IN THE SUPREME COURT OF MISSISSIPPI

MICHAEL A. THOMPSON — **APPELLANT**

VS. — **CASE NO. 2007-CA-01621**

RIZZO FARMS, INC.,
A MISSISSIPPI CORPORATION — **APPELLEE**

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL DISTRICT
OF BOLIVAR COUNTY, MISSISSIPPI
CAUSE NO. 2003-0094

BRIEF OF APPELLEE

(Oral Argument is Not Requested)

EDWARD J. CURRIE, JR. (MS[redacted]
FRANK F. FARMER (MSB #[redacted]
CURRIE JOHNSON GRIFFIN GAINES & MYERS, P.A.
ATTORNEYS FOR APPELLEE
1044 RIVER OAKS DRIVE
POST OFFICE BOX 750
JACKSON, MISSISSIPPI 39205-0750
TELEPHONE: 601-969-1010
FACSIMILE: 601-969-5120

LINDA F. COLEMAN (MSB #[redacted]
LINDA F. COLEMAN ATTORNEY AT LAW
307 COTTON ROW
POST OFFICE BOX 667
CLEVELAND, MISSISSIPPI 38732-0667
TELEPHONE: 662-843-5253
FACSIMILE: 662-843-3972

IN THE SUPREME COURT MISSISSIPPI

MICHAEL A. THOMPSON — APPELLANT

VS. — CASE NO. 2007-CA-01621

RIZZO FARMS, INC.,
A MISSISSIPPI CORPORATION — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

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

1. The Honorable Robert P. Chamberlain, Jr., Circuit Judge, Third Circuit Court District, Hernando, Mississippi.
2. J. Kirkum Povall, S. Todd Jeffries, and W. Hunter Nowell, Poval & Jeffries, P.A., Cleveland, Mississippi, attorneys for Plaintiff/Appellant.
3. Edward J. Currie, Jr. and Frank F. Farmer, Currie Johnson Griffin Gaines & Myers, P.A., Jackson, Mississippi, attorneys for Defendant/Appellee.
4. Linda F. Coleman, Linda F. Coleman Attorney at Law, Cleveland, Mississippi, attorney for Defendant/Appellee.

5. Michael A. Thompson, Gunnison, Mississippi, Plaintiff/Appellant.

6. Phillip Rizzo, President, Rizzo Farms, Inc., Defendant/Appellee.

7. Rodney Brown, employee of Rizzo Farms, Inc.

THIS the 16th day of January, 2009.

EDWARD J. CURRIE, JR. (MSB #5546)
FRANK F. FARMER (MSB #100370)
LINDA F. COLEMAN (MSB #6362)
ATTORNEYS OF RECORD FOR
DEFENDANT/APPELLEE, RIZZO FARMS, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State of Mississippi Cases:

Cases from Other Jurisdictions:

Statutes:

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal arises from a personal injury lawsuit filed by the Plaintiff/Appellant, Bolivar County Deputy Sheriff Michael A. Thompson ("Thompson"), as a result of a car wreck between a 1997 Ford Crown Victoria Sheriff's Department patrol car he was driving and a 2001 Chevrolet pick-up truck driven by Rodney D. Brown,[1] ("Brown") an employee of the Defendant/Appellee, Rizzo Farms, Inc. ("Rizzo Farms"). On August 28, 2002, while both vehicles were east-bound on Highway 8 in Bolivar County, Mississippi, Thompson attempted to overtake a C.P. House Gas Company pick-up truck (this vehicle was also traveling east on Highway 8 behind Brown but was not involved in the wreck) and Brown's vehicle. Immediately prior to the wreck, Brown had begun a left turn into his driveway. The C.P. House Gas Company truck behind Brown had slowed to allow Brown to complete his turn. As Brown actually got into his driveway, Thompson's patrol car, had come up behind and whipped around the C.P. House Gas Company truck at an extremely high rate of speed, struck the front, driver's side of Brown's truck, causing substantial damage to both vehicles and injuries to the Thompson and Brown. The collision occurred off the laned portion of the road in Brown's driveway. At the time of the wreck, both Thompson and Brown were operating their respective vehicles in the normal course and scope of their employment – Thompson with the Bolivar County Sheriff's Department and Brown with Rizzo Farms.

---

[1] Brown is not a party to this lawsuit.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Thompson filed his suit in the Circuit Court of the Second Judicial District of Bolivar County, Mississippi, alleging damages arising from the accident. (R. 1). Rizzo Farms, in its answer, raised numerous defenses to the allegations contained in Thompson's complaint, including the affirmative defense that Thompson's negligence was the sole proximate cause of the accident. (R. 5 - 6).

Prior to trial, both Thompson and Rizzo Farms moved for partial summary judgment regarding the standard of care applicable to Thompson's "fault", if any, bearing on the cause of the accident. Thompson sought a ruling from the trial court that, in order to prove contributory negligence on the part of Thompson, Rizzo Farms would have to meet a "reckless disregard" standard of care, rather than a simple negligence standard, citing the Mississippi Tort Claims Act. (R. 122). Rizzo Farms sought a ruling from the trial court that, in order to prove Thompson's fault, it need only show simple negligence rather than the heightened standard of "reckless disregard" for the safety and well-being of others. (R. 137). The trial court sustained the motion filed by Rizzo Farms and denied Thompson's motion, ruling that "the reckless disregard standard set forth [in the Mississippi Tort Claims Act] refers to the immunity which is provided to a police officer in the appropriate and particular circumstances and is not applicable to a case which that police officer brings alleging the negligence of another, a third party." (T. 26).

Although Thompson called numerous witnesses at trial, the only persons who testified for Thompson who were eyewitnesses to the accident were Thompson himself, and Brown, who was called adversely. (T. 450, T. 271). On the other hand, Rizzo Farms called five independent witnesses who saw the accident. Those witnesses were Jerry Jackson (T. 585), Tony Jones (T. 606), Melissa Stonestreet (E. 1263), Andy Ellis (T. 645) and Jeffery West (T. 658).

After each side rested, Thompson proposed peremptory instruction, P-13, which, if granted, would have instructed the jury that Brown was negligent as a matter of law. (T. 693). The trial court denied Thompson's proposed peremptory instruction, P-13 because the issue of Brown's negligence, if any, was a question for the jury. (T. 694-95). The jury rendered a unanimous verdict for Rizzo Farms, following which a final judgment was entered in favor of Rizzo Farms. (T. 842 - 45, R. 414).

Aggrieved by the verdict, Thompson filed a motion for a new trial, or, in the alternative, for judgment *non obstante veredicto* raising essentially the same issues in this appeal: 1) that certain jurors failed to respond to "relevant" questions during *voir dire* regarding arrest records pertaining to them and their family members, 2) that Thompson's proposed jury instruction P-13 should have been given and that the jury's finding that Thompson's negligence was the sole proximate cause of the wreck was against the overwhelming weight of the evidence, and 3) that Rizzo Farms should have been held to the stricter "reckless disregard" standard of care in proving Thompson's negligence. (R. 416 - 424).

The trial court held a hearing on the post trial motion filed by Thompson and allowed limited testimony from two jurors in order to inquire into their knowledge regarding the arrest records of various members of their families.[2] (T. 875 - 907). The trial court also entertained arguments on the remaining grounds for Thompson's motion for new trial. After considering the testimony of the jurors and Thompson, who was called as a witness by Rizzo Farms, the trial court correctly denied Thompson's post-trial motion. (R. 625).

2

One juror who was the subject of Thompson's motion, Leon Holloman, could not be found to be served with a subpoena. (T. 881).

C. FACTS

On August 28, 2002, Rodney Brown was traveling east on Highway 8 just outside of Cleveland, Mississippi, on his way home from work. (T. 285). Prior to attempting to make a left turn into his driveway, Brown engaged his turn signal, looked into his side mirror to check for vehicles behind him, looked in front of him for on-coming traffic, and seeing neither, began a lefthand turn into his driveway. (T. 315 - 16; E. 1266). At the time, a C.P. House Gas Company truck operated by Jerry Jackson was traveling behind Brown. (T. 587, T. 607). After Brown began his left turn, Thompson, who claimed that he was responding to an emergency domestic disturbance call and operating a Bolivar County Sheriff's Department patrol car at an extremely high rate of speed,[3] approached the C.P. House Gas Company truck behind Brown and "zipped" out from behind that truck in an attempt to pass it and Brown's vehicle. Seeing Brown's vehicle turning left, Thompson went off the road to his left and collided with Brown's vehicle in Brown's driveway. (T. 590, 604 - 05). There was substantial testimony supporting the conclusion that Brown began his left turn well before Thompson began his passing maneuver. (T. 604, E. 1265 - 66, T. 648 - 51, T. 678).

