IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JERRY WAYNE DUCKWORTH	**APPELLANT**
VERSUS	**NO. 2007-CA-01299**
STATE OF ALABAMA AND BART WALKER	**APPELLEES**

On Appeal From the Circuit Court of Monroe County, Mississippi
(CV-04-062-AM)

BRIEF OF APPELLEES THE STATE OF ALABAMA AND BART WALKER

ORAL ARGUMENT REQUESTED

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IN SUPREME COURT OF MISSISSIPPI

JERRY WAYNE DUCKWORTH **APPELLANT**

v. **SUPREME COURT No. 2007-CA-01299**

THE STATE OF ALABAMA and BART WALKER **APPELLEES**

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 disqualifications or recusal.

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2. Bart Walker, Defendant

3. Jerry Wayne Duckworth, Plaintiff

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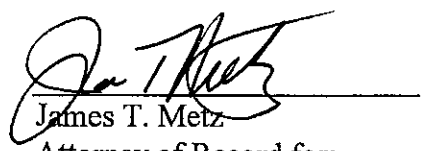

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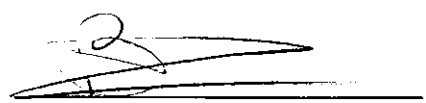

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I.

A. STATEMENT OF THE CASE

Jerry Wayne Duckworth filed the original complaint in this action on February 12, 2004, in the Circuit Court of Monroe County, Mississippi, naming as Defendants David Carrol Warren; Bart Walker, individually and as agent, servant, employee, and state trooper of the State of Alabama; the State of Alabama; Ray Stockman, individually and as agent, servant and employee of Emergystat, Inc.; Emergystat, Inc.; and Unknown Defendants 1-5. (T.R. Vol. 1, p. 22; R.E. 25;).[1] Duckworth alleged that Defendants were negligent and/or reckless which caused him to sustain injuries and damages in a vehicle collision and in a subsequent ambulance accident. (T.R. Vol. 1, pp. 22-40; R.E. 25-43).

Defendants Bart Walker and the State of Alabama (the "Alabama Defendants") filed on May 20, 2005, their Motion for Summary Judgment (T.R. Vol. 1, pp. 83-125; R.E. 44 - 67) and Memorandum of Authorities in Support of their motion. (T.R. Vol. 1, pp. 126 - 140). On June 16, 2006, a hearing was held before the trial court on the Alabama Defendants' Motion for Summary Judgment. (T. R. Vol. 7, pp. 1-31). On October 30, 2006, the trial court denied the Alabama Defendants' Motion for Summary Judgment. (T.R. Vol. 4, pp. 462 - 467; R.E. 19-24). On April 30, 2007, the United States Supreme Court reversed a decision of the Eleventh Circuit Court of Appeals based entirely on the record of a high speed police chase recorded on a video positioned in the police cruiser in Scott v. Harris, ___ U. S. ____, 127 S.Ct. 1769, 167 L. Ed. 2d

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[1]References to the Record shall be designated "T.R. Vol. ___, pp.___". References to the Record Excerpts shall be designated "R.E. ___." References to the Videotape, which is part of the Record, shall be designated "Videotape".

686 (2007).[2] The Court scolded the appellate court for ignoring the facts as depicted on the videotape deferring instead to Respondent's version of the events which the Court referred to as "visible fiction" so utterly discredited by the record that no reasonable jury could have believed him.[3] Based on Scott v. Harris, the Alabama Defendants filed Motion for Reconsideration of Their Motion for Summary Judgment on June 15, 2007. (T.R. Vol. 5, pp. 662 - 675; R.E. 70 - 83;). On June 26, 2007, Plaintiff filed his Response to the Alabama Defendants' Motion for Reconsideration of Their Motion for Summary Judgment. (T.R. Vol. 5; pp. 704-746). On July 2, 2007, a hearing was held before the trial court on the Alabama Defendants' Motion for Reconsideration of their Motion for Summary Judgment. (T.R. Vol. 8, 147-195). On July 5, 2007, the trial court entered its Opinion and Order granting Alabama Defendants' Motion for Summary Judgment. (T.R. Vol. 6, pp. 791 - 798; R.E. 11 - 18). The trial court noted that "[a]dditionally, in this case, the Court had the rare opportunity to view a video of the pursuit. It is fair to say that the video was very helpful, and the Court assigned it great weight because the Court was able to actually visualize the pursuit as it was taking place. The video establishes facts that have not been disputed with evidence supported by the record, and therefore, summary judgment is appropriate." (T.R. Vol. 6, p. 798; R.E.18). Plaintiff/Duckworth filed his Notice of Appeal on July 26, 2007. (T.R. Vol. 6, pp. 801(B) - 809; R.E. 84-92).

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[2]The question in Scott v. Harris was "whether a law enforcement official can, consistent with the Fourth Amendment, attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind." 127 S. Ct. at 1772. The Court held "the car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; . . . Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment." 127 S. Ct. at 1779.

[3]The Court stated "[t]he Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." 127 S. Ct. at 1776.

B. STATEMENT OF THE FACTS

On February 12, 2002, Alabama State Trooper Bart Walker ("Walker") was preparing to check licenses at the intersection of Buck Jackson Road and Aberdeen Road, located in Lamar County, Alabama, when he noticed a Toyota Celica, later determined to be owned and driven by Defendant, David Carrol Warren, traveling east on Highway 26. (T.R. Vol. 1, p. 90; R.E. 51). Trooper Walker noticed that the Celica had a broken windshield and the passengers were not wearing safety belts, both of which are primary offenses in the State of Alabama. (T.R. Vol. 1, pp. 90-91; R.E. 51-52). Trooper Walker began following the Celica and the driver of the Celica attempted to elude him, which is another primary offense in the State of Alabama. (T.R. Vol. 1, p. 91; R.E. 52; Videotape). Trooper Walker radioed his Hamilton Trooper Station dispatch to inform it of his pursuit of the Celica, and thereafter continued to pursue said vehicle along Aberdeen Road in Lamar County, Alabama, and across the Alabama-Mississippi state line onto Vernon Road in Monroe County, Mississippi. (T.R. Vol. 1, p. 91; R.E. 52). While traveling behind Mr. Warren around a soft curve and over a hill on Vernon Road, and upon emergence from the curve, Trooper Walker realized that the Celica had collided with a vehicle driven by Jerry Wayne Duckworth, the Plaintiff in this case. (T.R. Vol. 1, p. 91; R.E. 52; Videotape). Mr. Duckworth was placed in an ambulance which was involved in another accident while enroute to a hospital. (T.R. Vol. 1, pp. 25-26;R.E. 28 - 29) This action was filed by Plaintiff Jerry Wayne Duckworth against the State of Alabama, David Carrol Warren (the suspect driver of the Celica that collided with Mr. Duckworth), Trooper Bart Walker, Emergystadt, Inc.; Ray Stockman (ambulance driver) and Unknown Defendants 1-5.[4] (T.R. Vol. 1; p. 22; R.E. 25).

