SUPREME COURT OF MISSISSIPPI

No. 2007-CA-01403

RANDY SCOTT,

Appellant,

vs.

DICKERSON PETROLEUM, INC.
d/b/a BP CONVENIENCE AND SERVICE STATION;
and CITY OF GOODMAN, MISSISSIPPI,

Appellees.

APPEAL FROM CIRCUIT COURT OF
HOLMES COUNTY, MISSISSIPPI

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

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Appellees.

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

1. Randy Scott, Appellant.

2. Marshall Sanders, Esq., Attorney for Appellant.

3. Dickerson Petroleum, Inc. d/b/a BP Convenience and Service Station, Appellee.

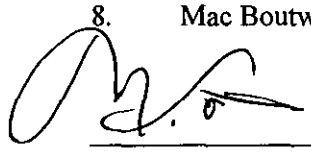
4. Thomas Y. Page, Esq., Page, Kruger & Holland, P.A., Attorney for Dickerson Petroleum, Inc. d/b/a BP Convenience and Service Station, Ap pelle e.

5. Pelicia E. Hall, Esq., Page, Kruger & Holland, P.A., Attorney for Dickerson Petroleum, Inc. d/b/a 1W Convenience and Service Station, Appellee.

6. City of Goodman, Mississippi, Appellee.

7. Daniel J. Griffith, Esq., Griffith & Griffith, Attorney for City of Goodman, Mississippi, Appellee.

8. Mac Boutwell, Esq., City Attorney for City of Goodman, Mississippi, Appellee.



Marshall Sanders

Attorney of record for
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STATEMENT OF THE ISSUES

I. Whether the Circuit Court erred in granting summary judgment to Appellee Dickerson Petroleum, Inc. d/b/a BP Convenience and Service Station (hereinafter "Dickerson Petroleum"), when the evidence presented a genuine issue of fact as to whether Dickerson Petroleum breached its duty to protect the Appellant (hereinafter "the Plaintiff') from injury by Defendant below Melvin Williams (hereinafter "Williams"), and whether the breach of that duty proximately caused the Plaintiffs harm.

II. Whether there is a lack of substantial, credible, and reliable evidence to support the circuit court's finding that the evidence was insufficient to sustain a claim of reckless disregard of the Plaintiff's rights by Melvin Williams and the City of Goodman, when the record indicates that Williams struck the Plaintiff without provocation, blocked the Plaintiff's exit from the store, and then shot the Plaintiff without justifiable cause.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW.

This is a personal-injury case. On October 8, 2003, the Plaintiff, Randy Scott, filed his Amended Complaint, in which he alleged that he was tortiously shot in the leg by Defendant Melvin Williams, a police officer of the Defendant City of Goodman, Mississippi. The Plaintiff alleged that the shooting took place at a convenience store owned and operated by Defendant Dickerson Petroleum. The Defendants answered the Amended Complaint, denying liability.

Defendant Williams filed a motion for summary judgment, arguing that, under the Mississippi Tort Claims Act ("MTCA") he could not be held personally liable because the Plaintiff alleged that Williams was acting within the course and scope of his duties as a police officer at the time of the occurrence upon which the Plaintiff's claims were based. The circuit court granted Williams' motion on May 8, 2006, and dismissed him from the case.

On January 30, 2006, Dickerson Petroleum filed a motion for summary judgment. That Defendant argued that it could not be held liable for the Plaintiff's harm because it did not create a dangerous condition presenting a risk to the Plaintiff, and the Defendant did not know of any dangerous condition created by a third party which posed an unreasonable risk to the Plaintiff. The circuit court granted Dickerson Petroleum's motion for summary judgment.

The case proceeded to trial against the City of Goodman on February 8 and 9, 2007. The circuit court, sitting as trier of facts in the MTCA cause of action against the City, concluded that, in order to recover against the City, the Plaintiff was required to prove that Williams had acted in reckless disregard of the Plaintiff's rights. The court found the evidence insufficient to sustain a claim of reckless disregard of the Plaintiff's rights. Accordingly, on July 6, 2007, the circuit court entered an order dismissing the Plaintiff's claim of liability against the City of Goodman. This appeal followed.