1) Thompson was Required to Engage the Emergency Lights and Siren if He Was on an Emergency Call

While the question of whether Thompson was actually responding to an emergency call at the time of the collision was contested by Rizzo Farms, audible and visual warnings were required by law if Thompson was responding to an emergency call and driving in excess of the

---

3 Thompson testified that he was traveling at approximately 65 or 70 miles per hour in the 55 mile per hour speed zone. (T. 461). However, Jeffery West estimated Thompson's speed at 85 miles per hour. (T. 661).

posted speed limit. Mississippi Code Annotated § 63-3-517 (1972) mandates that emergency vehicles may only exceed the speed limit "when responding to emergency calls and the drivers thereof sound audible signal by bell, siren, or exhaust whistle." The Bolivar County Sheriff's Department regulations additionally required that when responding to an emergency call "blue lights will be used at all times". (E. 1250).

These requirements were confirmed by the testimony of several deputies of the Bolivar County Sheriff's Department. Deputy Charles Gilmer testified that **both** the emergency lights and siren must be engaged if Thompson was responding to an emergency call and that, if either the emergency lights **or** siren were not engaged while responding to such a call, Thompson would be in violation of the Bolivar County Sheriff's Department's regulations. (T. 358). Thompson, himself, also testified that he was required to have both the emergency lights and siren activated if he was responding to an emergency call. (T. 490).

2) Thompson's Case in Chief

Thompson questioned twelve (12) witnesses during his case in chief, (most of whose testimony is not relevant to this appeal), including fellow officers of the law in Bolivar County. However, Thompson called only two witnesses who actually witnessed the accident, himself and Brown (adversely). His other witnesses either arrived at the scene some time after the accident or were never at the accident scene at all.

Thompson called Brown as an adverse witness, who testified that, prior to commencing his left turn into his driveway, he engaged his turn signal, looked into his side mirror where he did not see any vehicles in the passing lane, and began his turn. (T. 290 - 91). Brown further testified that had he seen such a vehicle or heard the siren of an emergency vehicle, he would not have attempted to turn into his driveway. (T. 290, 312). When asked whether he saw the C.P.

House Gas Company truck, Brown testified that he did not remember if he saw it. (T. 290, 296). However, Brown did recall that when he looked in his side mirror to prepare for his left turn, nothing was in the passing lane. (T. 293, 296).

Thompson testified that he was dispatched from the Bolivar County Sheriff's Department to assist another deputy, Gerald Wesley, in responding to a domestic disturbance call.[4] (T. 458). He testified that he treated this call as an emergency situation and engaged both his emergency lights and his siren when he left the station and proceeded down Highway 8 towards where the accident happened, which was approximately half a mile from the Sheriff's station. (T. 402, 458 - 60). According to the Bolivar County Sheriff's Department's "call log", Thompson was dispatched at 11:20am. (E. 604).

Thompson testified that while he was traveling east on Highway 8 on his way to answer the domestic disturbance call, he passed deputy Murray Roark, who was traveling in the opposite direction, and at that time, had his emergency lights and siren engaged. (T. 374). Roark testified that he called Thompson on the radio when they passed each other and asked if he needed assistance. (T. 376). Roark testified that when he passed Thompson on Highway 8, approximately a half mile from the scene of the wreck, Thompson's emergency lights were activated. (T. 376). However, on cross-examination Roark admitted that he did not know if the emergency lights were engaged at the time of the accident. (T. 383). Roark also could not testify that Thompson's siren was activated when they passed each other. (T. 378).

Rhonda Jenkins was working as a dispatcher for the Bolivar County Sheriff's Department

---

4

During this call, Thompson was referred to as "SO-10". (T. 425). The deputy he was going to assist, Gerald Wesley, was dispatched from a different location than Thompson, and was referred to as "SO-6".

on the day of the accident and testified that she overheard Thompson's conversation with Roark on the Sheriff's office radio frequency. (T. 427 - 28). She testified that she could hear Thompson's siren in the background during that conversation.[5] (T. 428). However, Jenkins admitted on cross-examination that she did not know how much time elapsed from when she heard Thompson's siren over the Sheriff's office radio frequency, to the time the accident took place. (T. 437). In fact, she admitted that she did not know if Thompson's siren was activated at all at the time of the accident. (T. 437). Other than Thompson himself, Jenkins was the only witness who testified that Thompson's siren was activated **at any time** on the day of the accident.

Deputy Wesley testified that he arrived at the location of the domestic disturbance call, in Cleveland at 11:22 a.m., and then issued a "1025" call at 11:23am, meaning that no back-up was needed and Thompson **need not respond to the call**. (E. 604, T. 431 - 32). Jenkins testified that she heard the "1025" at 11:23am and that Thompson should have heard that call because Wesley was using the same Sheriff's office radio frequency that Thompson was using. (T. 431, 436 - 37). Thompson, on the other hand, testified that he did not receive a "1025." (T. 484). The accident happened at 11:25am. (E. 1).

Thompson testified that if he had heard the "1025," he would have slowed to the speed limit[6] and returned to the station because it would be against the Bolivar County Sheriff's

---

5

Jenkins' testimony that she heard the siren was impeached on cross examination. (T.433 - 35).

6

The speed limit on the relevant portion of Highway 8 in Bolivar County is posted at 55 miles per hour. (T. 497 - 98).

Department procedures to travel in excess of the speed limit with emergency lights and siren engaged, if the emergency call was cancelled and he was "1025." (T. 497 - 98). According to the Bolivar County Sheriff's Department Driving Procedures, if a deputy is not operating his emergency vehicle in "pursuit" or during an "emergency condition", then the deputy is to "[o]bey all traffic laws including driving within posted speed limits" and is required to "[d]rive defensively." (E. 1249).

With regard to the accident itself, Thompson testified that, while traveling east on Highway 8 to answer the domestic disturbance call, he came upon the east-bound C.P. House Gas Company truck. (T. 461). He further testified that he accelerated to 65 or 70 miles per hour in order to pass that truck. (T. 461). During cross-examination, Thompson testified that he "slammed on the brakes" as soon as he saw Brown's vehicle (which was in front of the gas truck) turn into his driveway. (T. 493). Furthermore, Thompson testified that he was 75 or 80 yards from Brown when he first saw Brown turning into his driveway, when he began applying his brakes.[7] (T. 494 - 96). Despite Thompson's testimony that he accelerated to 65 to 70 miles per hour in order to pass the gas truck, he went on to testify that, after he "slammed on" his brakes and traveled an additional 75 to 80 yards, he was still traveling 65 to 70 mile per hour at the point of impact with Brown. (T. 462).

A major issue in the trial was whether, at the time of the accident, Thompson had engaged his emergency lights and siren so as to provide a warning to other motorists, such as Brown, that an emergency vehicle was approaching. Thompson testified that he was already in

---

7

Thompson's testimony was conflicting in that he also testified that he was only 65, 70, or 80 feet from Brown when Brown began his turn. (T. 462).

the "passing" lane when Brown began his left turn into his driveway. (T. 461). He also testified that his emergency lights and siren were engaged at the time of the accident. (T. 462 - 63). However, the testimony of every other witness who observed the accident contradicted Thompson's testimony on both of those issues. Thompson admitted during cross-examination that failure to use his siren and lights would prevent the warning of an emergency vehicle's presence from reaching other motorists. (T. 491). In fact, Thompson admitted that he knew that the Bolivar County Sheriff's Office guidelines required the use of emergency lights and siren when responding to an emergency call and when exceeding the posted speed limit, although he had not read those guidelines. (T. 496). He also admitted that he should have seen Brown's turn signal, if it were engaged. (T. 493).

Thompson called two witnesses, Conservation Officer Lee Ellington and Undersheriff Charles Anderson, who testified that the emergency light that had been mounted on the dash of Thompson's vehicle was still activated when they arrived at the scene several minutes after the collision. (T. 392, T.407). However, this testimony was impeached. Under cross-examination, Anderson admitted that since the motor in Thompson's vehicle was not running when he arrived at the scene, the flashing emergency light would have to be operating on the vehicle battery power. (T. 413). The battery was located at the front right of the vehicle. (T408). Additionally, Deputy Charles Gilmer, who testified that he installed the emergency lights in Thompson's vehicle, said: "The vehicle was a total loss. The entire front cap area was obliterated in the collision itself." (T. 343). Gilmer's testimony was confirmed by Anderson's testimony on cross-examination that the battery was destroyed. (T. 414). Gilmer also testified, based on his

knowledge of Thompson's vehicle,[8] that the wiring for the dash emergency light runs through a "track" and that that "wiring would have been cut" during the collision. (T. 345). Gilmer went on to testify that if power to the dash light was disrupted, then it would stop working. (T. 351).

