

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-01403

RANDY SCOTT

APPELLANT

VS.

**DICKERSON PETROLEUM, INC., D/B/A
B. P. CONVENIENCE AND SERVICE STATION,
THE CITY OF GOODMAN, MISSISSIPPI**

APPELLEES

*On Appeal from the Circuit Court of
Holmes County, Mississippi
Circuit Court No. 2003-147*

BRIEF OF APPELLEES

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

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

1. The Honorable Jannie Lewis, Circuit Judge, Circuit Court of Holmes County, Mississippi, Trial Judge;
2. Mr. Randy Scott; Appellant;
3. The City of Goodman, Mississippi by and through Marc Boutwell, Esq., City Attorney;
4. Dickerson Petroleum, Inc., Appellee;
5. Daniel J. Griffith, Griffith and Griffith Attorneys, Cleveland, Mississippi, Attorneys for Appellee City of Goodman; and,
6. Marshall Sanders, Esq., Attorney for Randy Scott, Appellant.
7. Jan F. Gadow, Esq., Attorney for Dickerson Petroleum, Inc., Appellee.

CERTIFIED this 11th day of March, 2008.



Daniel J. Griffith, MS Bar No. 8366
Attorney for City of Goodman, Appellee

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ORAL ARGUMENT IS REQUESTED

The Appellant, Mr. Randy Scott, did not allege that the conduct of City of Goodman Police Officer Melvin Williams rose above negligence. Mr. Scott then rested without requesting amendment to his pleadings. The trial court found immunity as a matter of law when it rejected Mr. Scott's argument that "gross negligence" and "reckless disregard" are one and the same. Mr. Scott has not briefed this issue. Rather, Mr. Scott asks the Court to second guess the factual findings of a trial court sitting as a finder of fact in a manner which is tantamount to de novo review. Oral argument will assist this Court in focusing on and deciding these questions which touch on the very nature of local governmental immunity and jurisprudence in Mississippi.

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BRIEF OF APPELLEE

I. Counter-Statement of the Issues

1. Whether the trial court correctly rejected the Appellant's argument that "gross negligence" and "reckless disregard" are one and the same.

2. Whether the trial court's fact findings are supported by substantial, credible and reasonable evidence.

II. Statement of the Case

A. Nature of the Case

At trial, the Appellant, Mr. Randy Scott, sought damages for a gunshot wound sustained when he was shot in the thigh by City of Goodman Police Officer Melvin Williams at the 17/55 BP Station. There is no dispute among the interested parties that the instant case arises under the Mississippi Tort Claims Act¹ and no dispute that Officer Williams was acting within the course and scope of his employment as a certified law enforcement officer of the City of Goodman. Mr. Scott failed to allege that Officer Williams acted in reckless disregard for his health and safety as required by the Law Enforcement Exemption of the Mississippi Tort Claims Act, *Miss. Code Ann.* §11-46-9(1)(c). At trial, Mr. Scott relied upon expert testimony that Officer Williams was negligent. Mr. Scott rested his case without seeking further amendment to his pleadings. Mr. Scott has not briefed the question of law addressed by the trial court, that “gross negligence” and “reckless disregard” are not one and the same. Rather, the instant appeal is a challenge to the validity of the fact findings by the trial court concerning the reasonableness of Officer Williams’ actions and the impact of those actions upon the immunity provided to the City of Goodman under the Law Enforcement Exemption.

B. Course of Proceedings and Disposition in Lower Court

Mr. Scott’s Amended Complaint alleges “Melvin Williams, a police officer of the City of Goodman, Mississippi, operating within the scope of his authority, who without cause, proceeded

¹*Miss. Code Ann.* §11-46-1, *et seq.* (1993), as amended.

to attack Plaintiff and shot him in the leg with a pistol. . . .”^{2,3} It further alleges that “the said Melvin Williams for his actions as stated above was ***grossly negligent and acted with complete disregard*** for the Plaintiff; therefore, Melvin Williams and The City of Goodman are responsible to the Plaintiff for actual and punitive damages incurred.”⁴ The case was removed to the United States District Court for the Southern District of Mississippi. There, Mr. Scott disavowed any federal claims resulting in remand to the Circuit Court of Holmes County. Following discovery, Officer Williams was granted Summary Judgment and entry of Final Judgment pursuant to Rule 54(b), *Miss. R. Civ. Proc.*, dismissing him with prejudice as an individual defendant based upon the uncontested fact that Mr. Scott was alleging in his pleadings that Officer Williams was at all times acting within the course and scope of his employment. No appeal was taken from the trial court’s entry of final judgment in favor of Officer Williams. The City of Goodman elected to proceed to a bench trial on February 7, 2007, before the Circuit Court of Holmes County.⁵ The case was tried before the Honorable Jannie Lewis, Circuit Court Judge. At trial, Mr. Scott relied upon testimony by his expert witness that Officer Williams was negligent, and then rested his case without seeking any amendment to his pleadings. (Vol. 4, Tr. 208:4 and 219:2.)