II. STATEMENT OF FACTS.

With respect to the Plaintiff's claim against Dickerson Petroleum, which did not proceed to trial in light of the court's order granting summary judgment to that Defendant, the deposition testimony established that there was a history of criminal activity and violence at the Defendant's convenience store. The Plaintiff testified that one person had previously been killed upon the premises, and that numerous robberies had occurred there. (Record Excerpts hereinafter "RE."] at 20-21; Circuit Clerk's Transcript of Record' [hereinafter "R."] at 70-71.) Scott testified that he knew who Officer Williams was, because Officer Williams lived close to Scott's mother's house, but that Scott did not know Williams personally. (RE. at 16; R. at 62.) As to the occurrence at issue, Scott testified that Officer Williams spoke to Scott upon the Plaintiff entering the store. (R.E. at 17; R. at 63.) Officer Williams said to Scott "you're the motherfucker I've been looking for." (R.E. at 17; R. at 63.) Scott replied to Williams "I don't even fuck with you like that." (R.E. at 17; R. at 63.) According to Scott, Williams may have been angry at him because Williams didn't catch him previously to give him a traffic ticket. (R.E. at 16-17; R. at 62-63.) That traffic incident had been resolved satisfactorily. (RE. at 16; R. at 62.). When Scott realized that Williams was angry and was acting "crazy", Scott decided that it would be best for him merely to leave the store (R.E. at 19: R at 65). Scott testified that, when he attempted to do so, Williams struck him in the chest and blocked Scott's path out of the door. (R.E. at 17; R. at 63). Officer Williams told Scott that he

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[1]The Clerk of the Circuit Court compiled the Record into three separate categories, a Circuit Clerk's Transcript of Record, an Exhibit Transcript, and a Court Reporter's Transcript of Record, an Exhibit Transcript, and a Court Reporter's Transcript, each with its own page numbering. Accordingly, the references to the Record in this Brief are to the page number of the relevant category of the Record.

was going to take Scott to jail, but did not explain why. (R.E. at 18; R. at 64.) Officer Williams did not, however, place Scott under arrest. As Scott attempted to walk around Williams in order to leave the store, Williams drew his service pistol, and shot Scott in the right leg, near the knee. (R.E. at 18; R. at 64).

In his deposition, Officer Williams contradicted most of the essential elements of Scott's account of the incident. (R.E. at 66; R. at 43.) According to Defendant Williams, he believed that Scott posed a threat to him because Scott had his hands in his pockets, and Williams believed that Scott may have had a weapon. (R.E. at 67; R. at 45.) Scott did not, in fact, have a weapon. (R.E. at 68-69; R. at 47-48.) On the basis of these depositions, the circuit court found that there was no genuine issue of material fact as to liability on the part of Dickerson Petroleum, and granted that Defendant's motion for summary judgment.

Regarding the liability of the City of Goodman pursuant to the MTCA, the evidence adduced at trial was also conflicting in some respects. Most of the witnesses, including Officer Williams, testified that, after Williams spoke to the Plaintiff as the Plaintiff and his friends were entering the store, the Plaintiff said something to Williams like "I don't fuck with you like that." (R.E. at 22, *35, 55;* Court Reporter's Transcript [hereinafter "Tr."] at 113, 151, 300.) While Williams testified that he merely offered a greeting to Scott and his companions, according to Scott Williams' first words to him were "you're the man I'm looking for." (R.E. at *35, 55;* Tr. at 151, 300.) Officer Williams did not tell Scott why he was looking for him, and did not attempt to arrest Scott. (R.E. at 35, *56;* Tr. at 151, 302.) Officer Williams told Scott that he was going to jail, but did not tell him why. (R.E. at 44; Tr. at 161.) Although none of the other witnesses heard such a reply from Scott, Officer Williams testified that Scott then told Williams that he was not going to jail. (R.E. at 56; Tr. at 302.) After Scott perceived that Officer Williams was acting aggressively toward him for no apparent reason, Scott resolved merely to leave the store, in