Thompson concluded his case-in-chief with an accident re-construction expert, Brett Alexander, who admitted that he first visited the scene of the accident some one and a half years after the wreck occurred and that he did not interview any of the people who actually witnessed the accident. (T. 562 - 63). Alexander testified that he calculated the length of time Thompson would be in the passing lane (and thus how long he would be visible to Brown) using the "lane-change" formula. (T. 547, 552). However, in order to use that formula, Alexander assumed that Thompson was traveling east on Highway 8 at 70 miles per hour when he began his passing maneuver. (T. 566).

When cross-examined about his calculations, Alexander admitted that if Thompson was traveling at rate of speed higher than his assumption, then Thompson would have been in the passing lane for a shorter period of time (and thus visible in Brown's side mirror for fewer seconds).[9] He also admitted that his calculations regarding the speed of Thompson's vehicle based on the distance traveled by his vehicle after he began braking would be drastically different depending on which version of Thompson's testimony the calculations were based upon – i.e., whether the he began braking at 75 or 80 yards or 75 or 80 feet from Brown's vehicle . (T. 567 -

---

8

In addition to having installed the emergency equipment in Thompson's vehicle, Gilmer testified that he was issued that vehicle prior to it being issued to Thompson. (T. 343).

9

West testified that Thompson was traveling at a rate of 85 miles per hour at the time he changed lanes. (T. 661).

70).

3) Rizzo Farms' Case in Chief

Five independent witnesses testified for Rizzo Farms that when Thompson began his passing maneuver and subsequently slammed into Brown's vehicle, Thompson was traveling at an extremely high rate of speed, that his emergency warning lights were not engaged and that his siren was not engaged. (T. 589, 592; T. 609 -10, 612; E. 1265, 1268; T. 649 - 50; T. 661 - 662). In this connection, it is noteworthy that cross-examination of Thompson's witnesses created a real question whether Thompson was even on an "emergency call" at the time of the accident.

Jerry Jackson was driving the C.P. House Gas Company truck behind Brown. (T. 588). Jackson testified that Brown slowed down and began his turn with his left turn signal engaged, **before Thompson moved into the passing lane**: "[Brown's] vehicle in front of me had given his signal to turn off, and as that vehicle was turning off the highway – he had gotten over off into the lane further to get off the highway, that's when I noticed [Thompson] began to come around me . . . ." (T. 588). Jackson later testified that "[Thompson] was behind my vehicle when I first glanced and noticed him. Then the next thing I know that [*sic*] he was zipping on around me." (T. 604). When Thompson did enter the passing lane, Jackson testified that Thompson's siren and emergency lights were not activated. (T. 589). Jackson also testified that Brown's turn into his driveway was almost complete when Thompson's vehicle hit Brown's vehicle. (T. 590).

Tony Jones was a passenger in the C.P. House Gas Company truck driven by Jackson. (T. 607). Jones testified that Jackson began to slow down in order to allow Brown, who had his turn signal engaged, to complete his turn into his driveway. (T. 609). Jones testified that after the gas truck began slowing down, Thompson came around the side of the gas truck and struck

Brown. (T. 609). Jones also testified that Thompson was traveling "fast" and did not have his emergency lights or siren activated at the time of the wreck. (T. 610 - 11).

Melissa Stonestreet and Andy Ellis both witnessed the accident from Stonestreet's apartment balcony, located on the north side of Highway 8 directly in front of the accident scene. (T. 647, E. 1264). Stonestreet testified that Thompson appeared "out of nowhere" at an excessive speed and without his emergency lights or siren engaged and struck Brown, who had almost completed his left turn into his driveway. (E. 1265 - 68). Stonestreet testified that Brown's turn signal was engaged prior to his turn. (E. 1265). Ellis testified: "Brown was coming eastbound down the highway and had slowed with his turn signal on to turn into his driveway. He was approximately midway through the turn or over midway through the turn, and [Thompson] came also eastbound in the other lane and hit the front of his truck." (T. 646, 648). Ellis also testified that neither Thompson's emergency lights nor siren were activated at the time of nor after the wreck. (T. 649 - 50).

Jeffery West was a postal carrier delivering mail to the house next door to Brown's when the accident occurred. (T. 658). West was traveling in the opposite direction of Brown and was east of the accident when it happened. As such, he was facing the accident scene. (T. 660). West testified that Brown had started his turn with his turn signal engaged before Thompson entered the passing lane. In other words, "out of nowhere appeared [Thompson's] car and struck [Brown's vehicle] in the side." (T. 660 - 61, 668). He also testified that Thompson was traveling at 85 miles per hour when he moved into the passing lane and that the emergency lights and siren on Thompson's vehicle were not activated. (T. 661).

Joseph Fioranelli was at his shop located approximately three tenths of a mile west of the scene of the accident on Highway 8 when it occurred. (T. 620). While he did not witness the

accident, he testified that he did not hear any sirens pass his shop while he was there. (T. 624). He also testified that he immediately went to the scene of the accident and observed the vehicles. He testified that he saw no activated emergency lights on Thompson's vehicle. (T. 625).

Following the evidence, the jury returned a unanimous verdict in favor of Rizzo Farms. (T. 842 - 45).

4) Post-Trial Proceedings

After the trial court entered the final judgment, Thompson filed a motion for a new trial arguing that certain jurors failed to respond to "relevant" questions regarding the arrest histories of themselves and their family members during *voir dire*, that the verdict was against the overwhelming weight of the evidence such that Thompson should have been granted a peremptory instruction that Brown was negligent as a matter of law, and that the issue of Thompson's fault should have been held to the "reckless disregard" standard. (R. 416). At the hearing on Thompson's post-trial motion, the trial court allow Thompson to call certain jurors to the stand to allow limited testimony regarding the questions Thompson alleged the jurors should have answered during *voir dire.* Thompson, himself, was also called as an adverse witness at that hearing by Rizzo Farms.

Regarding the juror issue, counsel for Thompson asked three questions during *voir dire* to which Thompson felt certain jurors should have responded. The first "question" at issue was a vague and ambiguous "catch-all" statement:

> There may be some questions that I ask where I touch on a subject but maybe I don't zero right into the specific information that you have. My wife tells me that all the time that she doesn't understand me sometimes and that I'm confusing. So I am not – I'm subject to doing that today, and I would like for you – if you think I am close to asking some information, but maybe I am not hitting exactly on point, its okay to raise your hand and say "does this apply?"

(T. 159). The second question to which Thompson alleged certain jurors should have responded was whether Thompson had ever investigated them or their family members:

> Deputy Thompson has been in law enforcement ten years, as I mentioned, in different capacities working for the people of Bolivar County. Mack Grimmett is the sheriff. Thinking back, has anyone thought about either yourself or a family member who might have been involved in an incident or situation where Officer Thompson, either working alone or with someone else in Bolivar County, may have had to, for instance, investigate you or your family member for some kind of alleged problem?

(T. 165). The final question to which Thompson alleged certain jurors should have responded was whether Thompson had ever arrested any of the potential jurors:

> But is there anybody that in the last ten years that Mike has worked been arrested by Mike? That's kind of the base question that I need to ask. I am not asking you what reason. We have all had our problems, me included, but what is it - - if there is something, we would like to know, and if you need to, we can address it in chambers out of the presence of everyone else. Has anyone been in that situation?

(T. 165 - 66). The jurors at issue in this appeal did not respond to these questions.

Rachel Ramiz was the first juror called by Thompson to testify at the post-trial hearing. (T. 883). Ramiz has two family members – her sister and her cousin – who had arrest histories at the time of trial. (T. 884, 886). According to Thompson, he arrested Ramiz' sister two years prior to the trial. (T. 879, 884). When asked why she did not respond to the questions posed by Thompson's lawyers during *voir dire*, Ramiz testified that she didn't know that it was Officer Thompson who arrested her sister. (T. 886). According to Thompson, he also investigated Ramiz' cousin, who was arrested by the Bolivar County Sheriff's Department one year before the trial. (T. 887). When asked why she did not respond to the questions posed by Thompson's lawyers with regard to her cousin, Ramiz testified: "I don't know if it was with the Bolivar County Sheriff's Department or with the Rosedale Police Department because of what – his offense happened in Rosedale. So I just assumed that it was with Rosedale." (T. 886). She went

on to testify that she did not have anything to do with her cousin and that she did not know that Thompson investigated him. (T. 887). Finally, when asked why she did not respond to the "catch-all" question, Ramiz testified that she did not understand the question to be requesting the "full extent" of information that Thompson apparently desired. (T. 889).

