

IN THE SUPREME COURT OF MISSISSIPPI

JERRY WAYNE DUCKWORTH

Appellant,

-v-

BART WALKER and
THE STATE OF ALABAMA,

Appellees.

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

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE FACTS

On or about February 12, 2002, Defendant Alabama State Trooper Bart Walker initiated a vehicular pursuit of a suspect (David Carrol Warren) in Lamar County, Alabama. (Excerpts, pgs. 51-55; Record, pgs. 90-94). Defendant Trooper Walker initiated the pursuit because the suspect had a broken windshield, because passengers were not wearing their seatbelts, and because the suspect attempted to elude Defendant Walker. (Excerpts, pgs. 51-55; Record, pgs. 90-94). Defendant Trooper Walker pursued the suspect from Alabama into Monroe County, Mississippi on Vernon Road. (Excerpts, pgs. 51-55; Record, pgs. 90-94). After the pursuit traveled a considerable distance into Mississippi, the suspect's vehicle collided nearly head-on with Plaintiff's vehicle. (Excerpts, pgs. 51-55; Record, pgs. 90-94; Videotape). Plaintiff's vehicle was knocked off the road by the impact and Plaintiff was trapped inside his vehicle. (Excerpts, pg. 114; Videotape). Plaintiff received various broken bones, dislocations, lacerations and other injuries from the collision. (Excerpts, pgs. 28-29; Record, pgs. 25-26). Upon being freed from his vehicle, Plaintiff was loaded into an Emergystat, Inc. ambulance for medical transport. (Excerpts, pgs. 28-29; Record, pgs. 25-26). The ambulance then had a minor accident. (Excerpts, pgs. 28-29; Record, pgs. 25-26).

The above-mentioned police pursuit lasted six minutes and twenty-three seconds and covered nearly six and one-half miles. (Excerpt, pgs. 51-54; Videotape). Defendant Trooper Walker came upon the collision site seconds after the collision occurred. (Videotape). Defendant Trooper Walker was not able to witness the collision because it happened at a curvy, hilly area on Vernon Road. (Excerpts, pg. 52; Record, pg. 91; Videotape). The stretch of Vernon Road in Mississippi where the subject pursuit occurred was poorly paved and the road surface was in a state of disrepair. (Excerpts, pgs. 102-104; Record, pgs. 234-236; Videotape). Upon entering Mississippi, Defendant

Trooper Walker's video camera was shaken severely because of the condition of the road surface. (Videotape). Furthermore, on the stretch of Vernon Road where the pursuit occurred in Mississippi, there were several substantial curves and hills which made driving at increased speeds dangerous. (Excerpts, pgs. 95-101; Record, pgs. 452-458; Videotape). Also, there were many blind spots along the pursuit route, and Defendant Trooper Walker lost sight of the suspect briefly during various stages of the pursuit because of the blind spots on the road. (Videotape). During the pursuit, Defendant Trooper Walker was able to obtain the suspect's license plate number. (Excerpts, pg. 105; Record, pg. 334). Defendant Trooper Walker encountered nine cars other than the suspect's vehicle during the pursuit. (Videotape). At the time of the pursuit, State of Alabama pursuit policy was in place which prohibited Defendant Trooper Walker's pursuit of a suspect into Mississippi. (Excerpts, pgs. 57-59; Record, pgs. 96-98). Though Defendant Trooper Walker radioed to the appropriate authorities that he was entering Mississippi, Defendant Trooper Walker still violated State of Alabama pursuit policy because circumstances did not warrant that he cross state lines. (Excerpts, pgs. 51-59; Record, pgs. 90-98). Lastly, the speed limit on Vernon Road was forty-five (45) miles per hour and the instant pursuit's average speed was around sixty (60) mph. (Excerpts, pgs. 54, 117; Record, 93, 389). Furthermore, Defendant Trooper Walker did not maintain a safe following distance at all times during the pursuit. (Videotape).