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[4]The ambulance company and driver were dismissed from the action as a result of a settlement. David Carrol Warren never appeared in the action

The entire pursuit along Aberdeen/Vernon Road from Lamar County, Alabama, and into Monroe County, Mississippi from the beginning of the pursuit of Mr. Warren until his collision with Mr. Duckworth lasted only approximately six minutes, from approximately 4:55 p.m. until approximately 5:02 p.m. and was captured on a video recorder located in Trooper Walker's police cruiser. (T.R. Vol. 1, p. 91; R.E. 52;Videotape). Trooper Walker proceeded at all times during the pursuit with both sirens and blue lights engaged at speeds varying from fifty-five to sixty miles per hour maintaining a safe following distance behind Mr. Warren's vehicle. (T.R. Vol. 1, pp. 92-93; R.E. 53 - 54; Videotape). No houses or dwellings existed along the stretch of Vernon Road where the instant accident took place. (T.R. Vol. 1, p. 91; R.E. 52;Videotape). Vernon Road is a two-lane country road with some soft-curves and hills. (T.R. Vol. 1, p. 91; R.E. 52;Videotape). There are no intersecting roads or stop signs along the stretch of Vernon Road where the accident took place. (T.R. Vol. 1, p. 91; R.E. 52;Videotape). The curve where the accident occurred was not a severe curve nor did it have any reduction in speed limit signs or other extreme curve markings. (T.R. Vol. 1, p. 91; R.E. 52;Videotape) Trooper Walker did not encounter any pedestrian traffic during the pursuit and he only encountered one vehicle after entering into Mississippi, other then those driven by Mr. Warren and Mr. Duckworth. (T.R. Vol. 1, p. 92; R.E. 53;Videotape). The weather conditions present at approximately 5:00 p.m. on February 12, 2002, were clear with sunshine and good visibility. (T.R. Vol. 1, p. 92; R.E. 53;Videotape). Trooper Walker determined that Mr. Warren had outstanding warrants for his arrest in Lamar County, Alabama. (T.R. Vol. 1, p. 92; R.E. 53). No State of Alabama policy exists which prohibits pursuits by troopers into another state if the trooper notifies the proper individuals, which includes the primary law enforcement agency of the other state. (T.R. Vol. 1, p. 92; R.E. 53). During the instant pursuit, upon realizing that he was nearing the Alabama-

Mississippi State line, Trooper Walker radioed his Hamilton, Alabama Trooper Post which in turn notified the Lamar County, Alabama Sheriff's Department and the Monroe County, Mississippi Sheriff's Department of Trooper Walker's pursuit of Mr. Warren. (T.R. Vol. 1, p. 92; R.E. 53).

II.

A. SUMMARY OF THE ARGUMENT

The most astonishing aspect of Plaintiff/Duckworth's Brief is his failure to cite, even once, the recent decision of the United States Supreme Court in Scott v. Harris, ___ U. S. ___, 127 S.Ct. 1769, 167 L. Ed. 2d 686 (2007), the case upon which the trial court heavily relied in granting summary judgment in favor of the Alabama Defendants. Citing Scott v. Harris, the trial court wrote "in this case, the Court had the rare opportunity to view a video of the pursuit. It is fair to say that the video was very helpful, and the Court assigned it great weight because the Court was able to actually visualize the pursuit as it was taking place." (T.R. Vol. 6, p 798, R.E. 18) The Alabama Defendants can only surmise that Plaintiff/Duckworth's failure to mention Scott is part of his strategy of avoidance. In other words, he would rather respond to what the Alabama Defendants have to say about Scott v. Harris instead of addressing it head on. The only problem with that approach is that Plaintiff/Duckworth is the Appellant. In that capacity, one would expect that he would distinguish, not avoid, the cases cited by the trial court in support of summary judgment.

As we understand it, Plaintiff /Duckworth argues that summary judgment should be reversed since the decision of the trial judge, who reviewed the evidence and uncontradicted video in this case and applied her knowledge of Mississippi law, is contrary to the testimony of Plaintiff's expert, Dennis Waller, from Waukesha County, Wisconsin, who apparently reviewed the evidence and applied his knowledge of Mississippi law. Plaintiff further argues that this Court should accept Mr. Waller's opinion over the trial judge's opinion since Mr. Waller's name has been mentioned in a prior decision of the Mississippi Supreme Court involving a police pursuit which, in Mr. Waller's opinion, was reckless. What Plaintiff did not do is verify the

accuracy of the facts Mr. Waller cites as support for his opinion in this case. The Alabama Defendants submit that inaccurate facts severely compromise the integrity of any expert's opinion, even Mr. Waller's.

Plaintiff/Duckworth also argues that summary judgment should be reversed based on the existence of genuine issues of material fact. He argues that an analysis of the ten factors outlined by the Mississippi Supreme Court proves that the pursuit was conducted with reckless disregard. He further argues that since no new evidence was presented to the trial court between the time it entered its original order denying summary judgment and the time it entered its opinion and order granting summary judgment warrants reversal of summary judgment. As stated previously, Plaintiff failed to advise the Court of Scott v. Harris. The significance of Scott to the trial court in the analysis of the ten factors cannot be disputed. The trial court wrote, "[t]he video establishes facts that have not been disputed with evidence supported by the record, and therefore, summary judgment is appropriate." (T.R. Vol. 6; p. 798; R.E.18) The Alabama Defendants urge this Court to affirm the trial court's summary judgment in their favor.