Chedra Bolden was the next juror called to testify at the post-trial hearing. (T. 890). Bolden has two family members – both first cousins – who had arrest histories with the Bolivar County Sheriff's Department at the time the trial began in 2006. (T. 892 - 93). However, neither of her cousins were arrested or investigated by Thompson. (T. 892, 894). Furthermore, Bolden testified that she did not know the details of either of her cousins' arrests. (T. 892, 894).

Thompson also suggests another juror, Leon Holloman, was untruthful during *voir dire*. According to Thompson, Holloman was arrested by an officer listed on his witness list, Frazier Nash. (T. 881). However, Nash was never called during the trial of this matter. Furthermore, no testimony was taken from Holloman and no evidence, whatsoever, was presented that would support a conclusion that he knew the identity of the individual who arrested him some three (3) years prior to the trial of the instant case. (T. 881).

The last witness to testify at the post-trial hearing was Thompson himself, called adversely by Rizzo Farms. (T. 896). He testified that he learned of the arrests of Holloman and the family members of Bolden and Ramiz some two or three months after the trial.[10] (T. 896). However, he also testified that if he had wanted to obtain the arrest history of any particular

---

10

Thompson's motion for a new trial was filed on October 30, 2006, only forty-five (45) days after the trial of this matter concluded. Thompson's testimony that he first learned of these arrest histories two or three months after the trial is curious in light of the fact that the arrest histories were made part of the motion

person – such as those persons on the list of potential jurors provided to the parties prior to the trial – he would simply give that person's name to the "dispatcher or the lady working in the office there, and she would obtain it for me." (T. 898).

After considering the testimony of the witnesses at the post-trial hearing, the applicable law, and argument of counsel, the Court correctly denied Thompson's post-trial motion. (R. 625).

SUMMARY OF THE ARGUMENT

The evidence presented at the trial of this cause was, and remains, sufficient to support the unanimous verdict in favor of Rizzo Farms. Furthermore, the trial court committed no reversible error that would require a new trial on any of the issues.

The trial court correctly denied Thompson's proposed peremptory instruction because such an instruction was not supported by the evidence in light of the conflicting evidence and would have, therefore, invaded the province of a duly empaneled Bolivar County jury. Furthermore, the facts in evidence DID NOT point so overwhelmingly in favor of Thompson that reasonable men could not have arrived at a contrary verdict.

The trial court correctly denied Thompson's motion for a new trial based on allegations of jury bias. Here again, Thompson failed to satisfy the burden to support such a motion and the trial court did not abuse its discretion in its ruling. Plaintiff's questions during *voir dire* to the jury panel pertaining to arrests by Thompson of jurors and their family members in the context now advanced by Thompson with respect to jurors Holloman and Bolden were vague and ambiguous. Because these jurors were not asked direct and unambiguous questions about the arrest histories of themselves and their family members where those questions pertained only to the Plaintiff, they were under no obligation to volunteer any information not specifically

requested. With respect to Juror Ramiz, Thompson cannot demonstrate that she had substantial knowledge of the information sought by the *voir dire* questions and, as demonstrated Ramiz' testimony, were vague and ambiguous. The trial court correctly denied Thompson's motion for a new trial on this ground.

Finally, the Mississippi Tort Claims Act does not place a higher standard of care upon Rizzo Farms to prove its defense of comparative fault by Thompson. The trial court correctly distinguished between the negligence standard in an action filed against a law enforcement officer who is protected, in limited circumstances, by the Mississippi Tort Claims Act, as opposed to a defendant sued by that officer in a negligence action, asserting a contributory negligence defense. As a result, the trial court correctly interpreted the legal standard of care applicable to the fault, if any, of Thompson. The trial court correctly denied Thompson's motion for partial summary judgment and correctly granted the motion filed by Rizzo Farms.

Because no reversible error is present in the record of this case, Rizzo Farms respectfully requests that this Court affirm the trial court's rulings on each issue and deny Thompson's request for a reversal.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED THOMPSON'S MOTION FOR A DIRECTED VERDICT AND CORRECTLY REFUSED HIS PEREMPTORY INSTRUCTION P-13

At the close of the evidence at the trial of this matter, Thompson requested a directed verdict via his proposed peremptory jury instruction P-13, which would have erroneously instructed the jury that Brown was negligent as a matter of law:

> You are instructed that Rodney Brown was negligent, as a matter of law, for his failure to maintain a proper lookout for the vehicle driven by Michael A. Thompson in an effort to ascertain his location before executing the turn to ensure that the turn could be done with reasonable safety.
>
> Given the negligence of Rodney Brown, as a matter of law, you are instructed to consider his negligence in reaching your verdict. This negligence should be considered in accordance with the additional instructions provided to you.

(R. 349). Rizzo Farms objected to Thompson's proposed peremptory jury instruction P-13 because it was without any factual support in the evidence. (T. 693). The trial court correctly denied Thompson's motion for a directed verdict and refused to give proposed peremptory jury instruction P-13, stating:

> P-13 will be denied. My recollection of the testimony is that – well, I guess, most importantly, that's a jury issue is the main thing about that instruction. Mr. Brown, I guess, at the very least the last witness we heard from – I don't recall his name now – was that Mr. Brown had begun his turn when he first saw the police car, the sheriff's deputy's car. I think that is a question for the jury, and not an appropriate instruction for peremptory type instruction. P-13 will be denied.

(T. 694-95).

The standard for review for the denial of a peremptory instruction, motions for directed verdicts and judgment notwithstanding the verdict is well-established in Mississippi:

> [T]his Court will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand, if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Walmart Stores, Inc. v. Johnson, 807 So. 2d 382, 389 (Miss. 2001) (citations omitted). The trial correctly refused instruction P-13 because the testimony of numerous witnesses adduced evidence of such quality and weight that reasonable and fair minded jurors in the exercise of

impartial judgment might have reached different conclusions.[11]

Thompson erroneously draws the "inescapable conclusion" in his brief that Brown failed to look in his rearview or side view mirrors at any time, and as a result, he is somehow entitled to a reversal of the jury's verdict. Testimony elicited from Brown by Thompson clearly contradicts that conclusion. Brown repeatedly testified that he looked in his rearview mirror prior to making his left hand turn and saw no vehicles in the passing lane. (T. 290, 291, 293, 296).

Thompson also mis-characterizes Brown's testimony regarding what he saw when he looked in his side mirror prior to beginning his left turn. Brown testified that he did look in his side mirror and did not remember IF he saw the C. P. House Gas Company truck. (T. 290). The mere fact that Brown does not recall if he saw the truck operated by C. P. House Gas Company does not indicate that he failed to look. It simply establishes that, while testifying at the trial of this matter, Brown did not recall if he saw that vehicle after looking in his side mirror. In any event, whether or not Brown saw that particular truck is irrelevant because it was not involved in the collision. The vehicle that struck Brown was operated by Thompson and Brown testified, unequivocally, that he did not see Thompson's vehicle in the passing lane because it was not there when he looked in his side mirror. (T. 293, 296). Brown testified that had he seen the vehicle attempting to pass him when he looked into his mirror, then he would not have proceeded with his turn. (T. 290).

No witness for Thompson offered any testimony that Brown failed to check his side mirror prior to beginning the left turn into his driveway. In fact, Thompson is only able to reach

---

11

Though fair and impartial jurors could have reached different conclusions, the twelve-member jury panel in this case reached a unanimous verdict in favor of Rizzo Farms. (T. 843 - 45).

this unreasonable conclusion by drawing his own unlikely inference from the evidence presented. The jury in this matter obviously did not accept Thompson's unlikely inference that Brown failed to check his side mirror prior to turning left into his driveway and, instead, accepted as more credible the testimony presented by Brown and a host of independent eye-witnesses to the accident.

Witnesses Jones, Stonestreet, and West all testified that Thompson was traveling at a high rate of speed prior to the collision. (T. 612, E. 1265, T. 661, T. 462). Additionally, Jackson saw Thompson "zip" out from behind the C. P. House Gas Company truck immediately prior to the collision while Brown was already making his left hand turn. (T. 604 - 05). Jackson, Jones, Stonestreet, Ellis and West all testified that Thompson was proceeding without his emergency lights or siren activated when he attempted to pass the C. P. House Gas Company truck and Brown. (T.589, T. 609 - 10, E. 1268, T. 649, T. 661).