order to avoid a confrontation. (R.E. at 36; Tr. at 152.) According to Scott, his friend Lamarcus Williams, and Melvin Jordan and Marjorie Freeman, who were employees of the convenience store on duty at the time of the incident, Officer Williams would not permit Scott to leave the store, and blocked Scott's exit. (R.E. at 23, 26, 28, 29, 37, 38, 50-51, 52; Tr. at 116, 119, 128, 130, 153, 155, 251-252, *256.)* As Scott attempted to leave, Officer Williams struck Scott in the chest and pushed him back. (R.E. at 37, 50, 56; Tr. at 153, 251, 302.) Scott again attempted to get around Officer Williams and exit the store, and, at that point, Officer Williams grabbed Scott, and shot him in the leg. (R.E. at 26, 29, 39, 58; Tr. at 119, 130, 156, 308.) Scott was standing in the doorway when he was shot. (R.E. at 31; Tr. at 132.) *After* he shot the Plaintiff, Officer Williams then sprayed mace, pepper spray, or a similar chemical agent into the Plaintiff's face and eyes. (R.E. at 32, 40, *58;* Tr. at 133, 157, 308.) Williams handcuffed Scott after he had shot and maced him. (R.E. at 43; Tr. at 160.)

Officer Williams testified that the Plaintiff did not possess a weapon when Williams shot him. (R.E. at 59, 62; Tr. at 315, 327.) Lamarcus Williams confirmed that the Plaintiff did not have a weapon, and did not draw one out of his pocket during the incident. (R.E. at 33; Tr. at 134). Rodney Harrison, a customer in the store at the time, also testified that Scott did not have a weapon. (R.E. at *54;* Tr. at 290.) Melvin Jordan, the convenience store employee, and Lamarcus Williams both testified that Scott did nothing that would amount to a threat against Officer Williams, and that Scott did not attack Williams. (R.E. at 24, 27, 29; Tr. at 117,122, 130.) None of the other witnesses testified that Scott did anything which could be interpreted as a threat to or an attack on Officer Williams. In fact, at his deposition Officer Williams himself testified that Scott was not trying to attack him when Scott was attempting to get around Williams in order to leave the store, but that Scott was just coming into Officer Williams' "personal

space". (RE. at 64; Tr. at 337.) Officer Williams' trial testimony contradicted his earlier deposition testimony on this point. (R.E. at 56, 63; Tr. at 302. 332.).

There was a conflict in the testimony as to whether Scott had his hands in his pockets at the time Officer Williams was blocking Scott's exit from the store. Melvin Jordan, one of the employees of the convenience store, testified that, while having his hands in his pockets was the Plaintiffs "trademark", the Plaintiff's hands were not in his pockets at the time of the shooting incident. (R.E. at 24-25; Tr. at *ii 7-1* 18.) *Lamarcus* Williams also testified that Scott did not have his hands in his pockets, and that the Plaintiff's hands were in the open just before he was shot by Officer Williams. (R.E. at 30, 34; Tr. at 131, 135.) The Plaintiff himself testified that, at the time of incident, he was wearing a fleece sweatshirt, which did not have pockets, because his nursing-home employer did not allow employees to wear shirts or jackets with pockets while at work. (R.E. at 41-42; Tr. at 158-159). The Plaintiff explained, however, that the scrub uniform in which he worked did have pockets in the pants. (R.E. at 45; Tr. at 173). The Plaintiff testified that he had left work just before arriving at the convenience store. (R.E. at 42; Tr. at 159.)