The City sought judgment as a matter of law based upon the legal question of whether Mr. Scott had raised a sustainable claim under the Law Enforcement Exemption and the factual question

²The Clerk of the Circuit Court compiled the Record into three separate categories: A Circuit Clerk’s Transcript of Record, a Court Reporter’s Transcript of Record, and an Exhibit Transcript, each with its own page numbering. Accordingly, references to the Circuit Clerk’s Transcript of Record shall be indicated by Volume number and “R.”; references to the Court Reporter’s Transcript shall be indicated by the Volume No. and “Tr.”; references to the Exhibit Transcript shall be indicated by the Volume number. and “R.E.”

³Vol. I, R.18 (Amended Complaint, ¶4).

⁴Vol. I, R.18 (Amended Complaint ¶8, emphasis added).

⁵*See Miss. Code Ann.* § 11-46-13(1) (Rev. 2004).

of whether a fair consideration of the evidence would require a finding of immunity for the City. (Vol. 4, Tr. 221:17.) Mr. Scott argued that “gross negligence” and “reckless disregard” are one and the same for the purpose of the Law Enforcement Exemption.(Vol. 4, Tr. 221:25.) The trial court exercised her discretion to defer consideration on the motion for judgment as a matter of law by the City pending the remainder of the trial.⁶ Following trial, Judge Lewis issued a ten (10) page Memorandum Opinion which addressed two points.⁷ First, Judge Lewis rejected Mr. Scott’s argument that “gross negligence” and “reckless disregard” are one and the same, ruling as a matter of law that the City of Goodman retained immunity.⁸ Second, Judge Lewis ruled that there was insufficient evidence from the totality of the circumstances to raise a claim of reckless disregard in which the City of Goodman loses immunity.⁹

C. Standard of Review

Issues of law, are reviewed under a *de novo* standard.¹⁰ A trial judge's findings of fact following a bench trial are subject to the same deference as a chancellor's findings of fact and will not be disturbed on appeal as long as those findings are supported by substantial, credible and reasonable evidence.¹¹

⁶Vol. I, R.139 (Memorandum Opinion of Trial Court at ¶1).

⁷Vol. I, R.135-144(Memorandum Opinion of Trial Court).

⁸Vol. I, R. 141 (Memorandum Opinion of Trial Court).

⁹Vol. I, R. 144 (Memorandum Opinion of Trial Court)

¹⁰Broome v. City of Columbia, 952 So. 2d 1050 (Miss. Ct. App. 2007) (Citing City of Jackson v. Brister, 838 So.2d 274, 277-78 (Miss. 2003).

¹¹Id.

III. Statement of the Facts

Mr. Scott testified on his own behalf. In addition, Mr. Scott's Case in Chief consisted of liability witnesses Melvin Jordon (BP Store Employee), Lemarcus Williams (friend riding with Randy Scott), Lindsey Horton (Law Enforcement Expert), copies of Plaintiff's medical records, and photographs taken from surveillance cameras inside the 17/55 BP Station on the night of the incident.

Mr. Scott admitted using profane language when he entered the store in response to Officer Williams' greeting.(Vol. 4, Tr. 151:7.) Clearly, Mr. Scott recognized Williams upon entering the store, recalling a prior incident where Scott was fined \$2,600.00 by the City of Goodman after fleeing an attempted arrest from Williams for reckless driving and driving under the influence of alcohol.(Vol. 3, Tr. 147:10 - 149:5.) By deposition, Mr. Scott claimed that he was wearing clothing commonly known as scrubs, that he was only wearing a t-shirt and that he had no pockets.(Vol. 4, Tr. 174:29.) At trial, Mr. Scott claimed that the top was actually a fleece pullover. (Vol. 4, Tr. 155:18 and 158:26.) In any event, Scott claims that he was merely attempting to leave the store, that his hands were visible at all times and that he had no pockets.(Vol. 4, Tr. 182:6; 184:9 and 194:23.)

The testimony of all of Mr. Scott's liability witnesses establishes that a tussle between Mr. Scott and Officer Williams occurred for some moments before Officer Williams ultimately discharged his weapon. Mr. Scott could not account for his prior testimony under oath that he was not going to allow Officer Williams to arrest him, because he believed that he was outside his jurisdiction. However, any attempt by Mr. Scott to justify his tussle and attempt to push his way past Officer Williams is contrary to the law of this case, as both the pleadings and grant of summary judgment to Officer Williams establish that Williams was acting within the course and scope of his employment as a police officer for the City of Goodman, Mississippi. Hence, Mr. Scott had no right

to force his way past Officer Williams on the basis of resisting an attempted illegal arrest.¹²

