the 2003 Ford Escape is 69.1 inches, a difference of less than 2 inches. The overall length of a 1992 4-door Explorer is 184.3 inches and the overall length of a 2003 Escape is 173.0 inches, a difference of just slightly less than a foot. Both are known in the automobile industry as "mini-SUV's." Based on this evidence, one can easily see how a law enforcement officer, driving at a high rate speed and following a white, 2003 Ford Escape, which is also driving at a high rate of

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Although Appellant makes much of the fact that the vehicle driven by Phillips had its emergency flashing signals on at the time of the incident, and this should have somehow alerted Troopers Seals and Little that they pulled over the wrong suspect vehicle, there is absolutely no evidence in the record as to whether the actual suspect had his emergency flashing signals on during the pursuit, or if this fact would have really made a difference.

speed, and the officer is focusing his attention so as to not collide with said vehicle while he attempts to pull it over, could mistake the white, 2003 Ford Escape for a white, 1992 Ford Explorer, and miss the fact that one is only a few inches shorter or longer than another.

Finally, Appellant asserts that if Trooper Seals had run a license plate check on Phillips' vehicle or had asked Phillips for his identification prior to removing him from his vehicle, this incident would not have occurred. When Seals caught up to Trooper Rayborn, who was driving next to what Seals believed was the white Ford SUV in question, only a matter of seconds lapsed between the time of Seals' arrival and the time the decision was made with Rayborn to conduct a rolling roadblock maneuver. Seals testified that there was no telling how long it would have taken to call in the license plate tag to the dispatcher and get their response. (TT, p. 115-16). In the meantime, the suspect continues to remain mobile and a continuing threat to himself and the public.

Appellant wants this Court to acknowledge that when Seals finally got what he believed to be the suspect vehicle pulled over, he should have conducted this like a routine traffic stop of someone going 60 m.p.h. in a 55 m.p.h. zone and being caught on radar. Based on the information known by Seals, this was not an ordinary traffic stop situation, and, in fact, was a very dangerous situation by the admission of even Phillips. (TT, pp. 23-24, 85-86, 114-15). Seals knew the suspect in question was involved in a domestic crime, typically a volatile situation and one of the most dangerous to any law enforcement officer. Second, Seals knew the suspect in question had demonstrated his non-compliance with multiple law enforcement agencies' attempts to get the suspect vehicle to stop when he continued to flee from pursuing officers at high rates of speed, sometimes in excess of 100 m.p.h., endangering the lives of all around. Third, Seals had made multiple attempts, himself, to get what he believed to be the

suspect vehicle to pull over and stop on the right shoulder of Highway 49. Fourth, Seals made two commands for the suspect to exit the vehicle, neither of which were complied with. Fifth, between the 1st and 2nd command, the suspect placed his hands on his lap, indicating he had no intentions of complying with the lawful order of a law enforcement officer. Even with all this known information and multiple refusals to obey police commands, Appellant unrealistically and even absurdly believes that Trooper Seals should have asked: "May I have your driver's license, registration and proof of insurance, please?" Appellant's assertion borders on the ridiculous and certainly does not take into account the safety of our police officers facing a dangerous and potentially volatile situation against one who they had believed demonstrated no regard for his safety or that of others.

Moreover, when the "suspect" decided to place his hands on his lap, instead of following Seals' second command to get out of the car, Seals had no idea what the "suspect's" intentions were. For all Seals knew, the "suspect" was attempting to reach for a weapon. To not consider this a very real possibility would unacceptably place Seals in a life threatening situation. Phillips is referred to as the "suspect" because at all relevant times, he admittedly chose to remain mute about being a reserve deputy sheriff. It is absolutely incomprehensible why one in the very situation as that of Phillips, a trained law enforcement officer, would not shout from the top of his lungs his identity or furiously waive his law enforcement credentials out the window. He should have done this as a matter of courtesy to avoid the delay caused by him in pursuing the correct suspect and placing the lead officer in harms way. But again, this was yet another poor decision made by Phillips. Seals, on the other hand, was faced with another "split-second" decision, and wisely chose to remove the "suspect" from the vehicle and secure him so that Seals would not be placed himself in any danger before securing and questioning could took place.