On the other hand, Marjorie Freeman testified that the Plaintiff had his hands in his pockets at the time of the events at issue. (R.E. at 49, 51; Tr. at 250, *252.)* Rodney Harrison also believed that the Plaintiff's hands were in his pockets. (R.E. at 53; Tr. at 287.) Officer Williams testified that Scott had his hands in his pants pockets. (R.E. at 60; Tr. at 322.) After testifying at his deposition that he did not believe that the Plaintiff was attempting to attack him, at trial Officer Williams testified that Scott had his hands in his pockets as if"he was going to get something out of his pocket and use it on me." (R.E. at 57; Tr. at 303.) Officer Williams stated that he shot the Plaintiff while the Plaintiff had his hands in his pockets. (R.E. at 61; Tr. at 325.)

Each side introduced the testimony of an expert witness. The Plaintiffs expert, Lindsey Horton, an expert in police training and tactics, considered the testimony of the witnesses and the other evidence of record and offered his opinion that Officer Williams overreacted to the situation. (R.E. at 46; Tr. at 214.) According to Horton, Officer Williams acted incorrectly in blocking the Plaintiffs exit from the store. (R.E. at 48; Tr. at 217.) The witness found that nothing the Plaintiff did justified Officer Williams' decision to shoot the Plaintiff, and to spray mace in the Plaintiffs eyes after he had shot him. (R.E. at 47: Tr. at 215). On the other hand, Mike Farrell, the City's expert witness, opined that Officer Williams acted properly in that he could have perceived a "high degree of threat level" under the circumstances. (R.E. at 65: Tr. at 354).

SUMMARY OF THE ARGUMENT

The circuit court erred in granting summary judgment to Dickerson Petroleum. The owner or proprietor of business premises is under a duty of reasonable care to protect invitees from unlawful attacks by third parties. This duty is breached, and the breach is the proximate cause of the invitee's harm, if the attack on the invitee was foreseeable. An attack by a third person on an invitee is foreseeable if the landowner had actual or constructive knowledge of the assailant's violent nature, or actual or constructive knowledge that an atmosphere of violence existed on the premises. Evidence of an existing atmosphere of violence may include the overall pattern of criminal activity prior to the event at issue that occurred in the general vicinity of the defendant's business premises, as well as the frequency of criminal activity on the premises.

In the case at bar, there was an issue of fact as to whether Officer Williams' shooting of the Plaintiff was foreseeable. The uncontradicted deposition testimony established that the convenience store owned by Dickerson Petroleum had been the scene of at least one murder and numerous robberies. An atmosphere of violence existed both on and around the Defendant's premises. A factual question existed as to whether this atmosphere of violence caused Defendant Williams to perceive as a threat conduct by the Plaintiff which actually posed no threat to Williams, and to overreact to the situation by employing deadly force against the Plaintiff. The circuit court erred in concluding, as a matter of law, that Dickerson Petroleum owed no duty to the Plaintiff to control its premises so as to prevent a misperception regarding a threat of violence, such that a police officer might unlawfully employ deadly force against an innocent customer of the Defendant's business.

There is a lack of substantial evidence to support the circuit court's finding that the evidence was insufficient to sustain a claim of reckless disregard of the Plaintiff's rights by Melvin Williams and the City of Goodman. In order to recover from a municipality under the MTCA based upon activities relating to police protection, a plaintiff must show that the employee acted in reckless disregard of the plaintiff's safety and well-being. A fair reading of the Plaintiff's Amended Complaint discloses that the Plaintiff alleged reckless disregard on the part of Melvin Williams. Moreover, the evidence presented at trial was sufficient to establish reckless disregard of the Plaintiff's safety and well-being. The evidence demonstrated that Officer Williams acted intentionally in deciding to confront and then to shoot the Plaintiff, and that Officer Williams willfully engaged in conduct, in a high-crime area, which he reasonably should have believed could escalate to the point where he might misperceive the situation as to his own safety. In light of the evidence, the circuit court erred in finding that Officer Williams, and derivatively, the City of Goodman, did not act in reckless disregard of the Plaintiff's safety and well-being, and that, therefore, the Plaintiff could not recover under the MTCA.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DICKERSON PETROLEUM, WHEN THE EVIDENCE PRESENTED A GENUINE ISSUE OF FACT AS TO WHETHER THE DEFENDANT BREACHED ITS DUTY TO PROTECT THE PLAINTIFF FROM INJURY BY MELVIN WILLIAMS, AND WHETHER THE BREACH OF THAT DUTY PROXIMATELY CAUSED THE PLAINTIFF'S HARM.