SUMMARY OF THE REPLY ARGUMENT

The State of Alabama and Alabama State Trooper Bart Walker are completely wrong in their argument that the United States Supreme Court case of Scott v. Harris, ___ U.S. ___, 127 S.Ct. 1769, 167 L. Ed. 2d 686 (2007), mandates the grant of summary judgment in favor of the Alabama

Defendants in the instant action. The United States Supreme Court held in Scott that, “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” Scott v. Harris, ___ U.S. ___, 127 S.Ct. 1769, 167 L. Ed. 2d 686 (2007), quoting, Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S 574, 586-587, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986). The Supreme Court, in Scott, clearly directs that the whole record should be considered when determining summary judgment. See Id. The holding in Scott is that when a videotape of a police pursuit is available on the record at the summary judgment stage, it is improper for a trial court to disregard the clear facts established by such videotape when resolving disputes and drawing reasonable inferences in favor of the party opposing summary judgment. Scott v. Harris, 127 S. Ct. at 1774-1776.

The Alabama Defendants, however, would have this Court believe that Scott stands for the proposition that a trial court, when determining summary judgment in a police pursuit case, must only consider a videotape of the pursuit, even if other evidence is on the record and available for the trial court to consider. The Alabama Defendants’ contention about Scott is incorrect and Defendants want this Court to go down the same wrong path that the trial court ventured down when it granted the Defendants’ Motion for Reconsideration of Their Original Summary Judgment Motion less than two weeks before this matter was set for trial. (Excerpts, pg. 69 and pgs. 11-24; Record, pg. 473 and pgs. 791-798). The trial court disregarded the evidence on the record which showed that there were disputes as to genuine issues of material fact. (Excerpts, pgs. 11-24; Record, pgs. 791-798). The trial court erred in granting the Alabama Defendant’s Motion For Reconsideration and Plaintiff Duckworth requests that this Court reverse the trial court’s erroneous decision and that it remand the case back to the Circuit Court of Monroe County, Mississippi for a trial by jury.

It is correct that there is a videotape of the pursuit in the instant case just as there was a videotape of the pursuit in Scott v. Harris. 127 S. Ct. at 1775. (Videotape). In Scott, the videotape of the police pursuit was the sole piece of evidence available on the record. Id. In the case at hand, however, the videotape of the instant police pursuit is only one part of the record which was available to be considered in determining summary judgment. (Excerpts, pgs. 57-59, 95-101, 102-104, 105, and 106-121; Record, pgs. 96-98, 452-458, 234-236, 334, 378-393). In addition to the videotape, the record in the instant case consists of the following: 1) the affidavit of Plaintiff Duckworth's police pursuit expert, Dennis Waller, whereby such expert stated that Defendant Alabama State Trooper Bart Walker was reckless in pursuing the suspect from Alabama into Mississippi for a broken windshield and passengers failing to wear their seatbelts; 2) State of Alabama pursuit policy which states that, "Normally, pursuits into another state should be avoided"; and 3) the deposition testimony and interrogatory responses of Defendant Trooper Bart Walker, in which he admitted pursuing the suspect from Alabama into Mississippi for a broken windshield, passengers not wearing their seatbelts, and attempting to elude. (Excerpts, pgs. 95-101, 57-59, 106-121; Record, pgs. 452-458, 96-98, 330-335, 378-393). Based on all the evidence on the record, the Alabama Defendants' summary judgment motion should have been denied because of the existence of genuine issues of material fact.

The police pursuit videotape in the instant case, while clearly important, is not the only piece of evidence on the record which was available to the trial court prior to its grant of the Alabama Defendants' Motion to Reconsider Their Summary Judgment Motion. (Excerpts, pgs. 95-101, 57-59, 106-121; Record, pgs. 452-458, 96-98, 330-335, 378-393). In fact, the videotape does not address a number of the ten factors which the Mississippi Supreme Court has set forth to be