Under our caselaw, using self-defense against the officer by tussling with him and attempting to push his way past the officer would not be justified unless Mr. Scott had reason to believe that the use of excessive force by Officer Williams was imminent. On cross-examination, Mr. Scott acknowledged that he had previously told investigating officers with the Holmes County Sheriff's Department that he had seen Officer Williams draw his weapon, and that the gunshot hit him in the leg because he had blocked an attempt by Williams to shoot him in the head.(Vol. 4, Tr. 196:6.) Yet, at trial Mr. Scott denied ever seeing Officer Williams draw his weapon.(Vol. 4, Tr. 196:23.) Instead, Mr. Scott stated that he tussled with the officer in part because he believed that the officer intended him harm and that he could not see the officer's hands.(Vol. 4, Tr. 197:3.) Ironically, Mr. Scott could not explain why the officer would not be entitled to the same concern for his own safety had he failed to display his own hands. (Vol. 4, Tr. 198:6.) Mr. Scott claimed that his recollection at trial was better than it had been when he was initially interviewed by law enforcement or deposed by the City. (Vol. 4, Tr. 196:11.) Regardless, Mr. Scott admitted that the circumstances at the moment of the gunshot were "tense" and "rapidly evolving." (Vol. 4, Tr. 199:10-14.) In spite of surveillance photographs which depict Mr. Scott advancing on Officer Williams with his hands in his pockets, he maintained that his hands were visible at all times and that he had no pockets. (Vol. 4, Tr. 194:23.)

Witness Lemarcus Williams denied Mr. Scott's profane language, testified that Mr. Scott was wearing clothing with no pockets and that he appeared to be attempting to leave the store. (Vol. 3, Tr. 144:8-16, 136:21, and 135:2.) Mr. Scott claims that he was shot in the side of his right leg while

¹²See Murrell v. State, 655 So. 2d 881 (Miss. 1995)("That self help is a practical remedy is anarchistic.")(Quoting People v. Hess, 687 P.2d 443 (Col. 1984).

tussling with the officer. (Vol. 4, Tr. 157:28.) Lemarcus Williams claimed that Mr. Scott was shot in the back of the leg while attempting to flee from the store. (Vol. 3, Tr. 139:10 and 140:14.) In reviewing the evidence, the trial court had the benefit of the medical records admitted into evidence during the Mr. Scott's Case in Chief, which clearly showed that Mr. Scott actually sustained a gunshot wound to his right thigh, descending downward to his knee. The factual impossibility of both versions of the shooting, as described by Lemarcus Williams and Mr. Scott, were clearly sufficient to raise serious questions as to their credibility.

Store employee Melvin Jordon heard very little of the conversation between Mr. Scott and Officer Williams, but noted that Mr. Scott was wearing jeans and a jacket. (Vol. 3, Tr. 117:16 and 118:9.) Mr. Jordon recalled seeing Mr. Scott with his hands in his pockets. (Vol. 3, Tr. 119:28.) Although Mr. Jordon noted that he did not perceive Mr. Scott as attempting to attack the officer, he admitted that his vantage point was poor. (Vol. 3, Tr. 122:10.) Review of store surveillance photos confirmed that Mr. Jordon would have had a poor vantage point for viewing the actions which took place between Mr. Scott and Officer Williams as a confrontation occurred near the front or main entrance door of the convenience store.(Vol.2, R.E. 234-262.) Moreover, these same surveillance photos depict Mr. Scott in a jacket, having both hands in his pockets and advancing on Officer Williams without paying for the items he had entered the store to purchase. (Vol. 2, R.E. 234-262.)

By Affidavit on file in the summary judgment record of this case, Mr. Scott's law enforcement expert, Lindsey Horton offered the opinion that "**Melvin Williams was negligent in his handling of this situation with Randy Scott.**"¹³ (Emphasis added) This same statement of opinion

¹³Vol. 2, R. 175-176 (Affidavit of Lindsey Horton, Exhibit "F," Plaintiff's Response in Opposition to Dickerson Petroleum's Motion for Summary Judgment).

is disclosed in Plaintiff's Second Supplemental Responses to Interrogatories.¹⁴ At trial, Mr. Scott tendered expert witness Lindsey Horton as an expert in subject control and police tactics. (Vol. 4, Tr. 206:12.) In response to this tender, Counsel for the City asked Mr. Horton if he intended to offer any new opinions or change any of his opinions previously disclosed through discovery. Mr. Horton responded in the negative and advised that he could be expected to explain his opinions in more detail, but responded that he would not be offering any new opinions or changing those opinions disclosed through discovery. Relying upon this statement, Counsel for the City accepted Mr. Horton as an expert witness. After being accepted by the Court as an expert witness in these fields, Mr. Horton offered testimony to a reasonable degree of probability based upon his education, training, experience, review of documents, and his consideration of the testimony offered by Mr. Scott's liability witnesses. (Vol. 4, Tr. 207:25.) In Mr. Horton's opinion, Officer Williams was negligent as he discharged his weapon. (Vol. 4, Tr. 208:4.) Mr. Horton further stated that the act of using a chemical agent to spray Mr. Scott after the shooting "*added insult to injury.*" (Vol. 4, Tr. 215:20.) Counsel for the City declined cross-examination. Thereafter, Mr. Scott rested without seeking further amendment to his complaint. (Vol. 4, Tr. 219:2.) Both parties agreed to the qualifications of Mr. Horton to offer opinion testimony as an aid to the Court in deciding this case, with advance knowledge that Horton's expert opinion testimony would equate the conduct of Officer Williams to "*negligence.*" As a practical matter, the trial court would have been required to disregard Mr. Horton's testimony in order to rule for Mr. Scott based upon his evidence alone.¹⁵ As noted by the

¹⁴Vol. 2, R. 181-182 (Exhibit "B," Dickerson Petroleum's Motion to Strike Supp. Discovery Response).