Finally, Plaintiff/Duckworth attempts to compare the facts of this case with three police pursuit cases cited in support of his brief. The facts of each are easily distinguished. In City of Jackson v. Brister, 838 So. 2d 274 (Miss. 2003), this Court found reckless disregard primarily based on the fact that the officers violated department policy by initiating the chase "without knowing that the suspect had committed a felony." Id. at 281. The **pursuit in Brister** proceeded **through the City of Jackson in a heavily populated residential area** at very high speeds. Id. at 280 - 281. Contrast the case sub judice, in which the pursuit proceeded along rural sparcely populated country roads with very little vehicular and no pedestrian traffic at an average speed less than 60 miles per hour. (T.R. Vol.1, pp. 91-93; R.E. 52-54; Videotape). Furthermore,

Trooper Walker complied with the State of Alabama Pursuit Policy as he entered into Mississippi by notifying the proper authorities. (T.R. Vol. 1; p.92; R.E. 53). Plaintiff also cites Johnson v. City of Cleveland in which the pursuit proceeded through a residential neighborhood **at night** with vehicular and pedestrian traffic present. The officer **did not have his siren on and it was disputed whether his blue lights were flashing when the officer hit a pedestrian**. In contrast, in the instant case, the pursuit proceeded along rural sparcely populated country roads with very little vehicular and no pedestrian traffic on a clear day with good visibility at approximately 5:00 p.m. in the afternoon. (T.R. Vol.1, pp. 91-93; R.E. 52-54; Videotape). Trooper Walker had his siren and lights engaged during the entire pursuit. (T.R. Vol. 1, p. 92; R.E. 53; Videotape) Also, Trooper Walker's vehicle was not involved in the accident. (Videotape). Finally, Plaintiff cites City of Ellisville v. Richardson, 913 So. 2d 973 (Miss. 2005) in which the **pursuit occurred at night** in a residential neighborhood **and the officer knew the suspect he was pursuing** and knew that the suspect was prone to flee. The officer in Richardson continued the pursuit despite the fact that the suspect had run oncoming traffic off of the road and passed six vehicles in a distance of less than one mile. The Court also noted the officer was proceeding in violation of the City of Ellisville's Pursuit of Motor Vehicle Policy. The facts of the instant case are easily distinguished from Richardson, also. Alabama Trooper Bart Walker engaged in a pursuit along rural sparcely populated country roads with very little vehicular and no pedestrian traffic on a clear day with good visibility at approximately 5:00 p.m. in the afternoon. (T.R. Vol.1, pp. 91-93; R.E. 52-54; Videotape). Trooper Walker pursued the suspect at an average speed of 55 to 60 miles per hour (45 mile per hour speed limit) with his siren and lights engaged. (T.R. Vol. 1, pp. 92-93 and 123; R.E. 53-54 and 65; Videotape). Neither Trooper Walker nor the suspect ran any vehicle off the road nor passed any vehicle during the entire six and one-half mile pursuit.

(Videotape). Although Trooper Walker obtained the license plate number of the suspect vehicle, he did not know the suspect driver and did not know who owned the vehicle. (T.R. Vol. 3, p. 340, 342-343 and 346). Finally, Trooper Walker complied with the State of Alabama Pursuit Policy as he entered into Mississippi by notifying the proper authorities. (T.R. Vol.1, p. 92 ;R.E. 53).

The Alabama Defendants have sympathy for Plaintiff and the fact that he sustained serious injuries in the accident. Despite that fact, the culprit in this case is not Trooper Walker or the State of Alabama, but David Carrol Warren, the suspect whose vehicle collided with the Plaintiff's. (Videotape).

After comparing the facts in this case to other pursuit cases, the Alabama Defendants submit that one should expect applause, not attacks, for a pursuit like the one in the instant case — in which a trooper follows a suspect on a clear day, along a rural sparcely populated route with very little vehicular and no pedestrian traffic, at a safe distance, avoiding high speeds, in compliance with the pursuit policy. (T.R. Vol. 1, pp. 90-93; R.E. 51-54). The Alabama Defendants submit that if the facts of this case do not exhibit a proper pursuit, then no pursuit can ever be determined to be appropriate. That being said, there simply is no genuine issue of material fact in this case and summary judgment should be affirmed.

B. ARGUMENT

1. Issue 1: The Decision of the Trial Court Granting the Alabama Defendants' Motion for Summary Judgment Should be Affirmed Despite the Affidavit of Dennis Waller, Plaintiff's Expert

Plaintiff/Duckworth argues that since the expert he retained has been mentioned in a previous Mississippi Supreme Court case, his opinion should be given great weight. First of all, although Mr. Waller was mentioned in City of Jackson v. Brister, 838 So. 2d 274 (Miss. 2003), the Court certainly did not base its decision on his opinion. Secondly, the Mississippi Supreme Court has previously stated that "an expert's opinion is ordinarily merely advisory and not binding upon the court." Davidson v. Rogers, 431 So. 2d 483, 485 (Miss. 1983). In any event, it is fundamental that an expert's opinion is only as reliable as the facts upon which that opinion is based. If the expert relies on erroneous facts, the integrity of the expert's opinion is compromised. Consider the following: Mr. Waller states as a fact that the suspect drove at speeds well in excess of 60 miles per hour. (T.R. Vol.4, p. 454; R.E. 97). It is undisputed that the pursuit covered 6.5 miles and lasted 6 minutes (T.R. Vol.4, p. 454; R.E. 97). This yields an average speed of 55.38 miles per hour ((6 ÷ 6.5) * 60). There is no evidence in the record which supports Mr. Waller's opinion that the suspect drove at speeds well in excess of 60 miles per hour.

Mr. Waller states that "[t]ermination of the pursuit would have terminated the reckless behavior of the driver of the Toyota." (T.R. Vol. 4, p. 455; R.E. 98). The United States Supreme Court has stated that this assumption is erroneous: "[w]hereas Scott's action–ramming respondent off the road–was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rear-

view mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. . . . Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow." Scott v. Harris, 127 S. Ct. 1769, 1778-79 (2007).

Mr. Waller's opinion states that the pursuit was initiated for the offenses of a broken windshield and occupants not wearing safety belts. (T.R. Vol. 4, p. 455; R.E. 98) Mr. Waller's opinion fails to mention the most significant offense of "attempting to elude" which actually initiated the pursuit and is clearly depicted on the video. (T.R. Vol. 1 , p. 91; R.E. 52 ; Videotape). In addressing a similar element in Scott v. Harris, the United States Supreme Court stated that "[r]espondent did not pose . . . [an] inherent threat to society, since (prior to the car chase) he had committed only a minor traffic offense and, as far as the police were aware, had no prior criminal record. But in this case, unlike in Garner, it was respondent's flight itself (by means of a speeding automobile) that posed the threat of "serious physical harm . . . to others." 127 S. Ct. at 1777 n.9.