Seals appropriately removed the "suspect" from his vehicle using the straight-arm bar technique, one of many maneuvers taught at the law enforcement academy. Even after being taken down to the ground, it took two troopers to place the handcuffs on the "suspect." Both Seals and Little testified the "suspect" was resistant to their efforts.

Based on all of the evidence in the record, this Court should find as the trial court correctly did, that Troopers Seals and Little did not act with "reckless disregard." While it may have been a "mistake" and even worse, "negligent," on the part of Trooper Seals to not confirm the suspect vehicle's license tag number with dispatch or to call in the license tag number of Phillips' vehicle prior to pulling him over, such inaction on the part of Trooper Seals paled in comparison to the egregious actions of Officer Luckett in Foster v. Noel. This is because the MHP, Trooper Seals, and Trooper Little did not know that Phillips unpredictably decided to involve himself in the pursuit (an event that is glorified television, but certainly not in real law enforcement life) as Phillips had absolutely no way of communicating with them or making his presence known to them. In addition, Phillips' vehicle was nearly identical to that driven by the suspect vehicle, and was not equipped with any compliant emergency devices (sirens or blue lights). And, at the very moment when Seals caught up to the pursuit, Phillips' vehicle, which matched the description of the suspect vehicle, happened to be right next to Trooper Rayborn, traveling at a high rate of speed. There was no other white Ford SUV in sight. Taking into account all of these factors, the action or inaction of Trooper Seals and Little cannot be described as reckless.

D. Phillips Acted in Reckless Disregard of the Safety and Well-Being of Other Law Enforcement Officers and of the General Public.

One could argue, however, that based on all of the evidence in the record, Phillips, rather

than Troopers Seals and Little, acted with reckless disregard of the safety and well-being of all law enforcement officers involved in the pursuit and of the general public driving on Highway 49 that evening. It makes absolutely no sense whatsoever as to why Phillips decided to involve himself in this police chase. One has to wonder if Phillips thought he was going to be the next police hero in the newest installment of Lethal Weapon or America's Most Wanted.

Forrest County Sheriff Billy McGee testified that in all his thirty-two (32) years of law enforcement, he has never heard of anyone using their personal vehicle to engage in a pursuit. (TT, p. 349). Sheriff McGee testified that it is dangerous for an officer to do so because the personal vehicle is unmarked and not equipped with blue lights or sirens, and therefore, appears to be just another member of the general public. (TT, p. 349). Sheriff McGee further testified that Forrest County Sheriff's Office Operating Procedure #93-003 did not authorize an officer to use their personal vehicle in pursuit. (TT, p. 340-42; D-14). This is because the policy required an officer to have various designated and authorized equipment on their vehicle, such as a siren, blue lights, and headlights, before engaging in pursuit. (TT, p. 340-42; D-14). Phillips violated this policy and he should have never engaged in the pursuit. (TT, p. 340-42, 348; D-14). Sheriff McGee testified that had he known Phillips was in the pursuit in his POV, he would not have authorized it and would have advised him to cease and desist. (TT, p. 343).

Phillips did absolutely nothing to help the situation, and in fact, hindered law enforcement efforts to stop the actual suspect vehicle in question. Defense expert Charles Sims explained that by engaging in the pursuit in his personal vehicle that was similar to the suspect vehicle, that was not marked, and not equipped with blue lights and sirens, and with no way to communicate with the MHP, Phillips actually confused and hampered the law enforcement officers involved. (TT, p. 372). In addition, when Phillips did not immediately identify himself

as "Forrest-124" after being pulled over, he unnecessarily detained Troopers Seals and Little at the scene, meaning Trooper Rayborn had no backup assistance. (TT, p. 382).

By engaging himself in this pursuit, Phillips placed himself at risk, his fellow officers at risk, and private citizens at risk. (TT, p. 374). Phillips actions were clearly in reckless disregard for the safety and well-being of all those driving around him. Phillips should not be rewarded for his own egregious conduct.

II. TRIAL COURT DID NOT ERR IN FINDING THAT PHILLIPS WAS ENGAGED IN CRIMINAL ACTIVITY AT THE TIME OF HIS INJURIES.

Even if this Court were to find that Troopers Seals and Little acted in reckless disregard, Phillips failed to meet his burden of proving that he was not engaged in criminal activity at the time of his injuries, the second requirement of Section 11-46-9(1)(c) of the Mississippi Tort Claims Act.