considered in determining whether a police pursuit was accomplished in reckless disregard of the safety of the public. See, Johnson v. City of Cleveland, 846 So.2d at 1039; City of Ellisville v. Richardson, 913 So.2d 973, 977 (Miss. 2005). The factors set forth by the Mississippi Supreme Court to determine if a pursuit was reckless are as follows: 1) the length of the chase; 2) the type of neighborhood; 3) characteristics of the streets; 4) the presence of vehicular or pedestrian traffic; 5) weather conditions and visibility; 6) the seriousness of the offense for which the police are pursuing the suspect; 7) whether the officer proceeded with sirens and blue lights; 8) whether the officer had available alternatives which would lead to the apprehension of the suspect besides pursuit; 9) the existence of police policy which prohibits pursuit under the circumstances; and 10) the rate of speed of the officer in comparison to the posted speed limit. Johnson v. City of Cleveland, 846 So.2d at 1039; City of Ellisville v. Richardson, 913 So.2d 973, 977 (Miss. 2005). The videotape of the instant pursuit does not recite or show a copy of the State of Alabama vehicle pursuit policy, and it does not indicate when or even if the Defendant Trooper Bart Walker entered into Mississippi during his pursuit of the suspect. (Videotape). The videotape gives no indication that the subject police pursuit began in Alabama and tragically ended in Mississippi. (Videotape). In addition, the videotape does not show or indicate the offenses (other than attempting to elude) which gave rise to Defendant Trooper Walker's pursuit of the suspect from Lamar County, Alabama into Monroe County, Mississippi. (Videotape).

State of Alabama pursuit policy directs that, "Normally, pursuits into another state should be avoided. However, if circumstances warrant continuing pursuit into another state, a supervisor and the affected Division Chief must be notified, as well as the primary law enforcement agency of the other state." (Excerpts, pg. 57; Record 97). Such policy clearly instructs Alabama State Troopers to

stay out of other states unless something extraordinary requires or justifies crossing state lines. (Excerpt, pg. 57; Record, pg. 97). Defendants contend that Defendant Trooper Walker followed State of Alabama pursuit policy; Plaintiff Duckworth contends that such pursuit policy was violated. (Excerpts, pg. 74; Record, pg. 666). Because there is a genuine issue of fact regarding the State of Alabama pursuit policy and because the existence of police policy which prohibits pursuit under the circumstances is a factor in determining if a police pursuit was accomplished in reckless disregard of the safety of an innocent third party, the issue of fact regarding the State of Alabama pursuit policy is a material one. See City of Ellisville v. Richardson, 913 So.2d at 977; Johnson v. City of Cleveland, 846 So.2d at 1037. And since there is a genuine issue of material fact as to whether State of Alabama pursuit policy prohibited Defendant Trooper Walker's pursuit of the suspect from Alabama into Mississippi, summary judgment should not have been granted and this case should have been allowed to go to the jury. See, Johnson v. City of Cleveland, 846 So.2d at 1036 (quoting Canizaro v. Mobile Comms. Corp of Am., 655 So. 2d 25, 28 (Miss.1995)).

In the instant case, Defendant Trooper Walker pursued the suspect from Alabama into Mississippi for passengers failing to wear seatbelts, for having a broken windshield, and for attempting to elude. (Excerpts, pgs. 51-54, 106-107; Record pgs. 90-93, 378-379). First, attempting to elude is an offense which is present in every pursuit case. If attempting to elude is an offense which justifies pursuit, then the Mississippi Supreme Court's reckless disregard factor regarding the seriousness of the offense for which the suspect is being pursued becomes a non-factor and pursuits would always be lawful and justified if enough of the other nine reckless disregard pursuit factors were satisfied. The offenses of passengers not wearing their seatbelts and having a broken windshield were not serious enough to justify Defendant Trooper Walker's pursuit of the suspect

from Alabama into Mississippi. See, City of Jackson v. Brister, 838 So.2d at 280-281. The Alabama Defendants' assertion that these offenses justified a dangerous police pursuit of a suspect from Alabama into Mississippi is ludicrous. See, Id. Bart Walker's pursuit of the suspect from Alabama into Mississippi for the above offenses at least creates a genuine issue of material fact for the jury decide.