The call log maintained by the Bolivar County Sheriff's Department and entered into evidence at trial established a time-line for the entire sequence of events on the morning of the accident, and provides support for clear inferences that could be drawn by the jury. (E. 603 - 05). At 11:20 a.m. both Wesley and Thompson were dispatched to a domestic disturbance call at #4 Hyman Lucas in Cleveland. (E. 604). At 11:22am Wesley arrived at the location of the call and radioed in that no further assistance was needed. (E. 604). At 11:23am, the call log indicates that Thompson was "off" the call, or "1025." (E. 604). According to the call log, Thompson was involved in the motor vehicle accident at 11:26 a.m. (E. 604).

"It is the province of the jury to determine the weight and worth of testimony, and the credibility of the witness." *Independent Life & Acc. Ins. Co. v. Mullins*, 173 So. 2d 663, 665 (Miss. 1965) (citing *Martin v. Illinois Cent. R. Co.*, 149 So.2d 344 (1963); *Johnson v.*

Richardson, 108 So.2d 194 (1959)). Following their deliberations, the jury accepted as more credible and attributed more weight to the evidence present by Rizzo Farms, or at least determined that Thompson had failed to meet his burden of proof.

Likewise, this Court must not only consider the evidence in the light most favorable to Rizzo Farms, but also accept all the favorable inferences that may be drawn reasonably from the testimony and evidence. *Johnson,* 807 So. 2d at 389. One set of inferences the jury may have reasonably drawn in reaching its unanimous verdict is supported by the testimony of numerous witnesses and the evidence: If Thompson received the "1025" call,[12] he testified that he would have turned off his lights and siren. (T. 497 - 98). Based on that testimony and the fact that the call log indicates that Thompson was "1025", or off the emergency call, two to three minutes prior to the collision, a jury could reasonably infer that Thompson did turn off his lights and his siren after he passed Roark and after Jenkins overheard a conversation between the two, but prior to coming up on the C. P. House Gas Company truck which had slowed to allow Brown to turn into his driveway. A jury could also reasonably infer, based on the testimony of numerous witnesses, that Thompson failed to slow to the posted speed limit between the time he turned off his emergency lights and siren and the time he passed the C. P. House Gas Company truck and was, therefore, in violation of both Mississippi law and the Bolivar County Sheriff's Department regulations.

On the other hand, the jury could have reasonably inferred that Thompson was still on the emergency call but was not using his siren and emergency lights as required by statute and

---

12

Jenkins testified that Thompson should have heard the "1025s" because he was on the Sheriff's Department radio frequency after he was dispatched.

Sheriff's department regulations, while exceeding the speed limit, and zipped into the passing lane. The jury also could have reasonably inferred that Thompson appeared "out of nowhere" in an effort to overtake the C. P. House Gas Company truck and Brown immediately after Brown checked his side-view mirror and began his left-hand turn. As a result, Thompson, without emergency lights and siren and traveling in excess of the posted speed limit, had not given the required warnings to other motorists. Moreover, jurors could reasonably infer that Thompson's speed, when compounded with the absence of such warnings, caused Thompson's vehicle to be unseen and unheard when Brown checked his side mirror prior to making his left hand turn. Accordingly, a jury could reasonably infer that this breach of duty was the sole proximate cause of the collision. All of these reasonable inferences are supported by the evidence and numerous eye-witnesses to the accident.

Thompson relies on *Campbell v. Schmidt*, 195 So. 2d 87 (Miss. 1967), for the argument that Brown is "charged with seeing that which [he] should have seen." *Campbell*, 195 So. 2d at 89. In *Campbell*, the defendant pulled to within a car length of a stop sign that was approximately forty-five feet from the intersection of a local road and U. S. Highway 84. *Id.* at 88. Then, after looking to her right and left, and not seeing any traffic approaching, the defendant"'stayed there quite a while' before proceeding upon the highway, but she did not look again to her right (west) before going on the highway." *Id.* This Court pointed out that the facts of *Campbell* established that the defendant "not only stayed some time at the place where she stopped, a considerable distance from the highway, but after having remained there some time, she drove on the highway without looking to the west." *Id.* at 89. "It is apparent that if the defendant . . . had looked to the west, she would have seen the truck approaching the intersection for some distance." *Id.* As opposed to the facts in this case, the defendant in *Campbell* stopped

some distance from an intersection and after having looked both ways, remained there for some time, before she proceeded through that intersection without again looking both ways a second time to determine whether or not the course of travel was still clear. *Id.*

The facts of the case at bar are easily distinguishable from *Campbell* for two reasons. First and foremost, in *Campbell*, "not only was negligence shown by the overwhelming testimony of the witnesses, **but also from the admission of the defendant**, Mrs. Schmidt, that she was negligent and that her negligence was a direct and proximate cause of the accident." *Id.* (emphasis added). Second, in the case at bar, Brown's testimony establishes that he engaged his turn signal, slowed for the purpose of making his turn, looked in his side mirror and seeing nothing, proceeded with his turn into his driveway. (T. 290 - 91). Brown did not look and then pause for a period of time before proceeding with his turn as in *Campbell*. Additionally, at no time in the case at bar did Brown or Rizzo Farms admit that Brown was negligent and that his negligence was a direct and proximate cause of the collision, as occurred in *Campbell*. *Campbell*, 195 So. 2d at 89.

In *Andrews v. Jitney Jungle Stores of America, Inc.*, 537 So. 2d 447 (Miss. 1989), the plaintiff, a City of Jackson Police Officer, was driving a patrol car which collided with a tractor trailer rig operated by an employee of the Jitney Jungle. *Andrews,* 537 So. 2d at 448. The officer testified that he was dispatched in response to an emergency call about gun shots having been fired when he passed through the intersection of Amite Street and Mill Street with his flashing emergency lights engaged. *Id.* However, at the same time, the driver of the Jitney Jungle tractor truck was also approaching the intersection. *Id.* Neither motorist saw each other prior to entering the intersection due to a building located on the corner of that intersection. *Id.* As a result, a collision occurred and the police officer sued Jitney Jungle Stores of America, Inc.

alleging that the driver of the tractor trailer rig was negligent. *Id.* at 449. Like the case at bar, the jury in *Andrews* returned a verdict in favor of the defendant. *Id.* The plaintiff appealed arguing that the defendant was negligent, as a matter of law, for failing to yield the right-of-way to an emergency vehicle. *Id.*

In affirming the jury verdict, the Supreme Court in *Andrews* pointed out that the police officer in that action ignored the fact that an emergency vehicle is not given the right to disregard safety laws without "first ascertaining that he can do so safely." *Id.* The Supreme Court also distinguished *Campbell* by noting that, unlike the *Andrews* case (and the case at bar), the driver's failure in *Campbell* to look at all was negligence as a matter of law. *Id.* at 450 (citing *Campbell*, 195 So. 2d at 89). In *Andrews*, the Supreme Court noted that the defendant was unable to see the plaintiff due to the building that was blocking his view of the police vehicle. *Id.* Likewise, in the case at bar, Brown did not fail to look in his side mirror. Instead, he checked his side mirror and noted that nothing was in the passing lane because Thompson had not yet "zipped" out from behind the C. P. Gas House Company truck that was between Thompson's vehicle and Brown's pick-up truck.

Based on the overwhelming weight of the evidence presented, the trial court correctly denied Thompson's motion for a directed verdict and correctly refused to give Thompson's proposed peremptory instruction P-13. Therefore, this assignment of error is without merit.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT THOMPSON'S MOTION FOR A NEW TRIAL BASED ON CERTAIN JURORS' ALLEGED FAILURE TO RESPOND TO THOMPSON'S AMBIGUOUS AND VAGUE *VOIR DIRE* QUESTIONS

The denial of a motion for a new trial is a matter within the trial court's sound discretion. *White v. Yellow Freight System, Inc.*, 95 So. 2d 506, 510 (Miss. 2004) (citing *Green v. Grant*,

641 So. 2d 1203, 1207 (Miss. 1994)). On appeal, appellate courts may reverse the granting of a new trial only when the trial court has abused its discretion. *Id.* (citing *Green,* 641, So. 2d at 1207). "The existence of trial court discretion, as a matter of law and logic, necessarily implies that there are at least two differing actions, neither of which if taken by the trial judge will result in reversal." *Id.* (citing *Shields v. Easterling,* 676 So. 2d 293, 298 (Miss. 1996)).