¹⁵City of Greenville v. Jones, 925 So. 2d 106 (Miss. 2006)(Reversing the Circuit Court of Washington County because the conduct of the officers "might rise to the level of negligence, but certainly these actions or inactions fall well short of conduct which could be described as reckless disregard.").

trial court, Mr. Horton's testimony "helped the City of Goodman's defense by testifying that Williams' conduct was, at most, negligence."¹⁶

Holmes County Deputies Floyd Meek and O. C. Williams provided background concerning their response to the 17/55 BP on the night of the incident. Weather conditions were dark and raining. (Vol. 4, Tr. 236:9.) Each responded from the Holmes County Sheriff's Department in nearby Lexington, Mississippi. (Vol. 4, Tr. 230:21.) Upon arrival, Mr. Scott was outside the store under the awning. Contrary to Mr. Scott's testimony, these officers do not recall him being left out in the rain. (Vol. 4, Tr. 237:7.) Deputy O. C. Williams further explained the cooperative nature of Holmes County Law Enforcement. (Vol. 4, Tr. 239.) Due to the size and sparse population of Holmes County, it is not uncommon for multiple municipal units to be called out by the Holmes County Sheriff's Department to assist in law enforcement matters. Radio dispatch for Holmes County is available and responsive to calls for assistance from the respective municipalities in the county. Thus, it would not be unreasonable for a City Police Officer, such as Officer Melvin Williams of the City of Goodman, to attempt contact with Holmes County for guidance when presented with the situation he confronted at the 17/55 BP involving Mr. Scott.

Marjorie Freeman, a cashier working at the counter at the time of the incident, observed Officer Williams at the counter talking with persons in the store when three young men entered. (Vol. 4, Tr. 243:22.) Officer Williams spoke to each of the young men as they entered. (Vol. 4, Tr. 243:22 - 244:3.) One young man whom they called "Peanut" responded by saying "I don't f___ with you." (Vol. 4, Tr. 244:3-11.) Ms. Freeman recalls Officer Williams asking the young man "what did you say" and "do you know me." Ms. Freeman observed the young man walk toward Officer

¹⁶ Vol. 1, R. 143 (Memorandum Opinion of Trial Court).

Williams. Ms. Freeman then observed Mr. Scott put his hands in his pockets in a threatening manner. (Vol. 4, Tr. 244:9-11.) Ms. Freeman then observed Officer Williams draw his weapon. (Vol. 4, Tr. 244:9-11.) Ms. Freeman then observed Mr. Scott back up and say "you gone have to use it." (Vol. 4, Tr. 244:12.) Ms. Freeman then observed Mr. Scott start toward Officer Williams and saw the officer push him back. (Vol. 4, Tr. 244:18.) Ms. Freeman recalled that Mr. Scott again charged toward Officer Williams and they started tussling. (Vol. 4, Tr. 244:23.) According to Ms. Freeman, when the tussle reached the point where Mr. Scott and Officer Williams were in the doorway, the gun went off. Ms. Freeman further verified that there was an available rear exit had Mr. Scott simply wished to leave the store. (Vol. 4, Tr. 246:20.) In short, Ms. Freeman characterized Mr. Scott as the aggressor. (Vol. 4, Tr. 246:1.)

Witnesses Jimmy Lester and Rodney Harrison are truck drivers who were in the store drinking coffee at the time of the incident. (Vol. 4, Tr. 264:28 and 279:18.) Both Mr. Lester and Mr. Harrison characterized Randy Scott as the aggressor (hands in pockets, foul mouthed and charging Officer Williams). (Vol. 4, Tr. 270:1, 281:10 and 283:4.)

Officer Williams' testimony reflects a potentially dangerous, tense, uncertain and rapidly evolving situation. On February 26, 2003, Officer Williams came on duty at 10:00 p.m. (Vol. 4, Tr. 298:10.) He made a round through Goodman and then went on break, traveling to the BP station at the intersection of Interstate 55 and State Highway 17. He was there for approximately 45 minutes talking with various customers. (Vol. 5, Tr. 299:1.) Officer Williams was positioned to the right of the entrance, which is adjacent to the front counter. There were two truckers visiting a short distance away. A male clerk was on the far side of the counter. A female clerk was at the cash register. Officer Williams was in the midst of telling the truckers about the most recent robbery (showing them a bullet hole in the ceiling) when Mr. Scott came into the store with two other black males.