The Alabama Defendants take issue with Plaintiff's police pursuit expert, Dennis Waller. In his expert opinion, which was made part of the record and which was available to the trial court in deciding whether to grant summary judgment, Dennis Waller concluded that Defendant Trooper Walker was reckless in pursuing a suspect from Alabama into Mississippi for the offenses of a broken windshield and passengers not wearing their seatbelts. (Excerpts, pgs. 95-101; Record pgs. 452-458). In their brief, Defendants argue that Dennis Waller relied on inaccurate facts in supporting his expert opinion. The fact that the Alabama Defendants dispute the integrity of Mr. Waller's expert opinion shows there is a disputed genuine issue of material fact. See, Johnson v. City of Cleveland, 846 So. 2d 1031, 1034-1035 (Miss. 2003).

REPLY ARGUMENT

1. The Opinions of Plaintiff's Expert, Dennis Waller, Show That There is a Genuine Issue of Material Fact Regarding Whether Alabama Defendant Bart Walker's Pursuit of the Suspect From Alabama into Mississippi Was Reckless

The Alabama Defendants have questioned the integrity of the opinions of Plaintiff's police pursuit expert, Dennis Waller, because they contend his opinions rely on erroneous facts. The Alabama Defendants call into question Mr. Waller's statement that the suspect drove at speeds well in excess of sixty (60) miles per hour. The Defendants erroneously assert that Mr. Waller is

incorrect in this statement's about the speed of the pursuit is incorrect and they incorrectly state that the average speed of the suspect (and thereby the pursuit) was 55.38 miles per hour. In supporting their average speed value, the Defendants state that it is undisputed that the pursuit covered roughly 6.5 miles and lasted roughly six (6) minutes. Furthermore, they use their calculation, $[(6/6.5) \times 60]$, to arrive at 55.38 miles per hour.

The Defendants' calculation is **incorrect**. In order to travel one mile in one minute, a vehicle has to be traveling at sixty (60) miles per hour. It follows that for a vehicle to travel six miles in six minutes, it also has to be going sixty (60) miles per hour. Logically, then, in order for a vehicle to travel 6.5 miles in 6 minutes, its speed would necessarily have to be greater than sixty (60) miles per hour. In the instant case, the correct calculation to be used to arrive at the suspect's average speed in the instant pursuit that covered 6.5 miles in six (6) minutes is $[(6.5/6) \times 60]$ which yields an average speed of 64.999998 miles per hour or basically sixty-five miles per hour. The Plaintiff is unaware if the Defendants' error in their calculation of average speed was intentional or the result of incompetence, but such error casts doubt on all the arguments and assertions made by the Alabama Defendants in this matter and also creates a material factual dispute as to the speed of the officer in comparison to the speed limit on Vernon Road.

The Defendants assert that Mr. Waller's failure to mention the offense of attempting to elude when reaching his expert opinions was in error because such offense was one of the reasons Defendant Trooper Walker initiated pursuit. First, the offense of attempting to elude is found in every police pursuit case. If attempting to elude is a serious enough offense to justify a pursuit in every situation, then the seriousness of the offense becomes a non-issue under the ten factor pursuit analysis and the offense of attempting to elude will always justify a pursuit if other pursuit factors

are satisfied. The fact that Defendants have gone to great lengths to discredit and argue against Plaintiff's police pursuit expert shows there is a genuine issue of material fact regarding such expert's opinions which, in turn, shows that summary judgment should not have been granted in favor of the Defendants.

Second, the Alabama Defendants cite Scott v. Harris for the rationale that the Scott suspect's flight from the police created risk of harm to others which justified pursuit. 127 S.Ct. 1769. In Scott, the pursuit was conducted around speeds of eighty-five (85) miles per hour and the suspect had forced people off the road and driven in the oncoming lane of traffic. 127 S. Ct. at 1775. The instant pursuit, while both reckless and negligent, has been suggested by the Defendants to be a peaceful pursuit under perfect conditions. They assert that the instant pursuit from Alabama into Mississippi was in a rural, sparsely populated area, that the road conditions were not hazardous, that not much vehicle traffic was present, and that the average speed of the pursuit was 55.38 miles per hour. (Excerpts, pgs. 71-74; Record, pgs. 663-665). The Alabama Defendants cannot have it both ways. They want this Court to believe that perfect conditions existed for a pursuit and that the pursuit was conducted at a safe speed but then they argue that respondent's flight itself posed a risk which justified a police pursuit from Alabama into Mississippi for a broken windshield and passengers not wearing their seatbelts and attempting to elude. The Defendants twist, distort, and manipulate law, facts and even simple math to try to convince this Court there was no genuine issue of material fact.