Directly on point is the testimony of Bart Walker in response to a question posed by counsel for Emergystat which confirms that in Bart Walker's mind, Warren's flight with two women in his vehicle posed a threat of serious physical harm to other(s). Trooper Walker testified:

> Q. Corporal Walker, my name is Teresa Harvey. I represent Emergystat and Ray Stockman in this case. I just have a few questions for you. Can you tell me your observations, at the scene of the accident of Mr. Duckworth and Mr. Warren, what you first observed when you came on the scene?
>
> A. Mr. Duckworth was trapped in his vehicle. After I secured Warren – I had to secure him first, because I didn't know what – why he was running, why I was having to pursue him, whether he committed murder, raped, or kidnaped. I didn't

> know. So I got him secured first, because his vehicle was on fire. And that's where my hands were burned. . . .

(T. R. Vol. 3, pp. 366-367; R.E. 82-83).

Mr. Waller's opinion states as a fact that Trooper Walker was not familiar with Vernon Road in Mississippi. (T.R.Vol. 4, p. 456; R.E. 99) Again, Mr. Waller assumes and bases his opinion on erroneous facts. Trooper Walker testified that he had traveled on the roads in Mississippi on which he was pursuing Mr. Warren. He testified that he had traveled such roads all the way to Wolf Road. (T.R. Vol. 3; p. 343).

Mr. Waller cites as support for his opinion that logging trucks use the roadway frequently and that a small community exists a short distance beyond the site of the collision. (T.R.Vol. 4, pp. 456; R.E. 99). Neither of these facts is relevant to this case. No logging trucks were encountered during the pursuit. (Videotape). The pursuit route did not encounter the community to which Mr. Waller makes reference. (Videotape).

Finally, Mr. Waller's opinions regarding the Alabama Pursuit Policy are based on erroneous facts. The section of Mr. Waller's opinion which discusses the policy repeats no less than five times that "*Mr. Warren was pursued because the occupants were not wearing seat belts and the vehicle had a cracked windshield.*" (T.R.Vol. 4, pp. 456-457; R.E. 99-100). As stated previously, this is not correct. The most significant offense which is clearly depicted on the video is the offense of "attempting to elude" which actually initiated the pursuit. (T.R. Vol. 1 , p. 91; R.E. 52; Videotape).

The Alabama Defendants urge this Court to affirm the trial judge's decision granting summary judgment in their favor.

2. Issues 2 and 3: Consideration of the Mississippi Supreme Court's Ten Factor Analysis in Light of the Video and Scott v. Harris Confirms Summary Judgment in Favor of the Alabama Defendants

Plaintiff/Duckworth argues that the trial court's grant of summary judgment should be reversed since no new evidence was presented to the trial court between the time the court entered its order denying the appellees' original motion for summary judgment and the time the court entered its opinion and order granting summary judgment based on the Alabama Defendants' motion for reconsideration. What Plaintiff failed to mention to the Court is that on April 30, 2007, the United States Supreme Court issued its decision in Scott v. Harris which held that when a police pursuit is captured on an unchallenged videotape, the Court should view "the facts in the light depicted by the videotape."127 S. Ct. at 1776. Citing Scott v. Harris, the trial court wrote "in this case, the Court had the rare opportunity to view a video of the pursuit. It is fair to say that the video was very helpful, and the Court assigned it great weight because the Court was able to actually visualize the pursuit as it was taking place." (T.R. Vol. 1, p.798; R.E. 18). The Supreme Court in Scott further instructed that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." 127 S. Ct. at 1776. Based on the decision of Scott v. Harris, the trial court reviewed the videotape in light of the ten factor analysis and properly entered summary judgment for Appellees. The undisputed facts of this case revealed in the video, as a matter of law, prove that Trooper Walker did not breach his duty to act in a reasonably prudent manner during the pursuit at issue herein. The Alabama Defendants urge this Court to affirm the trial court's summary judgment in their favor.

As previously mentioned, the Mississippi Supreme Court has set forth ten factors to be considered in determining whether a police pursuit proceeded with reckless disregard. See McCoy v. City of Florence, 949 So. 2d 69 (Miss. Ct. App. 2006). A discussion of these factors in light of the undisputed facts in this case *as documented by the video* and in light of the guidance of Scott v. Harris follows:

(1) the length of the chase;

The entire instant pursuit along Aberdeen/Vernon Road from Lamar County, Alabama, and into Monroe County, Mississippi from the beginning of the pursuit of Defendant Warren until his collision with Plaintiff lasted only approximately six (6) minutes, from approximately 4:55 p.m. until approximately 5:02 p.m. as documented by the video. The Order Denying the Alabama Defendants' Motion for Summary Judgment dated October 30, 2006, ("Order") found as an undisputed fact that "[t]he instant pursuit lasted almost six and one half minutes and covered approximately six miles."
(T.R. Vol. 4, p. 465; R.E.22; Videotape)

(2) type of neighborhood;

There existed no houses or dwellings along the stretch of Vernon Road where the instant accident took place as documented by the video. The video further documents that very few structures exist along the entire stretch of the pursuit.

(T.R. Vol. 1; p. 91; R.E. 52; Videotape)

(3) characteristics of the streets;

Vernon Road is a two-lane country road with some soft-curves and hills. There are no intersecting roads or stop signs along the stretch of Vernon Road where the instant accident took place. Furthermore, the curve in Vernon Road where the instant vehicle accident, between Defendant Warren and Plaintiff Duckworth, occurred was not a severe curve, nor did it have any reduction in speed limit sign or other extreme curve markings. These characteristics are documented on the video.
(T.R. Vol. 1, p. 91; R.E. 52; Videotape)

(4) the presence of vehicular or pedestrian traffic;

Defendant Trooper Walker did not encounter any pedestrian traffic during the instant pursuit, and he only encountered one (1) vehicle after entering into Mississippi, other than those driven by Defendant Warren and Plaintiff Duckworth. Once again, the video confirms that Defendant David Warren met nine cars on the entire pursuit route before he

collided with plaintiff's car while Bart Walker met only eight cars along the six mile stretch. The video further documents that neither Trooper Walker nor Defendant Warren passed a single vehicle along the six mile stretch. Plaintiff/Duckworth also acknowledges that the video establishes the number of cars encountered during the pursuit. The Alabama Defendants submit that in light of the documented pursuit on video, Trooper Walker met an average of 1.333 cars per mile. There is no genuine issue of material fact regarding this point either.
(T.R. Vol. 1, p. 92; R.E. 53; Videotape)

(5) weather conditions and visibility;