The Supreme Court employs a de novo standard of review when reviewing orders granting or denying summary judgment. *E.g., Thomas v. Columbia Group, LLC,* - So. 2D -, 2007 WL 4200297 (Miss. 2007). When considering a motion for summary judgment, all evidence, including the admissions in pleadings, answers to interrogatories, depositions, and affidavits, must be viewed in the light most favorable to the nonmoving party. 2007 WL 4200297 at *2. In addition, the nonmoving party is given the benefit of every reasonable doubt. *Id.*

The duty of a business-premises owner to keep his or her premises reasonably safe for invitees includes the duty to exercise reasonable care to protect an invitee from reasonably foreseeable injury at the hands of another patron. *Gatewood v. Sampson,* 812 So. 2d 212 (Miss. 2002); *see also American National Insurance Co. v. Hogue,* 749 So. 2d 1254 (Miss. Ct. App. 2000); *Davis v. Christian Brothers Homes of Jackson, Mississippi,* 957 So. 2d 390 (Miss. Ct. App. 2007) (duty of a premises owner to keep the premises reasonably safe extends to protecting invitees from the foreseeable criminal acts of others). The traditional elements of negligence apply in such a case, such that, in order for the defendant to be held liable, the plaintiff must prove a duty, breach of that duty, proximate causation, and damages or injury. *Thomas,* 2007 WL 4200297 at *22. A patron of a business or a person upon other commercial

premises with the express or implied invitation of the landowner is an invitee for purposes of the duty to protect against attacks by third persons. *See Gatewood,* 812 So. 2d at 220; *Thomas,* 2007 WL 4200297 at *3; *Davis, 957* So. 2d at 399.

The foreseeability of an unlawful attack on an invitee is an element of both the duty of a landowner, *see Davis,* 957 So. 2d at 399, and the proximate cause of the plaintiffs harm. *See Thomas,* 2007 WL 4200297 at *4• An assault is reasonably foreseeable if the premises owner has cause to anticipate such an act. *Davis,* 957 So. 2d at 401. Cause to anticipate the unlawful act of a third party may be imputed to the premises owner by virtue of his or her (1) actual or constructive knowledge of the assailants violent nature, or (2) actual or constructive knowledge that an atmosphere of violence existed on the premises. *Gatewood,* 812 So. 2d at 220; *Davis,* 957 So. 2d at 401; *Thomas,* 2007 WL 4200297 at *4; *Gibson v. Wright,* 870 So. 2d 1250 (Miss. Ct. App. 2004). Evidence of an existing atmosphere of violence may include the overall pattern of criminal activity that occurred in the general vicinity of the defendants business premises prior to the event in question, as well as the frequency of criminal activity on the premises. *Gatewood,* 812 So. 2d at 220; *Davis,* 957 So. 2d at 401; *Thomas,* 2007 WL 4200297 at *4; *Gibson,* 870 So. 2d at 1257. Thus, the amount and type of criminal activity in the general vicinity of the defendants business premises is one factor which should be considered in determining the foreseeability of an assault on an invitee by a third party. *See Grain v. Cleveland Lodge,* 641 So. 2d 1186 (Miss. 1994). Foreseeability as an element of proximate cause, means that a person of ordinary intelligence should have anticipated the dangers that his or her negligent act created for others. *Davis,* 957 So. 2d at 404. Foreseeability does not require that a person anticipate the precise manner in which the

the injury will occur once he or she has created a dangerous situation through his or her negligence. *Id. at 404.* Rather, what is required is the foreseeability of the general nature of the event or harm, not its precise manner or occurrence. *Id.* Whether a premises owner could or could not have anticipated the exact sequence of events leading to the actual assault is of no consequence in determining the foreseeability of the dangers created by the owner's acts or omissions. *Id.*