2. Scott v. Harris Does Not Control in the Instant Case and Does Not Make the Videotape of the Pursuit a Superior Piece of Evidence Which Requires the Exclusion of All Other Evidence on the Record

The Alabama Defendants' analysis of and reliance on Scott v. Harris is incorrect and faulty. Scott v. Harris does involve a police pursuit. 127 S. Ct. At 1772-1773. However, it is factually distinguishable and does not control in the instant case. See, Id. at 1774-1776. In Scott, Deputy Timothy Scott engaged in a police pursuit of a suspect. Id. at 1772-1773. After the pursuit had covered nearly ten (10) miles and lasted for six (6) minutes, Deputy Scott used his vehicle to bump the rear of the suspect's vehicle. Id. at 1773. The suspect then lost control of his vehicle and crashed. Id. at 1773. The suspect was severely injured and rendered a quadriplegic. Id. at 1773. Then, the suspect filed suit against Deputy Scott under Rev. Stat. §1979, 42 U. S. C. §1983 alleging a violation of his constitutional rights by the use of excessive force which resulted in an unreasonable seizure under the Fourth Amendment. Id. at 1773. Deputy Scott filed a Motion for Summary Judgment and the District Court denied the motion. Id. at 1773. Thereafter, an interlocutory appeal was filed by Scott, and "the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's decision to allow respondent's Fourth Amendment claim against Scott to proceed to trial." Id. at 1773. The Court of Appeals, in using the suspect's version of the facts, found that Deputy Scott's actions could amount to deadly force and would thereby violate the suspect's Fourth Amendment rights. Id. at 1773. In dealing with Scott, the Supreme Court stated, "The first step in assessing the constitutionality of Scott's actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such posture, courts are required to view the facts and

draw reasonable inferences ‘in the light most favorable to the party opposing the [summary judgment] motion.’” Id. at 1774. The Supreme Court then noted that there was “an added wrinkle” in the case because a videotape of the pursuit was on the record. Id. at 1775. The Supreme Court stated that the videotape “clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.” Id. at 1775. In dealing with the significance of the videotape, the Supreme Court stated, “At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’ dispute as to those facts.” Id. at 1776, quoting Fed. Rule Civ. Pro. 56(c). The Court noted that, “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial’”. Scott v. Harris, 127 S. Ct. at 1776, quoting Matsushita Elec. Industrial Co. V. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986). In addition, the Court stated, “When 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.” Scott v. Harris, 127 S. Ct. at 1776. The Supreme Court found that it was error for the lower courts to ignore the videotape in determining the facts of the pursuit and they found that, in light of the videotape, there were no genuine issues of material fact for the jury to decide, thereby making summary judgment proper. Id. at 1775-1776.

In the instant action, just as in Scott, a videotape of the pursuit was available for the trial court to view in deciding the Alabama Defendants’ Summary Judgment Motion. (Videotape). However, in Scott, only the videotape of the pursuit was available as evidence on the record. Scott v. Harris, 127 S. Ct. 1769. In the instant case, other evidence besides the videotape was on the record and available for the trial court to consider in ruling on the Alabama defendants’ motion for

summary judgment. In addition to the videotape, the record in the instant case includes the following: 1) the affidavit of Plaintiff Duckworth's police pursuit expert, Dennis Waller, whereby such expert stated that Defendant Alabama State Trooper Bart Walker was reckless in pursuing the suspect from Alabama into Mississippi for a broken windshield and passengers failing to wear their seatbelts; 2) State of Alabama pursuit policy which states that, "Normally, pursuits into another state should be avoided"; and 3) the deposition of Defendant Trooper Bart Walker, in which he admitted pursuing the suspect from Alabama into Mississippi for a broken windshield, passengers not wearing their seatbelts, and attempting to elude. (Excerpts, pgs. 95-101, 57-59; Record, pgs. 452-458, 96-98, 330-335).