(Vol. 5, Tr. 300:1-11.) Mr. Scott was the third one to enter the store. Officer Williams greeted each of them as they came into the store. Mr. Scott replied with "I don't f___ with you." Mr. Scott then went over to the cooler for a drink. Mr. Scott then approached the counter, set his drink down and continued in the direction of Officer Williams. The officer explained that Mr. Scott could have simply walked a step to his left (Williams' right) and walked out the door. Officer Williams denies the door was locked. Officer Williams further stated that there was a rear exit which Mr. Scott could have also used. As Mr. Scott approached, Officer Williams was thinking that Mr. Scott must have him confused with someone else. He said "did you say what I think you said" and "you must not know who I am." (Vol. 5, Tr. 301:18.) Mr. Scott replied with "I said, I don't f___ with you. Mother f___, I know who you are." (Vol. 5, Tr. 301:24.) As events developed, Officer Williams' perception of the threat level of the situation increased. (Vol. 5, Tr. 302:21 and 303:23.) Officer Williams raised his right arm in front of him, palm facing out. Mr. Scott walked into his arm, slapping it away with "get yo' mother f___ arm off me and I ain't going to no mother f___ jail." Mr. Scott put his hands in his pockets and appeared to be digging for something. (Vol. 5, Tr. 303:5 and 324:5.) Officer Williams perceived a more serious threat and began to call for assistance over his walkie-talkie with his left hand. (Vol. 5, Tr. 303:23.) Mr. Scott repeated that he was not going to jail and said in response to the radio attempt that "you gone have to take care of your own business tonight." Officer Williams drew his weapon with his right hand and held it down by his side. (Vol. 5, Tr. 304:3.) Mr. Scott approached to within two feet. Officer Williams bear hugged Mr. Scott with the radio in his left hand and the gun in his right hand. As Mr. Scott struggled, he spun him around to his right so that his weapon would not be pointed back into the store. (Vol. 5, Tr. 305:5.) As some separation developed between the two, Mr. Scott stood facing Officer Williams and appeared to be withdrawing his hands from his pockets. (Vol. 5, Tr. 307:6.) Officer Williams was in fear for his

life. (Vol. 5, Tr. 306:16.) Officer Williams fired his weapon, striking Mr. Scott in the upper right leg. (Vol. 5, Tr. 307:13.) Mr. Scott withdrew his hands from his pockets and went into the door, partially exiting the building. Officer Williams went down on top of him. As Officer Williams attempted to regain his footing, he holstered his weapon. Mr. Scott continued to struggle. Officer Williams drew a can of pepper spray and threatened to spray him if he continued. (Vol. 5, Tr. 308:1-25.) Mr. Scott complied and the spray was put back in its holster. Mr. Scott began to struggle as soon as the spray was put back in its holster. Seeing this, Officer Williams was able to again draw the spray and fire a burst into Mr. Scott's eyes. Mr. Scott complied and was handcuffed. Officer Williams explained that it was never personal, that he was never angry, and that he had no desire to cause Scott pain. (Vol. 5, Tr. 310:2-5.) Officer Williams called Pickens Police Department and the Holmes County Sheriff's Department requesting assistance and an ambulance. Officer Williams discovered then that his radio had not been on during the earlier attempt to report to the Holmes County Dispatcher. The ability of the Court to observe Officer Williams during testimony is significant here. During cross-examination, Counsel for Scott made a significant effort to inflame Officer Williams. In all respects, the demeanor of Officer Williams remained calm and professional. Officer Williams showed no anger or disrespect. It was reasonable for the trial court to draw the inference that Officer Williams is not easily angered.

Defense Expert, Mark Farrell, was qualified in the fields of Law Enforcement Training, Police Tactics and Use of Force, without objection. Mr. Farrell offered opinions to a reasonable degree of probability based upon his education, training, experience, document review, site investigation with Officer Williams and personal observation of the trial testimony. (Vol. 5, Tr. 353:4.) Mr. Farrell addressed numerous threat perception factors and the standard training scale for

the use of force by a law enforcement officer. (Vol. 5, Tr. 354:15 and 353:3-5.)¹⁷ Mr. Farrell explained that officers can be called upon to exercise discretion and judgment regarding the appropriate use of force under circumstances which are often potentially dangerous, tense, uncertain and rapidly evolving. Mr. Farrell found that these were the circumstances facing Officer Williams on the night of this incident.¹⁸ Mr. Farrell testified that he was of the opinion that under the circumstances, Officer Williams had a reasonable apprehension of serious injury or death.¹⁹(Vol. 5, Tr. 356:4 and 359:20.) Objectively speaking, Mr. Farrell further opined that a reasonable officer could believe that the use of deadly force was authorized under these circumstances. (Vol. 5, Tr. 356:18 and 359:14.) Mr. Farrell further opined that Officer Williams' conduct was not willful, wanton or evident of an intent to cause injury. Mr. Farrell explained that the discretionary decisions made by law enforcement officers in investigating criminal activity and in determining the appropriate level of response to a perceived threat involves public safety or social alternatives, as well as economic and political policy alternatives.(Vol. 5, Tr. 359:26.)²⁰ On cross-examination, Mr. Farrell was questioned extensively about the impact of not actually finding a weapon upon the officer's perception of a threat. (Vol. 5, Tr. 363:13.) Mr. Farrell noted that no one ever performed

¹⁷Young v. City of Killeen, 795 F. 2d 1349, 1352 (5th Cir. 1985)(citing Tennessee v. Garner, 471 U.S. 1, 105 S. Ct 1694 (1985). The key to determination of whether force is constitutionally reasonable is whether "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others.").