Thompson relies upon *Odom v. State,* 355 So. 2d 1381 (Miss. 1978), in arguing that he should be granted a new trial because certain jurors allegedly withheld information during *voir dire*. In *Odom,* this Court held:

> [W]here as here, a perspective juror . . . fails to respond to a relevant, **direct**, and **unambiguous** question presented by . . . counsel on *voir dire*, **although having knowledge of the information sought to be elicited,** the trial court should, upon motion for a new trial, determine whether the question propounded to the juror was (1) relevant to the *voir dire* examination; (2) **whether it was unambiguous**; and (3) **whether the juror had substantial knowledge of the information sought to be elicited**.

Odom, 355 So. 2d at 1383 (emphasis added). Thompson must first satisfy each element of this test before reaching the question of whether or not any prejudice "reasonably could be inferred from the juror's failure to respond." *Id.* In the case at bar, Thompson cannot satisfy the elements of the *Odom* test. Therefore, the issue of prejudice is not reached and this assignment of error must fail.

As a basis for this assignment of error, Thompson argues that certain jurors withheld information about the arrest histories of themselves or of their family members during *voir dire*. Thompson suggests that arrest records **maintained by his own employer**, Bolivar County Sheriff's Department (to which Thompson had access), show that juror Holloman was arrested by Deputy Frazier Nash three years prior to the trial of the instant case. (T. 881). Thompson further suggests that the same arrest records indicate that juror Bolden has one cousin who was

arrested by Deputy Gilmer over two years prior to the trial and one cousin who was arrested, at some unidentified time, by unidentified deputy at the Bolivar County Sheriff's Department. (T. 892, 893). Finally, Thompson suggests that the same arrest records indicate that juror Ramiz has a sister who was arrested two years prior to the trial by Thompson and a cousin who was investigated by Thompson one year prior to the trial. (T. 884, 887). The jurors' families' arrest histories notwithstanding, none of these jurors were asked directly and unambiguously for the information Thompson now complains was not divulged. Additionally, Ramiz did not have substantial knowledge of her relatives' arrest history with respect to Thompson.

Thompson's argument does not satisfy the *Odom* test for three reasons:

A. Thompson's Questions During *Voir Dire* Were Ambiguous

Thompson argues that the arrest history information sought voluntarily should have been disclosed by jurors in response to three *voir dire* questions. To justify his expectation that information not asked for should have been provided, Thompson primarily relies on a vague "catch-all" statement, instead of clear and unambiguous questions, during *voir dire*. Thompson now cannot complain about jurors' responses to a vague and ambiguous "catch-all" statement when no questions specifically addressing the information sought were posed to the panel.

Rather than posing clear and direct questions, counsel for Thompson asked:

> There may be some questions that I ask where I touch on a subject but maybe I don't zero right into the specific information that you have. My wife tells me that all the time that **she doesn't understand me sometimes and that I am confusing**. So I am not - **I'm subject to doing that today**, and I would like for you - if you think I am close to asking some information but maybe I'm not hitting exactly on point, it's okay to raise your hand and say "does this apply?"

(T. 159) (emphasis added). This "question" (it was not a question *per se*) is so overly broad and

vague that it cannot possibly satisfy the requirement that it be **direct** and **unambiguous** under the *Odom* standard. *Odom*, 355 So. 2d at 1383. In fact, the "statement" left it to the subjective judgment of the potential jurors to determine if they thought a question was "close to asking some information that maybe [Thompson's lawyer was not] hitting exactly on point . . . ." (T. 159). By the statement's own terms, if a juror subjectively thought that a question was not close to "hitting exactly on point," then there was no obligation for the juror to respond. The ambiguity of the question is compounded by the fact that it did not actually direct the jurors to do anything. Rather, counsel for Thompson merely told the jurors that if, in their subjective judgment, a question "not hitting on point" was close to asking for information they might possess, it would be okay to raise their hand and ask "does this apply?"

The other two questions Thompson argues were not answered are similar in their deficiencies:

> Deputy Thompson has been in law enforcement ten years, as I mentioned, in different capacities working for the people of Bolivar County. Mack Grimmett is the sheriff. Thinking back, has anyone thought about either yourself or a family member who might have been involved in an incident or a situation **where Officer Thompson, either working alone or with someone else in Bolivar County**, may have had to, for instance, investigate you or your family member for some kind of alleged problem?

(T. 165) (emphasis added).

> But is there anybody that in the last ten years that **Mike** has worked **been arrested by Mike**? That's kind of the base question that I need to ask. I'm not asking you what reason. We've all had our problems, me included, but what is it that – if there is something, we'd like to know, and if you need to, we can address it in chambers out fo the presence of everyone else. Has anyone been in that situation?

(T. 165 - 66) (emphasis added). These questions requested information about whether **Thompson**, himself, had investigated or arrested jurors or their families. Thompson now suggests that these questions actually sought more information than their plain meaning.

Thompson would have this Court require the prospective jurors to answer a question that was not asked: Whether they or their family members had ever been investigated or arrested **by anyone at all**? However, that question was never asked during *voir dire*.

In *Salter v. Watkins*, 513 So. 2d 569 (Miss. 1987), the Mississippi Supreme Court was presented with a similar scenario. In *Salter* counsel for the plaintiff asked the *venire* during *voir dire* whether any of them "personally knew [the plaintiff] . . . ." *Salter*, 513 So. 2d at 573. The juror at issue in that case answered that he did not know the plaintiff and went on to explain that the "[f]irst time [he] ever saw her was in court that morning." *Id.* After a verdict was entered in favor of the defendants, counsel for the plaintiff argued that the plaintiff was entitled to a new trial because the juror in question allegedly failed to inform the court, during *voir dire*, that he knew the plaintiff. *Id.* During a post trial hearing on plaintiff's motion for a new trial, the juror testified that he knew the plaintiff's father, mother and some of her brothers and sisters. However, the juror did not realize that fact until trial was under way. *Id.* Affirming the trial court's decision not to grant a new trial, the Supreme Court held that "[s]ince [the juror] was not asked during *voir dire* whether he knew members of [the plaintiff's] family . . . **[the juror] was under no obligation to bring that information to the attention of the court.**" *Id.* at 574 (emphasis added).

The case *sub judice* is very similar to *Salter*. Like the plaintiff in *Salter*, counsel for Thompson suggests that jurors should have answered a question that was not asked. The jurors in question were never asked whether any of them or their family members had ever been arrested or investigated by **anyone at all**. Instead, counsel asked whether any of the prospective jurors or their family members had ever been arrested or investigated by **Thompson** himself.

(T. 165). Jurors Holloman and Bolden honestly failed to respond to the questions as shown by the record.

Thompson offered no evidence that he ever arrested or investigated jurors Bolden or Holloman, or their family members. As a result, Thompson cannot offer any evidence that those jurors withheld that information during the *voir dire* examination. Instead, Thompson attempts to stretch a question asking for specific information (i.e., arrests by Thompson) into a question not defined by the terms of the question itself, but rather by the unspoken thought process Thompson's counsel. The ambiguity was demonstrated by Ramiz' response to the question put to her about why she did not respond during *voir dire* to the "catch all" question:

> A. Like it's the same thing with the first question you asked about Jessica. I didn't – I didn't understand – maybe I didn't understand the questions as to the full extent as to, you know – for the answer of that question pertaining to what you are asking me about. So, like I said, I don't know. I don't remember.

(T. 889). Therefore, Thompson cannot satisfy the test handed down in *Odom* because the questions posed during *voir dire* were ambiguous in this particular respect.

B. The Jurors Did Not Have Substantial Knowledge of the Information Sought to be Elicited by Thompson's Counsel During *Voir Dire*

The Supreme Court's holding in *Odom* also requires that jurors have "substantial knowledge of the information sought to be elicited" during *voir dire* if a new trial is to be granted based upon a juror's failure to respond to questions posed during the examination. *Odom*, 355 So. 2d at 1381. As a result, Thompson's assignment of error with regard to alleged jury bias

must fail unless Thompson can somehow endow the jurors with knowledge that they simply did not possess. Thompson unsuccessfully attempted to do so at the post-trial motion hearing conducted by the trial court. An examination of that hearing is useful in demonstrating Thompson's failure to satisfy the *Odom* test. (T. 882 - 901).

Thompson alleges that juror Ramiz wrongfully withheld information regarding her family members' arrest histories during *voir dire*. However, the following exchange between Thompson's counsel and Ramiz at the post-trial hearing clearly established that Ramiz did not have substantial knowledge of the information requested during *voir dire*.