Applying these rules, the court in *Gatewood,* 812 So. 2d at 220, held that evidence that numerous violent crimes had been reported to the police in the neighborhood of the subject gasoline station within three years prior to the shooting of the plaintiff during a robbery of the station was sufficient to establish an atmosphere of violence around the station, and therefore, foreseeability. A genuine issue of material fact as to foreseeability existed in *Davis, 957* So. 2d at 401, wherein the victim was shot in the *parking lot of an* apartment complex owned by the defendant, when the evidence indicated that there had been several incidents of shooting and gunfire on the premises in the two years preceding the victim's shooting death. Similarly, the court in *Thomas,* 2007 WL 4200297 at **4,* held that there was an issue of material fact, precluding summary judgment for the premises owner, as to whether the assault on the invitee was foreseeable:

> As to the existing atmosphere of violence, there is evidence in the record of several previous shootings on the premises and lots of fighting. Specifically, there were more than five shootings at Shady Lane prior to the incident between Thomas and Young, each of which resulted in death: Matthew Wright in 1993; Harry Smith in 1995; James Clark in 1996; and two unidentified Mexican men in 2002. Again, testimony shows that the apartment manager was aware of these occurrences. In this situation, there is at least enough evidence of foreseeability to establish a question of material fact for the jury to determine.

As to breach of duty, the court in *Gibson,* 870 So. 2d at 1257, held that the evidence supported a finding that the owner of a laundromat breached the duty he owed to a business invitee when the invitee was shot during an attempted robbery of the establishment, given evidence that there was a lack of lighting above an entrance which *was* left unlocked and open at night, that other businesses in the neighborhood had adopted security measures while the defendant had not, and that the defendant had previously hired a security guard to watch the premises at night, but had terminated such security services. A premises owner's duty to protect against foreseeable assaults by third persons is not negated by the owner's claim the victim was in a position to observe and to appreciate fully the peril he was in, when the victim did not willfully place himself in danger. *See Thomas,* 2007 WL 4200297 at *3; *see also Davis,* 957 So. 2d at 404 (genuine issue of material fact precluded summary judgment on issue of whether owner of low-income apartment complex breached duty to protect resident from foreseeable criminal acts of third party, after resident was shot to death in complex's parking lot).

In the ease at bar, as a matter of law Dickerson Petroleum had a duty to protect its business patrons, including Randy Scott, from reasonably foreseeable injury at the hands of other patrons. The undisputed evidence on Dickerson Petroleum's motion for summary judgment established that there had been several assaults and robberies on the premises prior to the Plaintiffs shooting. (R.E. at 70-78). Such evidence raised an issue of fact as to the foreseeability of the harm to Scott, as would establish both the Defendant's duty and the breach of such duty as the proximate cause of the injuries suffered by Scott. This is so because the evidence strongly tended to establish the Defendant's actual or constructive knowledge of an atmosphere of violence existing on the premises. As discussed above, the overall pattern

of criminal activity prior to the event in question is directly relevant to the issue of for foreseeability, and hence, to the premises owner's liability. Here, the circuit court erred in taking this issue from the jury. The evidence raised a genuine issue of fact as to whether the atmosphere of violence on and near the Defendant's premises rendered foreseeable Officer William's assault on Randy Scott, and the circuit court committed legal error in ruling as a matter of law, that the Defendant owed no duty to protect the Plaintiff.

Dickerson Petroleum's citation of *Titus v. Williams,* 844 So. 2d *459 (Miss. 2003),* does not alter this conclusion. In *Titus,* the court held that the victim's death was not proximately caused by the negligence of the defendant convenience store because the victim placed himself in a dangerous position by confronting a known criminal who possessed a gun. *Id.* At 466. In the present case, by contrast, the evidence establishes that the Plaintiff was attempting to *avoid* a confrontation with a *police officer.* Unlike the victim in Titus, nothing in the record suggests that Scott purposely caused a confrontation with a person known to be armed, violent, angry, and looking for a criminal encounter. Consequently, the rule of *Titus* has no application to the question of proximate causation in the case at bar. For the reasons discussed herein, there was a genuine issue of fact as to Dickerson Petroleum's duty to the Plaintiff, and whether a breach of that duty proximately caused the Plaintiffs harm. For all these reasons, the circuit court granted Dickerson Petroleum's motion for summary judgment in error, and its judgment should be reversed.