The weather conditions present at approximately 5:00 p.m. on February 12, 2002, were clear with sunshine and visibility along Vernon Road was good. The video documents these facts.
(T.R. Vol. 1, p. 92; R.E. 53; Videotape)

(6) the seriousness of the offense for which the police are pursuing the suspect;

It is uncontradicted that Warren's vehicle had a broken windshield and the occupants of said vehicle were not wearing their safety belts, both offenses being primary offenses in the State of Alabama. Furthermore, and more importantly, the video documents the offense of attempting to elude which initiated the instant pursuit. In addressing a similar element in Scott v. Harris, the Supreme Court stated that "[r]espondent did not pose . . . [an] inherent threat to society, since (prior to the car chase) he had committed only a minor traffic offense and, as far as the police were aware, had no prior criminal record. But in this case, unlike in Garner, it was respondent's flight itself (by means of a speeding automobile) that posed the threat of "serious physical harm . . . to others." 127 S. Ct. at 1777 n.9.
(T.R. Vol. 1, p. 90-91; R.E. 51-52; Videotape)

Directly on point is the testimony of Bart Walker in response to a question posed by counsel for Emergystat which confirms that in Bart Walker's mind Warren's flight with two women in his vehicle posed a threat of serious physical harm to other(s). Trooper Walker's testimony on this point follows:

> Q. Corporal Walker, my name is Teresa Harvey. I represent Emergystat and Ray Stockman in this case. I just have a few questions for you. Can you tell me your observations, at the scene of the accident of Mr. Duckworth and Mr. Warren, what you first observed when you came on the scene?
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> A. Mr. Duckworth was trapped in his vehicle. After I secured Warren – I had to secure him first, because I didn't know what – why he was running, why I was having to pursue him, whether he committed murder, raped, or kidnaped. I didn't know. So I got him secured first, because his vehicle was on fire. And that's where my hands were burned. . . .

(T.R. Vol. 3, pp. 366-367; Video [attempt to elude])

(7) whether the officer proceeded with sirens and blue lights;

It is uncontradicted that Trooper Walker proceeded at all times with both sirens and blue lights.
(T.R. Vol 1, p. 92;R.E. 53)

(8) whether the officer had available alternatives which would lead to the apprehension of the suspect besides pursuit;

At the time of the pursuit, no alternatives existed that would have led to the apprehension of the suspect besides the pursuit.(T.R. Vol. 1, p. 92; R.E. 53). This is true, even though Trooper Bart Walker did obtain the license plate number for the vehicle Defendant Warren was driving. (T.R. Vol. 3, p. 334; R.E. 105). The vehicle and/or the tag could have been stolen. Furthermore, Trooper Walker testified at the time of his deposition he still did not know who owned the Toyota (the suspect's vehicle) and that he did not recognize anyone in the suspect's vehicle until after the collision when the occupants of Warren's vehicle got out of the car. Even then, Trooper Walker only recognized one of the female passengers of Warren's vehicle, Lisa Anthony. Trooper Walker testified as follows:

Q. Four. When did you learn that the vehicle, the Toyota – when did you find out the owner of that vehicle?

A. I don't know. I still don't know who owned it. I just know who was driving it.

Q. And when did you find out who was driving the vehicle?

A. When the accident occurred.

Q. Were you able to identify the driver, without introduction?

A. No.

Q. Were you able to identify any of the passengers without introduction?

A. Yes.

Q. And who were they?

A. Lisa Anthony.

Q. And how were you able to identify Ms. Anthony without introduction?

A. I had worked two previous accidents that she had been the driver of. And she was from the Detroit area, and I know her brothers real well.

(T.R. Vol 3. pp. 346-347;R.E. 80-81; Videotape)

As noted in Scott v. Harris: "[w]e think the police need not have taken that chance and hoped for the best. Whereas Scott's action–ramming respondent off the road–was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rear-view mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. . . . Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow." 127 S. Ct. at 1778-79.

(9) the existence of police policy which prohibits pursuits under the circumstances;

No State of Alabama policy exists which prohibits pursuits by troopers into another state if the trooper notifies the proper individuals, which includes the primary law enforcement agency of the other state. During the instant pursuit, upon realizing that he was nearing the Alabama-Mississippi State line, Trooper Walker radioed his Hamilton, Alabama Trooper Post which in turn notified the Lamar County, Alabama Sheriff's Department and the Monroe County, Mississippi Sheriff's Office of his pursuit of Defendant Warren. Therefore, Trooper Walker followed the State of Alabama's pursuit policy at all times during the instant pursuit, including its policy regarding pursuits into other jurisdictions. The pursuit policy of Alabama has not been contradicted. The video establishes Trooper Walker's compliance with the pursuit policy. With regard to the offenses which initiated the pursuit, it is uncontradicted that the initial pursuit began as a result of a broken windshield, failure to wear safety belts and attempting to elude. The Alabama Defendants note that the video documents the most significant offense – attempting to elude.

(T.R. Vol. 1, pp. 90-92, 96-98; R.E. 51-53, 57-59; Videotape)

(10) the rate of speed of the officer in comparison to the posted speed limit;

The instant pursuit took place at approximately the speed limit for Vernon Road, as it took place at speeds varying from fifty-five to sixty miles per hour. Furthermore, Defendant Trooper Walker maintained a safe following distance behind Defendant Warren's vehicle at all times during the pursuit, of at least one hundred (100) to one hundred fifty (150) yards. The video recorded the length and time of the pursuit. It further documents the rural nature of the roads and area along the pursuit, clear weather

conditions and absence of vehicular and/or pedestrian traffic. Without question, there could be no better area for a pursuit. Finally, with regard to the speed of the vehicles, the Alabama Defendants referenced the Court's previous Order Denying the Alabama Defendants' Motion for Summary Judgment which noted that the instant pursuit lasted almost six and one-half minutes and covered approximately six miles.
(T.R. Vol. 4, p. 465; R.E.22; Videotape).