A. Timing of the "Criminal Activity."

The Mississippi Supreme Court has explained that a plaintiff will not be successful in his lawsuit against a governmental entity if he is engaged in criminal activity *at the time of injury*. City of Jackson v. Calcote, 910 So. 2d 1103, 1111 (¶26) (Miss. Ct. App. 2005). See also Bridges v. Pearl River Valley Water Supply, 793 So. 2d 584, 587-88 (¶¶9-13) (Miss. 2001). If the officer has probable cause to arrest and proceeds to do so, the Mississippi Supreme Court has held the requisite nexus between criminal activity and the action causing injury is met. Bridges, 793 So. 2d at 588. Felony violations as well as misdemeanor traffic offenses are criminal activities within the meaning of the statute. City of Jackson v. Perry, 764 So. 2d 373, 378-79 (¶¶ 20-24) (Miss. 2000). Only in circumstances where the victim is not involved in criminal activity or the criminal activity is merely fortuitous and is not a causal nexus between the officer's conduct and

the criminal activity will the governmental entity be found liable. Bridges, 793 So. 2d at 588 (citing City of Jackson v. Perry, 764 So. 2d 373, 378-79 (Miss. 2000)). The Mississippi Supreme Court has provided the following example of fortuitous criminal activity: "[A] recklessly negligent officer who runs down a pedestrian on the sidewalk, escapes liability on a showing that the pedestrian was then and there in possession of untaxed whisky." Perry, 764 So. 2d at 379 (¶25).

B. Resisting Arrest is Criminal Activity.

In the present case, the MHP contends and the credible evidence suggests that Phillips was injured during an appropriate takedown and handcuffing process. A factually similar case is Bridges v. Pearl Valley Water Supply, 793 So. 2d 584 (Miss. 2001), in which it was alleged that a security officer employed by the District used excessive force while arresting Bridges. During an August 1997 encounter, Gray, a security officer for the District, arrested Bridges on the District's property and charged him with possession of beer in a dry county, public drunkenness, and resisting arrest. Id. at 586 (¶ 2). Bridges claimed that Officer Gray used excessive force in arresting him. Id. (¶4). Apparently, after Officer Gray informed Bridges that he was under arrest, he instructed Bridges to place his hands on the truck, but Bridges refused. Pearly River Valley Water Supply District v. Bridges, 878 So. 2d 1013 (¶5) (Miss. Ct. App. 2004). Officer Gray informed Bridges that he needed to handcuff him. Id. Bridges, however, had his left hand in his pocket. Id. As Officer Gray reached for Bridges took his hand out of his pocket and stepped back. Id. Officer Gray then grabbed Bridge's arm and locked it behind Bridges. Id. Even though Bridges continued to struggle and resist, Officer Gray was able to pin Bridges against the truck after two attempts. Id. Even then, Bridges continued to struggle, so Officer Gray applied a wrist lock. Id. Officer Gray told Bridges that if he would stop resisting, he would

not have to apply the wrist lock, which Bridges claimed was hurting him. Id. Officer Gray was then able to place Bridges in handcuffs. Id. (¶6). Bridges was later treated for a sprained left wrist and an avulsion fracture of the left ulna. Id. (¶7).

The Mississippi Supreme Court found that the District was entitled to immunity because Officer Gray had probable cause to arrest and his alleged injuries had a sufficient nexus to his criminal activity. Bridges, 793 So. 2d at 588 (¶13). Accordingly, on the basis of Miss. Code Ann. § 11-46-9(1)(c), the Court held that the District was immune. Id.

The Bridges Court found that it was the plaintiff's active resistance that exacerbated the amount of force that the officer applied in making the arrest, and that extra force is what caused the injury. In other words, if a plaintiff resists arrest and suffers injury, the plaintiff can be said to have been engaged in criminal activity at the time of his injury. Gammill v. Langdon, 1998 WL 94821 *4 (N.D. Miss. 1998).

C. Phillips Resisted Arrest.

Like the plaintiff in Bridges, Phillips' resistance to being secured by Troopers Seals and Little was a direct cause of the escalation of the force they used in taking him down and handcuffing him. Phillips' physical injuries were to his eyebrow and forehead areas and were directly related to Troopers Seals having to pull him from his vehicle down to the gravel shoulder of Highway 49, as well as both Troopers Seals and Little having to hold Phillips down while placing his hands into the handcuffs. No credible evidence was submitted that Troopers Seals and Little continued to apply force after the handcuffs were placed.