Because the police pursuit crossed state lines, the videotape of the pursuit is **NOT** the most important piece of evidence from which to determine whether the instant pursuit was negligent or was accomplished in reckless disregard. Certainly the videotape is important and, if this case involved a police pursuit which was conducted wholly within Alabama, the videotape would arguably be the most important piece of evidence on the record. Because the instant police pursuit crossed state lines, however, the most relevant and important considerations deal with whether Defendant Alabama State Trooper Bart Walker had sufficient authorization and justification to pursue a suspect from Alabama into Mississippi. Evidence on the record does shed light on whether Defendant Trooper Walker had the authorization and justification to pursue a suspect from Alabama into Mississippi. (Excerpt, pgs. 51-52, 57-59, 106-108; Record, pgs. 96-98, 378-380). The State of Alabama pursuit policy clearly tells Alabama state troopers that "Normally, pursuits into another state should be avoided.." (Excerpt, pg. 58; Record, pg. 97). Defendant Trooper Walker testified that the only offenses for which he was pursuing the suspect were passengers failing to wear their

seatbelts, having a broken windshield, and attempting to elude. (Excerpt, pg. 107; Record, pg. 379).

Certainly, State of Alabama pursuit policy and Trooper Walker's sworn interrogatory responses should be considered in determining whether a genuine issue of material fact exists because they are part of the entire record. See, Scott v. Harris, 127 S. Ct. at 1776. Such items deal squarely with the seriousness of the offenses and pursuit policy in place which prohibits the pursuit, which are two of the factors set forth by the Mississippi Supreme Court to consider whether a pursuit is reckless. See, Johnson v. City of Cleveland, 846 So.2d at 1039, City of Ellisville v. Richardson, 913 So.2d 973, 977 (Miss. 2005). Furthermore, the videotape of the pursuit does not show that the pursuit began in Alabama and ended in Mississippi. (Videotape). The videotape does not show that a state line was crossed and it does not show that an Alabama state trooper entered into Mississippi. (Videotape). The most important facts in this case, i.e. State of Alabama pursuit policy, the fact that the pursuit started in Alabama and ended in Mississippi, and the fact that the pursuit was initiated for the offenses of passengers not wearing their seatbelts, having a broken windshield, and attempting to elude, are not shown by the videotape. (Videotape). Such facts must be considered in deciding a summary judgment motion in a Mississippi pursuit case. See, Johnson v. City of Cleveland, 846 So.2d at 1039, City of Ellisville v. Richardson, 913 So.2d 973, 977 (Miss. 2005). Given that the above mentioned facts are contested by the parties and that they are material because they are factors the Mississippi Supreme Court has set forth to be examined when deciding whether a police pursuit is reckless, genuine issues of material fact exist. See, Id. The entire record shows that the case should be submitted to the jury for trial. See, Id.

The videotape of the pursuit also shows that there are genuine issues of material fact regarding certain of the reckless disregard factors set forth by the Mississippi Supreme Court.

(Videotape). One factor is the length of the pursuit. See, Johnson v. City of Cleveland, 846 So.2d at 1039, City of Ellisville v. Richardson, 913 So.2d 973, 977 (Miss. 2005). The pursuit lasted approximately six and one-half minutes. Plaintiff Duckwirth argues that such a pursuit lasted too long. Defendants state that such a pursuit is not overly lengthy. Defendants also erroneously argue that because the actual length in time of the pursuit is not disputed by the parties, then there is no issue of fact. The Mississippi Supreme Court has held that when reviewing the ten reckless disregard factors, if there are disputes as to any of the factors, or if the factors are undisputed but susceptible to more than one interpretation, then a genuine issue of material fact exists and summary judgment must be denied. Johnson v. City of Cleveland, 846 So.2d at 1036 (quoting Canizaro v. Mobile Comms. Corp of Am., 655 So. 2d 25, 28 (Miss.1995)). The undisputed length of the pursuit is susceptible to more than one interpretation, therefore a genuine issue of fact exists. See Id.