¹⁸This determination must be based upon what a "reasonable officer under the same circumstances would concluded". Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 1871-1872 (1989).

¹⁹Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, 20-22 (1968)(The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.).

²⁰Dotts v. Pat Harrison Waterway Dist., 933 So. 2d 322 (Miss. Ct. App. 2006)(A decision is grounded in public policy when its costs and practicality are subject to being balanced against their value to the public.).

an extensive search of the area to find a weapon after the shooting. Having met with Officer Williams on-site to walk through the scene, reviewing his testimony at trial and relying on personal experience from numerous prior investigations as a supervisory officer, Mr. Farrell opined that Officer Williams was suffering from Post Traumatic Stress Syndrome immediately following the shooting, a classic symptom of officers involved in use of deadly force incidents. Moreover, it is very reasonable for the trial court to find that the lack of a secure crime scene or complete investigation has nothing to do with the correctness of the Officer Williams' pre-shooting perception of a threat from Mr. Scott. Counsel for Mr. Scott attempted to raise a question on cross-examination regarding the right of Officer Williams to stop or detain Mr. Scott in the store. Mr. Farrell explained that under a Terry²¹ analysis, a reasonable suspicion of criminal activity was all that was necessary for an officer to perform an investigatory detention of a suspect. In Mr. Farrell's opinion, a sufficient, reasonable suspicion existed for Officer Williams to detain Scott.²² (Vol. 5, Tr. 365:6.)

On rebuttal, Lindsey Horton was recalled by Scott over the objection of Counsel for the City. Mr. Horton stated that he agreed with most of the testimony of Mark Farrell, but stated that he disagreed with Mr. Farrell's opinions regarding the willfulness of Officer Williams' actions. (Vol. 5, Tr. 379:5.) The Court ultimately discontinued this line of questioning as it became clear that Counsel for Scott was attempting to elicit a change in Mr. Horton's earlier testimony to now have Officer Williams' actions equate with a higher standard of care than negligence. On cross-examination, Mr. Horton admitted giving a *pre-trial* affidavit equating the conduct of Officer

²¹Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, 1968 U.S. LEXIS 1345 (1968).

²²See also Graham v. Connor, 490 U.S. 386, 396, 109 S. Ct. 1865, 1871-72, 104 L. Ed. 2d 443 [*72] (1989) (Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.).

Williams to only *negligence* and admitted to testifying during the Scott's Case in Chief that it did not rise above the level of *negligence*. (Vol. 5, Tr. 384:7.) Mr. Horton further clarified that his rebuttal was only to clarify that use of pepper spray was more than negligence to him. (Vol. 5, Tr. 384:29.) The fact that Mr. Scott would recall his expert to change his "negligence" opinions is very telling. As noted by the trial court, the attempt to raise Mr. Horton's testimony to the level of reckless disregard, as required by statute, failed.²³

IV. Summary of the Argument

The lower court found immunity based upon two points. The first point: that "gross negligence" and "reckless disregard" are not one and the same for the purpose of the Law Enforcement Exemption has not been challenged on appeal.²⁴ As such, the trial court's judgment finding no waiver of immunity should be affirmed on appeal.²⁵ The second point relied upon by the trial court: that there was insufficient evidence from the totality of the circumstances to raise a claim of reckless disregard in which the City of Goodman loses immunity²⁶ should also be affirmed on appeal because it is supported by substantial, credible and reasonable evidence.

V. Argument

1. The trial court properly interpreted the Law Enforcement Exemption

The lower court correctly rejected the Appellant's argument that "gross negligence" and

²³Vol. 1, R. 144(Memorandum Opinion of Trial Court).

²⁴ Vol. 1, R. 144 (Memorandum Opinion of Trial Court).

²⁵ Bishop v. State, 882 So. 2d 135, 155(Miss. 2004)(citing federal authority "We will not consider issues raised for the first time in an appellant's reply brief." U.S. v. Anderson, 5 F.3d 795 (5th Cir. 1993), *cert. denied*, Barnett v. U.S., 510 U.S. 1137, 114 S. Ct. 1118, 127 L. Ed. 2d 428, (1994). "This is a fitting and obvious rule for this Court to adopt. Appellants cannot be allowed to ambush appellees in their Rebuttal Briefs, thereby denying the appellee an opportunity to respond to the appellant's arguments.").

²⁶Vol. 1, R. 144 (Memorandum Opinion of Trial Court).

“reckless disregard” are not one and the same and correctly ruled as a matter of law that immunity for the City of Goodman was not waived.