The Alabama Defendants submit that simple math shows that six miles in six and one half minutes converts to a speed of 55 miles per hour (6 miles divided by 6.5 minutes equals .923 miles per minute - then - .923 miles per minute multiplied times 60 minutes equals 55.38 miles per hour).
(T.R. Vol. 1, pp. 90-93; R.E. 51-54;Videotape)

3. The Video Has Not Been Challenged

No party to this lawsuit has alleged that the video taken by Trooper Walker has been altered in any way. Indeed, Plaintiff /Duckworth referenced the video as support to his opposition to the Appellees' Motion for Summary Judgment.(T.R. Vol. 2, p. 207) ("Plaintiff's allegations against Defendants are supported by the following: 1) the video tape recording of the instant pursuit which came from Defendant Trooper Walker's police cruiser, . . .") This point was very important to the Supreme Court in its reliance on the video in Scott v. Harris, wherein it observed: "[t]here are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened." 127 S. Ct. at 1775. The Alabama Defendants urge this Court to affirm summary judgment in their favor by placing as much reliance on the video in this case as the Supreme Court did on the video in Scott.

Scott v. Harris also addresses the importance of an unchallenged video when opposing parties tell two different stories, one of which is "blatantly contradicted by the record, so that no reasonable jury could believe it." 127 S. Ct. at 1776. In the instant case, Plaintiff/Duckworth's version of the facts set out in the Complaint is not only contradicted by the record, but also by subsequent pleadings *filed by Plaintiff.* The inconsistencies between Plaintiff's Complaint and Plaintiff's Response to the Alabama Defendant's Motion for Reconsideration of Motion for

Summary Judgment are most telling. In his Response, Plaintiff/Duckworth notes that the suspect in this case was not driving as "reckless" or as "fast" as the suspect in Scott. (T.R. Vol. 5., p.705). Plaintiff further states that "[i]n the case before this Court, while the suspect was speeding and did not stop for Defendant Walker, his driving, while reckless, did not rise to the same dangerous level as the suspect in Scott. The suspect did not drive around any vehicles or force any other vehicles to the shoulder. Further, while speeding, the suspect in the instant case, was not traveling 'shockingly fast.'" The Plaintiff then references the videotape of the pursuit. (T.R. Vol. 5., p.705). When one reads Plaintiff's complaint, one gets a different impression: "On or about February 12, 2002, Defendant David Carrol Warren was being pursued by Alabama State Trooper, Bart Walker in a *high speed pursuit*. . . . Defendant Bart Walker . . . *negligently and/or wantonly* conducted an improper pursuit or chase of the vehicle driven by David Carrol Warren. The pursuit or chase was overly lengthy, done at an unsafe speed for the present road conditions, *dangerous to other vehicles*, and created an unreasonable risk to the public totally out of proportion to the seriousness of the traffic violation committed by Defendant David Carrol Warren. The pursuit was conducted in *reckless disregard of the safety and well being* of the public at large . . . ." (T.R. Vol. 1, pp. 24-25, R.E. 27-28).

Scott v. Harris instructs that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." 127 S. Ct. at 1776. The Alabama Defendants submit that Plaintiff/Duckworth's version of the facts in his complaint is not only contradicted by the record but also by a subsequent pleading *filed by him* in this action.(T.R. Vol. 1, pp. 24-25, R.E. 27-28; T.R. Vol. 5., p.705) It follows that neither of Plaintiff's versions should be adopted. Based on the decision of

Scott v. Harris, the trial court reviewed the video tape in light of the ten factor analysis and properly entered summary judgment for the Alabama Defendants. (T.R. Vol. 6, p. 798; R.E. 18). The undisputed facts of this case revealed in the video, as a matter of law, prove that Trooper Walker did not breach his duty to act in a reasonably prudent manner during the pursuit at issue herein.

The United States District Court for the Southern District of Mississippi has affirmed the application of Scott v. Harris in cases in which evidence is captured on video. In White v. Collins, 2008 U. S. Dist. LEXIS 53992 (S.D. Miss. 2008), the court granted defendants' motion for summary judgement based on a video which revealed "absolutely no evidence of kicking, punching, or excessive force of any type." Id. at 13. The court further noted that "Plaintiff's allegations that Defendants repeatedly punched him in the face and gouged him in the eye after he was restrained are discredited by the video." Id. The Court referenced the holding of the United States Supreme Court in Scott v. Harris: "the court of appeals 'should have viewed the facts in the light depicted by the videotape,' which completely discredited plaintiff's version of the events." Id. at 10 - 11. The court noted that the Fifth Circuit and several other jurisdictions have made similar findings. Id.

4. Comparing the Police Pursuit Cases Cited by Plaintiff Confirms the Trial Court's Entry of Summary Judgment in Favor of the Alabama Defendants

Appellant cites three police pursuit cases in support of his argument that summary judgment was not proper in this case. A critical look at these cases confirms just the opposite. The oldest pursuit case cited by Appellant, City of Jackson v. Brister, 838 So. 2d 274 (Miss. 2003) involved a police chase of a vehicle driven by a women suspect who had allegedly attempted to

negotiate a forged check at a bank. Id. at 276.[5] During the police pursuit, the suspect's car collided with a car driven by another woman at the intersection of Ridgewood Road and Northside Drive, one of the busiest intersections in Jackson. Id. The next day, the innocent woman died from injuries she sustained in the accident. Id. The court affirmed the circuit court's decision that the officers acted with reckless disregard because they violated department policy by initiating the chase. Id. at 281. The Court noted that "pursuit was initiated and maintained despite the fact that the officers didn't know whether Slater [the suspect] had committed a felony or a misdemeanor." Id. at 279. The Court further noted that "General Order 600-20 requires that ***a pursuit may only be initiated when*** **the *officer knows that a felony has been committed* and the officer has probable cause to believe that the individual who committed the felony and the suspect's escape is more dangerous to the community than the risk posed by the pursuit**." Id. at 280. The Court cited additional facts to support the finding of reckless disregard as follows: the lead police car was driven by a one month rookie officer involved in his first hot pursuit and totally unfamiliar with the area; the pursuit route was heavily populated with residential areas including apartment complexes, single-family housing and condominiums, a park and an elementary school; the police cars traveled at speeds in excess of 55 miles per hour in a 35 mile per hour zone and the suspect traveled at speeds in excess of 70 to 80 miles per hour; and at the time of the crash, the police cars were within 20 yards of the suspect's vehicle." Id. The court held that "the officers initiated a high speed chase with 'conscious indifference' knowing they had not complied with Order 600-20 which was the existing governing policy of the police department at that time. Without adhering to that policy, the officers should have reasonably expected the possibility of adverse consequences including a fatal accident, thus plaintiffs clearly proved reckless disregard

[5]Brister was decided on February 20, 2003.

to the general public's safety." Id. at 281. The court mentioned, but did not discuss in detail, six factors to consider in determining whether a police chase constitutes reckless disregard as follows: length of chase; type of neighborhood; characteristics of street; presence of vehicular or pedestrian traffic; weather conditions and visibility; and the seriousness of the offense for which the police are pursuing the vehicle." Id. at 280. The Court also mentioned that plaintiff's expert, Dennis Waller, "concluded that the officers' conduct presented an extreme and unreasonable danger to the public," on the grounds that the case was contrary to General Order 600-20; the officers were engaged in active pursuit up to the collision; pursuit should have been terminated after the officers turned onto Ridgewood Road and realized the suspect would not stop; and the officers did not properly assess the public's safety with the immediate apprehension of a check forger. Id. at 279.