Another reckless disregard pursuit factor is the characteristics of the streets. The videotape shows the characteristics of the road where the instant pursuit took place. The Defendants assert that the videotape shows soft curves and hills. Plaintiff asserts that there are substantial curves and hills on Vernon Road and that the road surface, the hills and curves, blind spots, and little to no shoulder were conditions which made a pursuit hazardous. The road surface was so deteriorated in some areas that the video camera in Defendant Trooper Walker's vehicle shook violently. Though the videotape is uncontested, the facts shown by such videotape are capable differing interpretations. Therefore, as to road conditions, the videotape shows there are genuine issues of material fact.

Yet another of the pursuit factors is the presence of vehicular or pedestrian traffic. The videotape shows that the pursuit passed nine cars. Plaintiff says this was a fair amount of traffic. Defendants argue otherwise. A jury should decide whether nine cars was too much vehicle traffic.

Another pursuit factor is whether the officer has available alternatives which would lead to the apprehension of the suspect besides pursuit. It is undisputed that Defendant Trooper Walker obtained the vehicle's Alabama license plate number. (Excerpts, pg. 114; Record, pg. 334). Defendants argue that this did not provide an available alternative at apprehension of the suspect. Plaintiff Duckworth submits that having a license plate number gave Defendant Trooper Walker an alternative to catching the suspect other than the pursuit. See, City of Jackson v. Brister, 838 So. 2d 274, 280 (Miss. 2003). There was no evidence that the vehicle had been stolen and Defendant Trooper Walker could have broken off the chase and radioed to other Alabama law enforcement officers to look for the suspect's car when it reentered Alabama (the license plate was an Alabama license plate).

Yet another factor to be considered in determining if a police pursuit is reckless is the rate of speed of the officer in comparison to the posted speed limit. See, Johnson v. City of Cleveland, 846 So.2d at 1039, City of Ellisville v. Richardson, 913 So.2d 973, 977 (Miss. 2005). The videotape of the subject pursuit does not show the speed of the pursuit or of the Defendant Trooper Walker. (Videotape). However, because we know the distance the pursuit covered and the length of time of the pursuit, we can arrive at an average speed of the pursuit (and thereby an average speed of the officer during the pursuit). As has been previously established, the average speed of the pursuit was around sixty-five (65) miles per hour. Sixty-five (65) miles per hour is a fast speed for any road and was the former lawful speed limit for interstate travel in the United States. Sixty-five miles per hour on Vernon Road is a dangerous, reckless speed. Surely, because the Plaintiff and the Alabama Defendants dispute the speed of the officer in the instant pursuit and

because the parties assert different average speeds of the pursuit, a genuine issue of material fact exists and this case should be submitted to the jury for trial.

3. Though the Videotape of the Pursuit Has Not Been Challenged, It is Still Susceptible to More Than One Interpretation Which Presents a Genuine Issue of Material Fact For Trial

The videotape shows a curvy, hilly road which is in a state of deterioration and disrepair. (Videotape). The Defendants state that the videotape shows soft curves and hills. (Videotape). The videotape shows traffic on the road. (Videotape). Plaintiff argues that such amount of traffic is important and creates a fact question as to the vehicular traffic recklessness factor. Unsurprisingly, Defendant asserts that such traffic was negligible and does not create a material issue of fact. As stated above, the Mississippi Supreme Court has held that when reviewing the ten reckless disregard factors, if there are disputes as to any of the factors, or if the factors are undisputed but susceptible to more than one interpretation, then a genuine issue of material fact exists and summary judgment must be denied. Johnson v. City of Cleveland, 846 So.2d at 1036 (quoting Canizaro v. Mobile Comms. Corp of Am., 655 So. 2d 25, 28 (Miss.1995)). Because the videotape can be seen as in more than one way, there is a material question of fact for the jury to decide. See, Id.