The Trial Court was in the best position to weigh the credibility of the witnesses. Phillips testified that he never resisted and that after he was placed in handcuffs, the MHP troopers purposefully hit his head on the gravel two times and then choked him to the point of

unconsciousness. (TT, p. 174-75, 185). The testimony of Sheriff McGee, however, does not support Phillips' story. Sheriff McGee testified that as he was leaving the scene where the actual suspect was apprehended, he received a call from Phillips asking if he would meet him at the 21-Truck Stop. (TT, pp. 346-348). Sheriff McGee agreed to do so. (Id.). Upon arrival, Sheriff McGee saw that Phillips' head was bleeding. (Id.). Phillips told Sheriff McGee that MHP had pulled him over, thinking he was the suspect, slammed him to the ground, causing him to bust his head. (Id.). Phillips did not tell Sheriff McGee that the MHP troopers purposefully slammed his head into the gravel twice or that he was choked to the point of being unconscious. In fact, Phillips admitted to Sheriff McGee that he resisted the efforts of the MHP to secure him. (TT, p. 348).

Likewise, Phillips' actions after Troopers Seal and Little left the scene to assist Trooper Rayborn also cast doubt on his testimony. Phillips claimed that due to his injuries, he needed immediate medical attention. (TT, p. 180-81). Phillips admitted, though, that he did not call dispatch on his hand-held walkie-talkie to request an ambulance and he did not immediately go to the emergency room. (TT, p. 173). Phillips started out by heading north on Highway 49, as if going to Forrest General Hospital. (TT, p. 181). However, Phillips, who claimed to be dazed and incoherent at this point, turned around and headed back south, back to the area where he had been pulled over. (TT, p. 181). And, even though he is supposedly dazed and confused, he made two phone calls - one to Officer Gary Carter, who was with Shift Commander David Jones, and one to Sheriff McGee, and asked both to meet him at the 21-Truck Stop. (TT, p. 181-83, 346). Phillips claimed that none of these individuals offered him medical assistance. (TT, p. 273). Again, the testimony of Sheriff McGee is to the contrary. Sheriff McGee testified he saw that Phillips' head was bleeding. (TT, p. 346-47). Sheriff McGee testified that Phillips explained

what had happened to him. (TT, p. 346-47). Sheriff McGee asked Phillips if he needed to go to the hospital, but Phillips replied that he didn't think so. (TT, p. 346-47). Only after Sheriff McGee told Phillips that he really thought his head should be cleaned up did Phillips decide to go. (TT, p. 348).

Additionally, the medical records do not support Phillips' allegations that his head was slammed twice into the gravel or that he was choked to the point of unconsciousness. In particular, the medical records from the Forrest General Hospital emergency room specifically state there was no loss of consciousness. (TT, p. 207). The emergency room records indicate that Phillips only had a 2 cm laceration above his right eyebrow and a ½ cm laceration to the left eyelid, just below the eyebrow, as well as scattered abrasions to the forehead and bruising to both eyes. (TT, p. 208). The emergency room records show absolutely no abrasions or bruising to Phillips' throat. (TT, p. 209). Phillips' injuries were simply not the kind one would expect to on someone whose head was allegedly pounded into the gravel and who was **choked to the point of unconsciousness.**

D. Phillips' Injuries Did Not Occur After He Was Handcuffed.

The facts of the present case are clearly distinguishable from the likes of City of Jackson v. Calcote, 910 So. 2d 1103 (Miss. Ct. App. 2005) and City of Jackson v. Powell, 917 So. 2d 59 (Miss. 2005). In both of these cases, the evidence showed that when the police officers arrested the suspects, and after subduing and handcuffing them, they proceeded to beat the suspects. Powell, 917 So. 2d at 70-71 (¶¶ 41-43). When the handcuffs were finally placed, the suspects' attempts to resist arrest had ended. Id. Thus, the crimes for which the suspects were charged and convicted ceased prior to the delivery of the offensive blows by the police officers. Id. In the present case, and as discussed above, the credible evidence shows that Phillips received his

injuries in the process of being handcuffed – not after he was subdued. **Even Phillips' admits in his Brief on page 41 that his injuries occurred during the takedown and handcuffing process.** Consequently, based on these divergent fact patterns, the holdings of Calcote and Powell are irrelevant.