II. **THERE IS A LACK OF SUBSTANTIAL, CREDIBLE, AND RELIABLE EVIDENCE TO SUPPORT THE CIRCUIT COURT'S FINDING THAT THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CLAIM OF RECKLESS DISREGARD OF THE RIGHTS OF THE PLAINTIFF BY MELVIN WILLIAMS AND THE CITY OF GOODMAN, WHEN THE RECORD INDICATES THAT WILLIAMS STRUCK THE PLAINTIFF WITHOUT PROVOCATION, BLOCKED THE PLAINTIFF'S EXIT FROM THE STORE, AND THEN SHOT THE PLAINTIFF WITHOUT JUSTIFIABLE CAUSE.**

Questions concerning the application of the MTCA are reviewed de novo. *E.g., Mississippi Department of Public SaJèty v. Durn,* 861 So. 2d 990 (Miss. 2003). As to factual findings, the fact finding of a circuit court judge sitting as the trier of fact is given the same deference as that of a chancellor, and the judge's findings are upheld on appeal if they are supported by substantial, credible, and reliable evidence. *Id.* at 994.

In order to establish MTCA liability against a governmental entity based upon activities relating to police protection, the plaintiff must show that the governmental employee acted with reckless disregard of the safety and well-being of the plaintiff:

> **§ 11-46-9. Governmental entities and employees; exemption from liability**
>
> (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 of an employee of a governmental entity engaged in the performance or execution of duties or activities relating to police or fire protection unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury;

Miss. Code Ann. 11-46-9.

In its order dismissing the Plaintiffs claim against the City of Goodman, the circuit court initially addressed the question whether gross negligence and reckless disregard are the same thing. (R.E. at 7; R. at 139.) In its analysis, the court noted that the Plaintiff pointed out that his pleadings alleged that Officer Williams' acts were grossly negligent, and that Williams acted with "complete disregard" of the rights of the Plaintiff. (R.E. at 7, 14; R. at 19, 139.) In fact, the Amended Complaint is reasonably viewed as alleging reckless disregard of the Plaintiffs rights. The term "complete" is defined as "total" or "absolute". *Webster's New Collegiate Dictionary* (1980). "Reckless" is defined as "marked by a lack of proper caution". *Id.* Thus, the Amended Complaint alleged in substance that Officer Williams acted in total disregard of the Plaintiff's rights, while reckless disregard is disregarded marked by a lack of proper caution. Hence, it is apparent that the Plaintiff alleged more than was necessary and sufficient to invoke the reckless-disregard standard of Miss. Code Ann. 11-46-9(c). The question thus becomes whether the evidence was adequate to establish that Officer Williams acted with reckless disregard toward Randy Scott.

An MICA plaintiff has the burden of establishing, by a preponderance of the evidence, that a governmental employee engaged in police-protection activities acted in reckless disregard of the safety and well-being of the plaintiff. *Willing v. Estate of Benz,* 958 So. 2d 1240 (Miss. 2007). It has been held that "reckless disregard", for purposes of the MICA, is a higher standard than gross negligence, and embraces willful *or wanton* conduct. *Id.* at 1247; *Titus,* 844 So. 2d at 468. Willful or wanton conduct consists of knowingly and intentionally doing a thing or wrongful act. *Titus,* 844 So. 2d at 468; *Willing,* 958 So. 2d at 1247; *Broome v. City of Columbia* 952 So. 2d at 1050 (Miss. Ct. App. 2007.