At the post-trial motion hearing, Thompson's counsel began questioning Ramiz by asking about her sister, Jessica's arrest history:

26 Q. Are you aware that your sister Jessica was arrested by
27 Officer Michael Thompson in March of 2004 for uttering a
28 forgery?
29 A. No, sir, I was not aware of that.

(T. 884).

1 Q. Okay. You were not aware that she was specifically
2 arrested by Mr. Thompson?
3 A. No, sir.

(T. 885).

Counsel for Thompson also asked Ramiz questions about her cousin Terry's arrest history:

24 Q. Do you know if Terry Ramiz has an arrest history with the
25 Bolivar County Sheriff's Department?

A. I don't -- I don't know if it was with the Bolivar County Sheriff's Department or with the Rosedale Police Department because of what -- his offense happened in Rosedale. So I just assumed that it was with Rosedale.

(T. 886 - 87).

Q. Were you aware that Michael Thompson was the investigator on Terry Ramiz's rape charge?

A. No, sir. Like I say, I was not, you know, onto what he was -- what was going on with that. So I did not know nothing that went on with him at all.

Q. Did you ever come to find out that Michael Thompson was the investigator?

A. No, sir, I didn't.

(T. 887).

Following Ramiz's testimony, it is clear that she did not have "substantial knowledge of the information sought to be elicited" by the questions posed by Thompson's counsel during *voir dire*. Therefore, Thompson's assignment of error with regard to this juror must fail. *Odom*, 355 So. 2d at 1383.

Thompson also questioned Bolden at the hearing. The following exchange took place regarding Bolden's first cousin Centrea's arrest history with the Bolivar County Sheriff's Department:

Q. Do you know if Centrea Cerrie Bolden, your cousin, has an

(T. 891).

arrest history with the Bolivar County Sheriff's Department?

A. She have served time before, yeah.

Q. Okay. Do you recall what she was arrested for?

A. No, not exactly I don't.

Q. Okay. Are you aware that she was arrested by Chief Deputy Charles Gilmer in June of 2004 on obstruction charges?

A. No, sir.

* * * * *

Q. So it would be fair to say prior to the trial of this case, you had no knowledge of any arrests of your cousin by the Bolivar County Sheriff's Deputies? Is that fair?

A. I don't know who arrested her. I just know that she had served time.

(T. 892).

Thompson's counsel also asked Bolden questions about her other first cousin Jacqueline's arrest history:

Q. Okay. Do you know if Jacqueline Bolden has an arrest history with the Bolivar County Sheriff's Department?

A. Well, I know she had been arrested, yes.

(T. 893).

Q. Okay. Do you know if Bolivar County Sheriff Deputies arrested your cousin on those charges?

A. I don't know the details of her arrest.

Q. Okay. Do you have any knowledge of any arrest by Bolivar County Sheriff's Deputies of your cousin Jacqueline Bolden at any time?

A. Like I said, I really don't know who arrested her. I don't know if it was Cleveland Police Department or sheriff's department. I don't know.

(T. 894).

Following Bolden's testimony, it is also clear that she also did not have "substantial knowledge of the information sought to be elicited" by the questions posed by Thompson's lawyer during *voir dire*. Therefore, Thompson's assignment of error with regard to this juror must also fail. *Odom*, 355 So. 2d at 1383.

Comparing the questions asked by Thompson's counsel during *voir dire* with the testimony provided by Ramiz and Bolden, it is clear that they did not have "substantial knowledge of the information sought to be elicited." Logically, if the jurors did not possess the information sought, then they could not possibly withhold the information. For Thompson to ask this Court to hold jurors to a level of knowledge which they do not possess defies logic.

A nearly identical issue was addressed in *Salter* where the juror was accused of providing incomplete answers to questions asked by counsel during *voir dire*. This Court refused to grant a new trial in that case because, among other things, the juror in question was held not to have substantial knowledge of the information sought to be elicited. *Salter*, 513 So. 2d at 573. The Court's discussion in *Salter* is nearly on-point and is quoted at length:

> During voir dire examination [the juror] was asked whether he personally knew [the Plaintiff] and he testified in fact that he did not. [The juror] testified during the proffer on the motion for a new trial that the "First time I ever saw her was in

court that morning. I had to ask who she was." Other examination of [the juror] during the proffer was as follows:

Q. [D]id you know [the Plaintiff] prior to the trial?

A. After we got into court, I realized I knew her *indirectly*. I knew her father and her mother and some of her brothers and sisters, and her brother-in-law. I didn't know her husband.

Q. All right, sir.

A. But, I didn't know her until-well, I believe [another juror] was my informer as to who everybody was.

Q. Okay, sir, but you did not acknowledge-when asked on voir dire if you knew them-

A. (Interposing) I didn't know her at that time.

Q. You answered that you didn't know her, didn't you?

A. That's right.

Q. Okay, sir. When in fact did you know her?

A. I did know her, after we got into the case and I began to hear a few things.

Q. Okay, sir, but at voir dire you said that you did not know her.
A. I suppose I didn't, cause I didn't.

(emphasis added)

In fact, [the juror] had never laid eyes upon [the] Defendant . . . prior to the trial and had to be told who she was by . . . another juror. There was no evidence that [the juror] was even aware of the existence of [the Plaintiff] before the trial.

When asked on voir dire, [the juror] answered that he did not know [the Plaintiff] and that was an honest answer; therefore, he did not have "substantial knowledge of the information sought to be elicited" as required in *Dorrough v. State*, 437 So.2d 35, 36 (Miss.1983).

Salter, 513 So. 2d at 573.

The facts and result in *Salter* shed a great light upon the case at bar. In *Salter*, this Court

specifically discussed the requirement that a juror be possessed of substantial knowledge of the information sought by the lawyer conducting *voir dire*. Even in a case where the juror knew a number of a plaintiff's family members, the juror was held to not have "substantial knowledge" when he testified that he was unaware of the familial connection the plaintiff and his acquaintances. *Id.* In the case at bar, the jurors in question did not know the names of the officers who investigated or arrested members of their family up to three (3) years earlier. Because jurors Ramiz and Bolden did not have "substantial knowledge of the information sought to be elicited" by the *voir dire* examination, Thompson is unable to satisfy this prong of the *Odom* test and this assignment of error must fail.

C. Thompson had Access to the Arrest Records Prior to Trial and Failed to Cross Reference the Potential Jurors

It is ironic that Thompson argues that potential jurors should have been aware of the details of the arrest histories of members of their extended families and prejudiced his case for withholding information not asked for, when Thompson himself had access to that same information prior to trial. As shown above, the jurors in question did not have substantial knowledge of that information. Thompson, on the other hand, had access to the records of each person arrested by the Bolivar County Sheriff's Department and admitted, during the post-trial motion hearing, that if he wanted to know if someone had been arrested, he would give that person's name, or other identifying information, to the dispatcher or "lady working in the office" and that person would obtain the records for him. (T. 898). Thompson and/or his counsel had the names and addresses of the jury *venire* before the trial. It is apparent from Thompson's testimony, when compared with the testimony of the jurors, that Thompson had greater access to the arrest records and offense histories of those persons arrested by the Bolivar County Sheriff's

Department. (T. 898).

In *Bell v. State*, 835 So. 2d 953 (Miss. Ct. App. 2003), the Mississippi Court of Appeals addressed a similar issue. In *Bell*, the defendant moved for a new trial after a Bolivar County jury convicted him of sexual battery and attempted sexual battery, alleging that one of the jurors withheld information during *voir dire* concerning her prior acquaintance with the defendant. *Bell*, 835 So. 2d at 954. The facts revealed that the defendant, known only by his nickname to the potential juror, had a relationship with the juror's sister over twenty years earlier. *Id.* at 956. The Court of Appeals affirmed the trial judge's denial of the defendant's motion for a new trial and held such a remote relationship does not necessarily call into question the impartiality of the juror **as well as the fact that the defendant did not take any steps to avoid the situation at issue**. *Id.*

The facts in the *Bell* case are similar to the fact in the case *sub judice* because Thompson had more direct access to the information that he alleges was withheld during *voir dire* than did the jurors in question, based upon the questions asked during *voir dire*. However, Thompson chose not to inform the trial court of any concerns he had and did not avail himself of the unique resources accorded to his status as a deputy. The Court of Appeals' analysis of the facts in *Bell* are applicable:

> Thus, it is a fair assumption that Bell and defense counsel were both aware of this matter prior to the jury returning its verdict and that they purposely chose not to reveal the matter to the trial court. Whether a more timely disclosure would have permitted the court to inquire further and, if it appeared appropriate, to substitute an alternate juror . . . is not entirely clear, but it is crystal clear that the defense withheld the information until after the jury had returned its verdict, a time when any possible corrective action was impossible. It is a fundamental precept of judicial procedure that a party, upon becoming aware of any matter deemed harmful to that party's cause in the litigation, must contemporaneously make the court itself aware of the matter so that the harm may be dealt with appropriately and a mistrial avoided if at all possible. *Johnson v. State*, 477 So.2d 196, 210

(Miss.1985). In this instance, it appears that Bell was content to conceal the information from the court-perhaps hopeful that Hall would view him in a kindly light based on their prior acquaintanceship-and only brought it to light belatedly when the prospect of such an occurrence was gone.