4. An Examination of the Entire Record Supports the Plaintiff's Version of Events and Shows That There are Genuine Issues of Material Fact

Plaintiff's version of the facts is not blatantly contradicted by the record as the Alabama Defendants so erroneously claim. The videotape of the pursuit shows a pursuit that lasted more than six minutes on a hazardous road with some vehicle traffic. To see the complete picture, however, other parts of the record are needed. To discover that the pursuit started in Alabama and continued into Mississippi, Bart Walker's interrogatory responses and affidavits must be viewed. (Excerpts; pgs 51-52.; Record, pgs. 90-91). To know that Defendant Trooper Walker violated State of

Alabama pursuit policy, such pursuit policy, which is part of the record, must be considered. (Excerpts, pgs. 57-59; Record 96-98). To discover what the offenses were which gave rise to the pursuit (other than attempting to elude), Defendant Bart Walker's affidavit must be viewed. (Excerpts, pgs. 51-52; Record, pgs. 90-91). To know that Plaintiff's police pursuit expert (who has been quoted favorably by the Mississippi Court in City of Jackson v. Brister) has issued an opinion that the instant pursuit was reckless, the report of Plaintiff's expert must be considered. (Excerpts, pgs. 95-101; Record, pgs. 452-458). The videotape of the pursuit does not contain all the relevant evidence one needs in order to properly view the pursuit. (Videotape). The record as a whole, shows that Defendant Trooper Bart Walker was both reckless and negligent in his pursuit of the suspect from Alabama into Mississippi.

5. The Plaintiff Has Also Sued the Alabama Defendants Under a Theory of Negligence Because the Alabama Defendant Trooper Walker Has No Immunity Under the Mississippi Tort Claims Act Because He is Not a Mississippi Employee

If by some chance Defendant Trooper Walker was not reckless in his pursuit of the suspect in the instant case, then the record as a whole, shows that Defendant Trooper Walker was at least negligent in his pursuit of a suspect from Alabama into Mississippi for the offenses of a broken windshield and passengers failing to wear their seatbelts. Alabama pursuit policy states that "Normally, pursuits into another state should be avoided.." (Excerpts, pg. 58; Record, pg.97). In the face of such clear language, Defendant Trooper Walker negligently and unwisely chose to pursue the suspect from Alabama into Mississippi for the offenses of a broken windshield and passengers not wearing their seatbelts.

6. Defendant Trooper Bart Walker and All Other Alabama State Troopers Should Respect Mississippi's Borders and Not Endanger Mississippi Drivers For Non-serious Offenses

In the instant case, Defendant Alabama State Trooper Bart Walker failed to follow state of Alabama pursuit policy when he pursued the suspect from Alabama into Mississippi for passengers not wearing their seatbelts and a broken windshield. (Excerpts, pgs. 57-59; Record, pgs. 96-98). Crossing state lines to apprehend a suspect for such non-serious offenses was not worth risking the foreseeable dangers of a police pursuit. Alabama state troopers should stay out of Mississippi unless faced with serious reason which justifies crossing state lines. In the face of substantial evidence on the record which at shows genuine issues of material fact, affirming the trial court's grant of the Alabama Defendants' Summary Judgment Motion would only reward unwise, reckless, and improper conduct by an undisciplined State Trooper.

CONCLUSION

The entire record must be considered when granting summary judgment. Scott v. Harris, 127 S. Ct. at 1774-1776. The entire record in the instant case includes State of Alabama pursuit policy, Defendant Trooper Walker's Deposition Testimony, Affidavits, and Deposition Testimony, the opinion of Plaintiff Duckworth's police pursuit expert, and the videotape of the pursuit. The whole record, when viewed in light of the ten reckless disregard pursuit factors, clearly shows that there are genuine issues of material fact regarding the following seven factors: 1) length of the pursuit, 2) the characteristics of the streets, 3) the presence of vehicular traffic, 4) the seriousness of the offense for which the police are pursuing the suspect, 5) whether the officer had available alternatives which would lead to the apprehension of the suspect besides pursuit, 6) the existence of police policy

which prohibits pursuits under the circumstances, and 7) the rate of speed of the office in comparison to the posted speed limit. Plaintiff respectfully requests that this honorable Court reverse the trial court's grant of summary judgment and remand the case to the Circuit Court of Monroe County, Mississippi for a jury trial to decide the genuine issues of material fact.

Respectfully submitted, this the 22 day of October, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of October ~~May~~, 2008, I served a copy of the foregoing by placing the same in the U.S. mail, first class postage pre-paid and properly addressed to the following:

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Honorable Sharion Aycock
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