E. Force Used by Troopers Seals and Little Was Not Excessive.

Appellant also asserts that the amount of force used by Troopers Seals and Little was excessive because Phillips was older and not as big as them. The Mississippi Supreme Court has held that police officers may exert physical force which is reasonably necessary to overcome resistance encountered during arrest. City of Jackson v. Powell, 917 So. 2d 59 (¶47) (Miss. 2005). The actions of Troopers Seals and Little are to be judged on an objective standard with all the factors that they were confronted with, taking into account the fact that police officers must make split-second decisions. Id.

As already explained herein, the situation facing Troopers Seals and Little was that the suspect in question was wanted for domestic violence and had been evading law enforcement officers in a high speed pursuit, at times going over 100 m.p.h., endangering the officers' lives, as well as the lives of the general public. Unbeknownst to all those involved, Phillips recklessly entered this pursuit in his personal vehicle, even though (1) his personal vehicle was not marked and was not equipped with blue lights and sirens, in violation of Miss. Code Ann. § 63-3-517, (2) his personal vehicle was very similar to the suspect's vehicle, (3) he had no way of communicating his intentions to the MHP troopers, and (4) he was traveling right next to Trooper Rayborn in excess of the speed limit right. (TT, p. 372-373). In addition, the video from Trooper Seals' patrol car very clearly shows that the white SUV he was attempting to pull over would not come to an immediate stop, forcing Seals to make two attempts at blocking the vehicle on the

right shoulder of Highway 49. As explained by defense expert Charles Sims, all the red flags were there to indicate that Trooper Seals needed to secure the suspect as quickly as possible. (TT, p. 377-78). Phillips' failure to follow the commands of this law enforcement officer was in violation of Miss. Code Ann. §§ 63-3-809 and 97-35-7.

To make matters worse, Phillips did not follow two commands by Trooper Seals for him to exit his vehicle, again in violation of Miss. Code Ann. § 97-35-7. (TT, pp. 22-23). And, in fact, after the second command, Phillips placed his hands on his lap instead of where Trooper Seals could see them. (TT, p. 25). Phillips admitted that he did not follow the commands of Trooper Seals. (TT, p. 173). As a result of not knowing the suspect's intentions and fearing for his safety, Troopers Seals used the straight-arm takedown maneuver to remove the suspect from the vehicle and take him down to the ground to secure him with handcuffs. (TT, p. 25-26). Defense expert Charles Sims testified that this is an often-used extraction technique that is designed to remove the individual quickly and keeps the individual in control as they come down so that the officer can put himself into the handcuffing position. (TT, p. 380). Sims testified this is an acceptable, routine, and appropriate technique because it immobilizes the suspect when the suspect is a threat. (TT, p. 380-81). Even after Seals extracted the suspect to place him in the handcuffing position, the suspect continued to engage in a physical struggle, such that it took the efforts of both Seals and Little to get him handcuffed. (TT, p. 28-29). Defense expert Sims testified that he believes any reasonable and competent law enforcement officer in the same situation would have reacted the same way. (TT, p. 384). Phillips provided absolutely no evidence to the contrary.

Taking in all of the credible evidence, it is clear that Troopers Seals and Little did not engage in the use of excessive force during the takedown and handcuffing process of the

individual they believed to be the suspect in question. Phillips, on the other hand, was resistant to the handcuffing efforts of Troopers Seals and Little, thereby exacerbating the amount of force necessary to make the arrest, and that extra force is what caused his injuries. There was no credible evidence that Troopers Seals and Little continued to apply force after Phillips was handcuffed. As a result, the requisite nexus between Phillips' criminal activity (resisting arrest) and the action causing injury exists, such that Trial Court correctly held that the Mississippi Highway Patrol is immune.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Trial Court's Judgment granting immunity to the Mississippi Highway Patrol pursuant to Miss. Code Ann. § 11-46-9(1)(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, WILLIAM E. WHITFIELD, III, of the law firm of Bryant, Dukes & Blakeslee, P.L.L.C., do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the within and foregoing Appellee's Brief to the following at their record mailing addresses:

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