(a) First, this is an issue which has been waived on appeal.²⁷ Mr. Scott did not brief the lower court’s ruling on this question of law. As a result, the judgment of the lower court should be affirmed. Regardless of the discussion of the fact finding by the trial judge, an adequate independent basis for affirming the judgment of the trial court exists.²⁸

(b) Second, substantive analysis of the lower court’s ruling on this question of law reviews that it is consistent with the prior mandates of this Court and should be affirmed. The lower court’s decision on a question of law receives *de novo* review on appeal.²⁹

The law is clearly established that a political subdivision like the City of Goodman may not be sued except by the consent of the state.³⁰ The clear language of the Mississippi Tort Claims Act expresses the intent of the legislature to effect only a limited waiver of immunity.³¹ For a policeman acting within the scope of his authority, like Officer Williams, the State and its political subdivisions have retained immunity unless the officer acted in reckless disregard of the health and safety of a

²⁷Reid v. City of Canton, 858 So.2d 163 (Miss. App. 2003)(“Issues of error which are unsupported by citation or authority are considered abandoned.”... “Failure to cite relevant authority obviates this Court’s obligation to review such issues.” (Citing Hoops v. State, 681 So. 2d 521, 526 (Miss. 1996)); Simmons v. State, 805 So. 2d 452, 487 (P 90) (Miss. 2001) and (citing Williams v. State, 708 So. 2d 1358, 1362-63 (P 22) (Miss. 1998)).

²⁸Gates v. Gates, 616 So. 2d 888, 890 (Miss. 1993)(Citations omitted)(“If the action of the trial judge can be upheld for any reason, we must affirm.”).

²⁹Maldonado v. Kelly, 768 So.2d 906, 908 (Miss. 2000).

³⁰City of Jackson v. Powell, 917 So. 2d 59 (Miss. 2006) (Citing Hall v. State, 79 Miss. 38, 29 So. 994 (1901).

³¹Titus v. Williams, 844 So. 2d 459, 468 (Miss. 2003)(The Mississippi Tort Claims Act, *Miss. Code Ann.* §§ 11-46-1 to -23 (Rev. 2002), provides the exclusive civil tort remedy against a governmental entity, and a government is exempt from liability for the performance of police duties unless the employee(s) acted ‘in reckless disregard for the safety and well-being of the plaintiff.’”).

person who was not engaged in criminal activity.^{32, 33}

In Turner v. City of Ruleville, the court looked to Black's Law Dictionary for guidance as to the proper definition for reckless disregard:

Reckless disregard of the rights of others is defined as used in automobile guest law, means the voluntary doing by motorist of an improper or wrongful act, or with knowledge of existing conditions, the voluntary refraining from doing a proper or prudent act when such an act or failure to act evinces an entire abandonment of any care, and heedless indifference to results which may follow and the reckless taking of chance of accident happening without intent that any occur . . .

In Maye v. Pearl River County,³⁴ the Mississippi Supreme Court cited a definition of “recklessness” given by the Fifth Circuit:

The terms 'willful,' 'wanton,' and 'reckless' have been applied to that degree of fault which lies between intent to do wrong, and the mere reasonable risk of harm involved in ordinary negligence. These terms apply 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. The usual meaning assigned to do [sic] terms is that the actor has intentionally done an act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow.³⁵

Despite Mr. Scott's intimation that reckless disregard is the equivalent of negligence, gross negligence or complete disregard, the Mississippi Supreme Court has made it clear that there is a vast difference, and they are not the same.

³²City of Jackson v. Powell, 917 So. 2d 59, 71 (Miss. 2006)(“The statute granting conditional immunity to police officers is designed to protect law enforcement personnel from lawsuits arising out of the performance of their duties.”)(Citing City of Jackson v. Perry, 764 So.2d at 379).

³³Note the language of *Miss. Code Ann.* § 11-46-9(1)(c)(Supp. 1999).

³⁴Maye v. Pearl River County, 758 So.2d 391, 394 (Miss.1999).

³⁵Maye v. Pearl River County, 758 So.2d 391, 394 (Miss.1999)(quoting Orthopedic & Sports Injury Clinic v. Wang Labs., Inc., 922 F.2d 220, 224(5th Cir.1991) (emphasis in original)).

Reckless disregard has been described by this Court as 'a higher standard than gross negligence and 'embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act.'³⁶

The "reckless" or "willful and wanton" state of mind found in a waiver of immunity was not pled by Mr. Scott. Police officers and fire fighters are more likely to be exposed to dangerous situations and to liability, and therefore, public policy requires that they not be liable for mere negligence.³⁷ In summary, the lower court correctly applied established precedent in determining that immunity for the City was not waived as a matter of law.

2.

Substantial, credible and reasonable evidence supports the fact finding of the trial court.

The ruling of the trial court should be affirmed because its fact findings which are supported by supported by substantial, credible and reasonable evidence.³⁸ On appeal, a trial judge's findings of fact are afforded the same deferential treatment as a chancellor, who almost always sits, without a jury.³⁹ Here, the trial court found that after hearing all the pleadings, evidence, testimony, and arguments of both parties, the evidence presented is insufficient to raise a claim of liability against the City of Goodman on the part of Officer Williams.⁴⁰

The MTCA provides the exclusive civil remedy for any tort actions brought against a

³⁶Collins v. Tallahatchie County, 876 So.2d 284, 287 (Miss. 2004)(quoting Turner v. City of Ruleville, 735 So.2d 226, 230 (Miss. 1999)).