Significant factual differences distinguish this case from City of Jackson v. Brister. The pursuit in Brister proceeded through a heavily populated residential area and ended in one of the busiest intersections in Jackson, while the pursuit in the instant case proceeded along and ended on a country road in a rural sparcely populated area. (T.R. Vol. 1, p. 91-93; R.E. 52-54; Videotape). The suspect in Brister traveled at speeds in excess of 70 to 80 miles per hour and the police officers traveled in excess of 55 miles per hour in a 35 mile per hour zone, while both the suspect and the police officer in the instant case traveled at speeds from 55 to 60 miles per hour in a 45 mile per hour zone. (T.R. Vol. 1, pp. 93 and 123; R.E. 54 and 65; Videotape) The officer in Brister was a one month rookie who was unfamiliar with the pursuit route while Trooper Bart Walker was a seasoned trooper who had previously traveled along the pursuit route. (T.R. Vol. 2, p.254; T.R. Vol. 3; p. 343). Finally, and most significant to the Brister Court was the fact that the pursuit was contrary to General Order 600-20 since the officers testified that they did not know whether the suspect committed a felony or a misdemeanor. Id. at 275. In the instant case,

Trooper Walker complied with the Alabama Pursuit Policy by notifying the proper authorities as he crossed into Mississippi. (T.R. Vol. 1, p. 92; R.E. 53).

The second pursuit case cited by Appellant is Johnson v. City of Cleveland, 846 So. 2d 1031 (Miss. 2003).[6] Johnson involved two officers engaged in a high speed chase at night during which the second officer's cruiser struck and killed a pedestrian. Id. at 1034. The pedestrian beneficiaries filed a suit for wrongful death against the City of Cleveland alleging that the officer had acted in reckless disregard of Johnson. The court reversed the trial court's summary judgment in favor of the city and remanded the case for a bench trial since genuine issues of material fact existed whether the second cruiser had activated his blue lights. Id. at 1036. In a separate opinion concurring in the result only, Justice McRae noted that "[s]ummary judgment was inappropriate because the limited facts presented would permit a finding that the officer acted in reckless disregard for the safety and well-being of others traveling at an excessive speed with no siren in a residential neighborhood. Id. Justice McRae listed ten factors to consider in determining reckless disregard in connection with police pursuits and found six of the ten factors present. Id. at 1037. Significant factual differences distinguish this case from Johnson v. City of Cleveland. The police pursuit in Johnson was in a residential neighborhood, while the pursuit in this case was through a rural sparcely populated area.(T.R. Vol. 1, pp. 91-92; R.E. 52-53; Videotape). The pursuit in Johnson occurred at night (approximately 2:00 a.m.). Id.[7] In contrast, the police pursuit in the instant case occurred during daylight hours at approximately 5:00 p.m.

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[6]Johnson was decided on May 29, 2003.

[7]In a dissenting opinion, Justice Easley found the trial court did not err in granting summary judgement since reckless disregard applies "to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended." Id. at 1040.

with sunshine and good visibility. (T.R. Vol. 1, pp. 91-92; R.E. 52-53; Videotape) In Johnson, vehicular and pedestrian traffic was present, while in the instant case, Trooper Walker and the suspect met only 8 and 9 cars, respectively, and no pedestrians along a six mile route and never passed a single vehicle. (T.R. Vol. 1, pp. 91-92; R.E. 52-53; Videotape). The officer involved in the accident in Johnson did not have his siren on and there was a dispute as to whether he had his blue lights on, while in the instant case, there is no dispute that Trooper Walker proceeded with siren and blue lights during the entire pursuit. (T.R. Vol. 1, p. 92; R.E. 53; Videotape) Furthermore, Trooper Walker's vehicle was not involved in the accident. (Videotape).

The third and final police pursuit case cited by Appellant is City of Ellisville v. Richardson, 913 So. 2d 973, (Miss. 2005)[8] which involved a police pursuit of a suspect whose vehicle struck an innocent party in a truck. The evidence in Richardson revealed that the pursuit lasted for nine-tenths of a mile at night in a residential area on a hilly, curvy, two-lane road with medium levels of traffic. Id. at 978 - 979. The officer was familiar with the road and knew the suspect and his mother and where the suspect lived. Id. The officer had been assaulted by the suspect during his last attempt to arrest him and continued to pursue the suspect with sirens and flashing lights even though the suspect had run oncoming traffic off of the road, was driving in excess of the speed limit and had passed six vehicles in a distance of less than one mile. Id. The court also noted that the officer violated the City of Ellisville's Pursuit of Motor Vehicles Policy. Id. There are significant factual differences distinguishing this case from Richardson. The pursuit in this case occurred on a clear, sunny day at 5:00 in the afternoon along rural sparcely populated country roads and Trooper Walker did not recognize any of the occupants of the suspect's vehicle until after the crash. (T.R. Vol. 1, pp. 91-92; R.E. 52-53; T.R. Vol. 3, pp. 346-347; R.E. 80-81;

[8]This case was decided on April 28, 2005.

Videotape) As noted before, the pursuit in Richardson occurred at night and the pursuing officer positively identified the suspect prior to initiating the pursuit. As shown by the video, not one vehicle was passed or run off of the road by either Trooper Walker or the suspect. (Videotape). The suspect in Richardson ran oncoming traffic off of the road and passed several vehicles before colliding with the truck. Finally, Trooper Walker complied with the State of Alabama's Pursuit Policy from commencement of the pursuit to conclusion. (T.R. Vol. 1, p. 92; R.E. 53) The officer in Richardson was operating in violation of the city's pursuit policy.