Reckless disregard is normally accompanied by a conscious indifference to the consequences of one's act, amounting almost to a willingness that harm should follow. *Willing,* 958 So. 2d at 1247. It has also been observed that, for purposes of the MICA, reckless disregard is more than mere negligence but less than an intentional act. *Broome,* 952 So. 2d at 1053; *City of Jackson v. Calcote,* 910 So. 2d 1103 (Miss. Ct. App. 2005) (for an officer to be found reckless, the actions must be wanton or willful conduct, indicating a degree of fault somewhere between an intent to do wrong and the mere reasonable risk of harm involved in ordinary negligence). Such conduct usually requires an application of the unreasonable risk of danger, coupled with a conscious indifference to the consequences that were certain to follow: *Broome,* 952 So. 2d at 1052; *see City of Jackson,* 910 So. 2d at 1110 (reckless disregard exists when the conduct involved evinces not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved). Importantly, in determining whether reckless disregard exists for purposes of the police-activity provision of the MICA, the focus is not on whether the officer *intended to harm* the plaintiff, but on whether the officer *intended to do the act that caused harm* to the plaintiff. *Bradley v. McAllister,* 929 So. 2d 377 (Miss. Ct. App 2006). Applying these rules, the court in *City of Jackson,* 910 So. 2d at 1110, held that an officer's actions in shoving the plaintiff arrestee's face into a concrete floor, pressing his fingers into the arrestee's eyes, and rolling the arrestee's face across the concrete floor were willful and wanton in reckless disregard of the arrestee's safety, and that, therefore, the defendant city was not immune from the arrestee's claim under the MICA.

In the case at bar, the circuit court's finding that Officer Williams did not act in reckless disregard of the safety and well-being of Randy Scott is unsupported by substantial, credible, and reliable evidence.

As discussed at length above, the weight of the testimony was clearly that Scott simply desired to leave the store in order to avoid the confrontation with Officer Williams portended by Williams' statement to Scott that "you're the man I'm looking for". The circuit court correctly found that the evidence demonstrated that Scott was not engaged in any criminal activity at the time he was confronted and shot by Williams. (R.E. at 10; R. at 142.) However, the court discounted, without explanation, the undisputed evidence that Scott did not possess a weapon, as well as the weight of the evidence that Scott did nothing that could reasonably be interpreted as posing a threat to Officer Williams and that Scott did not have his hands in his pockets at the time Williams initiated the confrontation. (RE. at 10-12; R. at 142-144.) Based on this error, the circuit court incorrectly found that the Plaintiff had created the hostility and aggression by having his hands in his pockets. The court did not attempt to reconcile the virtually undisputed evidence that Scott was merely attempting to leave the premises with the court's finding that Scott was exhibiting hostility and aggression which reasonably would have placed Officer Williams in fear for his safety. (R.E. at 10-12; R. at 142-144.) The evidence of record clearly fails to support the circuit court's finding that Scott's conduct manifested such hostility and aggression toward Officer Williams as could have justified Officer Williams' shooting of the Plaintiff *after* the Plaintiff had passed Williams in an effort to exit the store. Moreover, the court did not even mention the fact that Officer Williams sprayed mace into the Plaintiffs face after he shot him, and then proceeded to handcuff the Plaintiff For all these reasons, the circuit court's finding that Officer Williams did not act with reckless disregard of the safety and well-being of the Plaintiff is not supported by substantial, credible, and reliable evidence. Therefore, the judgment of the circuit court must be reversed.

CONCLUSION

For all the foregoing reasons, the Plaintiff, Randy Scott, respectfully requests that this Honorable Court reverse the judgment of the circuit court as to Appellees Dickerson Petroleum and the City of Goodman, Mississippi, enter final judgment in favor of the Plaintiff against the City of Goodman, and remand the case for trial against Dickerson Petroleum.

Respectfully submitted,

Randy Scott

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AMENDED CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing Brief of Appellant upon all parties by depositing a copy in the United States Mail, postage prepaid, addressed as follows:

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This the 11th day of January, 2008.

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