³⁷Maldonado v. Kelly, 768 So. 2d 906, 909 (Miss. 2000).

³⁸Id.

³⁹City of Jackson v. Perry, 764 So.2d 373, 376 (Miss. 2000) (citing Puckett v. Stuckey, 633 So.2d 978, 982 (Miss. 1993)).

⁴⁰ Vol. 1, R. 144 (Memorandum Opinion of Trial Court).

Mississippi governmental entity or its employees.⁴¹ Although the MTCA waives sovereign immunity for certain tort actions, it also exempts certain circumstances from this statutory waiver. In these circumstances, the governmental entity retains its sovereign immunity. The instant claims arise out of one such exempt circumstance:

- (1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
 - (c) Arising out of any act or omission or an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of the injury . . .

Miss. Code Ann. § 11-46-9(1)(c) (2003).

Because the immunity afforded by this exemption is invoked, Mr. Scott must prove by a preponderance of the evidence that Officer Williams acted in reckless disregard for his safety.⁴² This means that the officers must not have exercised *any* care, i.e., that he (a) appreciated a risk and (b) deliberately disregarded it, even though (c) he knew the risk involved a high probability of harm.^{43,44}

The trial court observed the demeanor of the witnesses and made decisions about the reliability of their testimony which are clearly supported by the record.⁴⁵ Mr. Scott and his witness, Lemarcus Williams, were clearly biased and contradicted by both prior testimony and the established

⁴¹*Miss. Code Ann. § 11-46-7(1) (2003).*

⁴²Simpson v. City of Pickens, 761 So.2d 855, 859 (Miss. 2000).

⁴³Maldonado v. Kelly, 768 So.2d 906, 910-11 (Miss. 2000).

⁴⁴City of Jackson v. Brister, 838 So.2d 274 (Miss. 2003).

⁴⁵ Vol. 1, R. 142. (Memorandum Opinion of Trial Court Judge)(Citing: Miss. Dep't of Wildlife, Fisheries and Parks v. Brannon, 2006 WL 772872 (Miss. Ct. App. 2006)(“The judge, sitting in a bench trial as the trier of fact, has the sole authority for determining the credibility of witnesses.”)).

physical facts of this incident. The store clerk, Melvin Jordon, offered little information as to the actual tussle between Mr. Scott and Officer Williams because of his vantage point in the store, but his recollections as to the physical facts of the scene and Mr. Scott's clothing were probative of Mr. Scott's lack of credibility. The truck drivers, cashier and Officer Williams all support a finding that Mr. Scott was the aggressor and Officer Williams' perception of danger was reasonable under the circumstances. The experts (Plaintiff and Defense) both agree on the major points, with neither of them equating Officer Williams' conduct to the required reckless disregard for the health and safety of Mr. Scott. In finding that the conduct at issue did not rise to the level of reckless disregard, the trial court looked at the totality of the circumstances and found substantial evidence that Officer Williams' actions were the result of the hostility and aggression exhibited by Mr. Scott toward him in conjunction with fumbling for something in his pocket.^{46, 47} The trial court found that Officer Williams was reacting to the level of threat Mr. Scott posed in a tense and escalating situation.⁴⁸ In sum, the fact findings by the lower court are supported by the record.

VI. Conclusion

The lower court properly determined that gross negligence is not the same thing as reckless disregard and correctly ruled as a matter of law that the immunity was not waived for the City. Both a waiver of this issue by Mr. Scott and established precedent interpreting the Law Enforcement Exemption of the Mississippi Tort Claims Act support affirming the verdict of the trial court.

⁴⁶See Memorandum Opinion of the Trial Court, Vol. 1, R. 142. (Citing Thomas ex rel. Thomas v. Miss. Dep't of Public Safety, 882 So. 2d 789, 796 (Miss. Ct. App. 2004).

⁴⁷See Also: Bazan v. Hidalgo County, 246 F.3d 481 (5th Cir. 2001). (Bazan reaffirmed that the appropriate inquiry in an excessive force claim must be directed to the danger presented by the subject at the very moment the officer used deadly force. *Id.* at 493 (citing Fraire v. City of Arlington, 957 F. 2d 1268 (5th Cir. 1992); and Young v. City of Killeen, 775 F. 2d 1349 (5th Cir. 1985)).

⁴⁸ Vol. 1, R. 142 (Memorandum Opinion of Trial Court).

Factually, the ample record in this case supports the fact findings of the trial court that there was insufficient evidence from the totality of the circumstances to raise a claim of reckless disregard in which the City of Goodman losses immunity. As to both issues addressed, the City of Goodman respectfully prays that this Court affirm the decision of the lower court.

RESPECTFULLY SUBMITTED this 11th day of March, 2008.

**CITY OF GOODMAN, MISSISSIPPI
AND MELVIN WILLIAMS**

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CERTIFICATE OF SERVICE


I, Daniel J. Griffith, attorney of record for Appellees, Melvin Williams and City of Goodman, Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellees* to:

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