The Alabama Defendants submit that the Opinion and Order of the trial court says it all: "[c]onsidering the totality of the circumstances in this instant case, no genuine issues of material fact exist that the trooper acted in reckless disregard. Stated differently, had an officer pursued a motorist for a broken windshield and occupants' failure to wear seat belts in a highly populated area at high speeds at night, the outcome of this motion likely would be different." (T.R. Vol. 6, p.798; R.E. pp.18)

5. Considering the Totality of the Circumstances Confirms the Appropriateness of Summary Judgment in This Case

Plaintiff/Duckworth correctly states the standard for granting summary judgment. What he fails to appreciate is the "totality of the circumstances" analysis and the fact that summary judgment is proper despite the presence of hot disputes regarding nonmaterial facts. These points are addressed below.

"It is appropriate for trial courts to consider all ten factors, and to look at *the totality of the circumstances* when analyzing whether someone acted in reckless disregard." City of Ellisville v. Richardson, 913 So. 2d 973, 978 (Miss. 2005) (emphasis added). Phillips v. Mississippi Department of Public Safety, 978 So. 2d 656, 661 (Miss. 2008) instructs that the Court will look

to the "totality of the circumstances" when considering whether someone acted in reckless disregard and that "the nature of the officers' actions is judged on an objective standard with all the factors that they were confronted with, taking into account the fact that the officers must make split-second decisions." Id. (citations omitted). The "totality of the circumstances" analysis in McCoy v. City of Florence, 949 So. 2d 69, 80 (Miss. 2006) is particularly appropriate for application to the instant case since McCoy involved an appeal from a trial court's grant of summary judgment in favor of the city and county involving a police pursuit. The McCoy Court explained that after examining all ten factors under Richardson it could find no factor which raised a genuine issue of material fact as to whether the officer acted with reckless disregard. Id. at 83. McCoy held that "[f]inding not one factor, we can certainly not find reckless disregard when considering the totality of the circumstances." Id. Richardson and McCoy confirm that "totality of the circumstances" requires that all ten factors be considered, but no one factor is determinative. How many factors are required? In Johnson v. City of Cleveland, in an opinion concurring in the result only, Justice McRae noted that six out of ten factors would be sufficient, in his opinion, for a finding of reckless disregard. 846 So. 2d at 1037.

McCoy affirmed the trial court's summary judgment in favor of two cities and the county finding no reckless disregard with respect to a police pursuit. In McCoy, the chase lasted for a matter of minutes over five miles on Highway 49 on a sunny clear day; the suspect was operating a stolen vehicle with a suspended license; the officer's sirens and blue lights were engaged during the pursuit; although the officer had the suspect's driver's license in his possession, he did not have an opportunity to compare the picture on the license to the suspect; Florence's Pursuit Policy was not violated; and the fact that the officer exceeded the speed limit did not indicate reckless disregard. 946 So. 2d at 82 - 83.

The analysis in McCoy is applicable to the instant case. Trooper Walker pursued the suspect for approximately six miles in six and a half minutes on a sunny clear day with his sirens and blue lights flashing. (T.R. Vol. 1; pp. 91-92; R.E. 52-53; T.R. Vol. 4, p. 465; R.E.22; Videotape). Although Trooper Walker obtained the suspect's license tag number, he did not recognize anyone in the suspect's vehicle and did not know whether the vehicle or license tag may have been stolen. (T.R. Vol. 3, p. 340; 346-347; R.E. 105) Trooper Walker's speed averaged fifty-five miles per hour on a clear day with very little vehicular and no pedestrian traffic along a rural sparcely populated country road. (T.R. Vol. 1, pp. 91-93; R.E. 52-54; T.R. Vol. 4, p.465; R.E. 22; Videotape) Trooper Walker complied with the State of Alabama's Pursuit Policy during the entire length of the pursuit. (T.R. Vol. 1, p. 92; R.E. 53)

Plaintiff/Duckworth argues that the presence of logging trucks (none of which were revealed in the video) and communities which were not encountered on the pursuit route, support his position that the pursuit was conducted recklessly. (Videotape). Neither of these facts is *material* to this case. This Court has consistently held that "[i]f viewing the evidence in a light most favorable to the party against whom the motion has been made, that party's claim or defense still fails as a matter of law, summary judgment ought to be granted, even though there may be **hot disputes** regarding **non-material facts**." Key Constructors, Inc. v. H & M Gas Co., 537 So. 2d 1318, 1324 (Miss. 1989) (quoting Vickers v. First Mississippi National Bank, 458 So. 2d 1055, 1061 (Miss. 1984)(emphasis in original). This Court has further stated that "the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the *material* issues of fact." Id. at 1324 (quoting Shaw v. Burchfield, 481 So. 2d 247, 252 (Miss. 1985)(emphasis in original). Plaintiff has not challenged the video and cannot now question the undisputed facts established by it. Summary judgment in favor of the Alabama

Defendants should be affirmed.

6. Scott v. Harris Supports the Proposition That We Cannot Let the Bad Guys Go Every Time they Run

In response to Plaintiff/Duckworth's argument regarding the risk involved with police pursuits in general, Scott v. Harris notes: "[s]ociety accepts the risk of speeding ambulances and fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police. 127 S. Ct. at 1776. It follows that society would applaud a pursuit like the one in the instant case — in which a trooper follows a suspect on a clear day, along a rural sparcely populated route with very little vehicular and no pedestrian traffic, at a safe distance, avoiding high speeds, in compliance with the pursuit policy. (T.R. Vol. 1, p. 91-93; R.E. 52-54; Videotape).

The importance of allowing pursuits, even in light of danger, is explained by the United States Supreme Court in Scott v. Harris: "we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so *recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness." 127 S. Ct. at 1779.

The trial court relied upon the directive of the United States Supreme Court regarding unchallenged video recordings when it wrote: "[t]he video establishes facts that have not been disputed with evidence supported by the record, and therefore, summary judgment is appropriate." (T.R. Vol. 6, p. 798; R.E. pg. 18). The Alabama Defendants urge this Court to affirm the trial court's summary judgment in their favor.

III.

CONCLUSION

This case, like Scott v. Harris, contains an undisputed video record documenting all factors necessary for this Court's consideration and decision. This video record, considered in light of the ten factor analysis, confirms that there is no genuine issue of material fact for a jury. The Alabama Defendants respectfully request that this Court affirm the trial court's decision granting summary judgment in their favor.

Respectfully submitted, this the 4th day of September, 2008.

THE STATE OF ALABAMA and
BART WALKER, individually and as agent, servant, employee and state trooper of the STATE OF ALABAMA

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CERTIFICATE OF SERVICE

I, the undersigned Betty Ruth Fox, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellees by placing the same in the United States mail, postage prepaid and properly addressed to the following:

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