Id. at 956. Similarly, in the case at bar, Thompson admitted that he had access to the arrest information that he now argues was withheld from him during *voir dire*. (T. 898). This Court should not reward his failure protect his own case interests by awarding a new trial.

III. THE TRIAL COURT PROPERLY DENIED THOMPSON'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND APPLIED THE PROPER STANDARD OF CARE BY GRANTING RIZZO FARMS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The standard for reviewing the grant or denial of summary judgment is:

> This Court employs a *de novo* standard of review of a lower court's grant or denial of a summary judgment and examines all the evidentiary matters before it -- admissions and pleadings, answers to interrogatories, depositions, affidavits, etc. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. If, in this view, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied. Issues of fact sufficient to require denial of a Motion for Summary Judgment obviously are present when one party swears to one version of the matter in issue and another swears to the opposite. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. That is, the non-movant should be given the benefit of the doubt.

McMillan v. Rodriguez, 823 So. 2d 1173, 1176 (Miss. 2002) (citing *Heigle v. Heigle*, 771 So. 2d 341, 345 (Miss. 2000)).

In the case at bar, the sole issue raised by the competing motions for partial summary judgment is the applicable legal standard of care to be applied to Thompson's comparative or sole negligence (fault) as a result of his employment with the Bolivar County Sheriff's Department at the time of the accident. Rizzo Farms argued, and the trial court correctly ruled, that the Mississippi Tort Claims Act does not strip a defendant being sued by a law enforcement

officer from a defense that the officer was guilty of simple negligence which proximately caused or contributed to the accident at issue. Mississippi Code Annotated § 11-46-9(1)(c) applies only when a claimant sues for recovery of damages against the officer. (R. 116, 137, 184).

Thompson's argument confuses the issue of fault for the purposes of determining his contributory or sole negligence with the issue of liability for that negligence. While this issue may appear to be one of first impression, in *Mack Trucks, Inc. v. Tackett*, 841 So. 2d 1107 (Miss. 2003), this Court addressed the concept that is at the root of this issue. There, the Court held that a party's immunity does not prevent the allocation of fault to that party under Mississippi's apportionment statute. *Tackett*, 841 So. 2d at 1114. In *Tackett*, the jury apportioned fault to the Plaintiff's employer (who was not named in the lawsuit), which is immune under the Mississippi Workers' Compensation Act. This Court opined that there is an important difference between "fault" and "liability":

> Fault and liability are not synonyms. "Fault" is defined by [Miss. Code Ann.] § 85-5-7 as "an act or omission." Immunity from liability does not prevent an immune party from acting or omitting to act. Rather, immunity shields that party from any liability stemming from that act or omission. **There is nothing logically or legally inconsistent about allocating fault but shielding immune parties from liability for that fault. And there is no reason to imagine that the Legislature did not intend fault to be allocated against immune parties,** insofar as that allocation can be of no detriment to those parties.

Id. (emphasis added). Even if Thompson's liability for acts or omissions fall within the protections of the Mississippi Tort Claims Act, the limited immunity found in that Act does not prevent a defensive apportionment of fault to him using the simple negligence standard.

The trial court correctly noted that the issue of the immunity provided under the Mississippi Tort Claims Act and the issue of the applicable standard of care when considering comparative negligence are separate issues to consider, and should not be confused. (T. 25).

Aware of the important distinction between fault and liability, the trial court correctly granted Rizzo Farms' motion for partial summary judgment, holding:

> The Court finds in this case that the Motion for Partial Summary Judgment filed by the Plaintiff in this case is not well taken and is denied.
>
> The Motion for Partial Summary Judgment filed by the Defendant in this case on the same facts and circumstances is well taken and will be granted.
>
> * * * * *
>
> Nothing this Court says today removes the requirement that in a similar circumstance, depending on the facts, of course, that the Plaintiff filing a lawsuit against a police officer who was in pursuit or in the course of their duties in an emergency situation, that they would have to prove the heightened reckless disregard burden to defeat the immunity given to the police officer. That is not the case. I find nothing that would give any separate standard of care to a police officer in this situation than it would in any other ordinary citizen.
>
> * * * * *
>
> Once again, I find that the reckless disregard standard set forth refers to the immunity which is provided to a police officer in the appropriate and particular circumstances and is not applicable to a case which that police officer brings alleging negligence of another, a third party.
>
> * * * * *
>
> I don't believe that the Mississippi Legislature, nor do I believe that our appeals court would allow the shield that is provided for these police officers in the course of their activities to be used as a sword in a personal injury action which they bring. They would be receiving protections that I do not think our Legislature or our Supreme Court would mean for them if they bring a lawsuit.
>
> * * * * *
>
> **[T]he issue of negligence and the issue of liability are two totally separate things. The Plaintiff police officer in this case is not being asked or the Court is not being asked nor will the jury be asked to find that person liable for the damages of the Defendant but rather merely that his fault contributed to the accident that caused the injuries.**

(T. 24 - 27) (emphasis added).

The *Andrews* decision, discussed *supra* (pp. 24 - 25), has close parallels and provides further support for Rizzo Farms' argument that the issue of fault and liability (negligence and immunity) are separate considerations. *Andrews*, 537 So. 2d at 448. As discussed, *supra*, the plaintiff in *Andrews* was a police officer who sued Jitney Jungle as the result of an automobile collision. *Id.* The police officer in that case testified that he was answering an emergency call and had his emergency lights activated but without his siren activated. *Id.* The police officer also testified that he was traveling at fifty miles per hour in a thirty-five mile per hour speed zone. *Id.* The defendant in that case testified that he was unable to see the police officer approaching because a building at the corner of the intersection where the collision occurred was blocking his view of the police car. *Id.* The police officer testified that his vision also was limited by the building and that he assumed that a driver on the cross street would have a similar sight restriction. *Id.* Both drivers testified that they entered the intersection with the green light. *Id.*

At the conclusion of the evidence in *Andrews*, a jury returned a verdict for the defendant finding that the plaintiff police officer was negligent and that his negligence was the sole proximate cause of the accident. *Id.* at 450. The plaintiff appealed arguing that "since he was an on-duty police officer operating his police vehicle with the blue emergency lights flashing when he entered the intersection, [the defendant] was negligent as a matter of law when he failed to yield the right-of-way to an emergency vehicle." *Id.* at 449.

The Supreme Court's decision in *Andrews* reaffirmed that the "the issues of proximate cause, **negligence**, and **contributory negligence** are for the jury to decide under proper instructions from the court." *Id.* at 450 (citing *Smith v. Walton*, 271 So. 2d 409, 413 (Miss. 1973); *Mathews v. Thompson*, 95 So. 2d 438, 449 (Miss. 1957) (emphasis added)). The officer

in *Anderson* was operating his vehicle in the course and scope of his employment, was found to be negligent under an ordinary standard of care as a result of which his recovery, as in the case *sub judice*, was denied. *Id.*

Thompson disingenuously attempts to distinguish *Andrews* based on the fact that the jury in *Andrews* found the police officer to be the **sole proximate** cause of the accident in that case, but that in the instant case, the jury found that Rizzo Farms was not guilty of any negligence that proximately caused the accident. (R. 405). However, this argument is a distinction without a difference. By extension, if the jury unanimously found that Rizzo Farms was not guilty of negligence that proximately caused or contributed to the accident, then Thompson's negligence as supported by the facts must have been the sole proximate cause of the collision in question.[13]

Thompson also argues that the *Andrews* case was decided prior to the Mississippi Tort Claims Act. At the time of the decision in *Andrews*, the Mississippi Tort Claims Act was enacted, but not yet effective. *See* Miss. Code Ann. §11-46-9; *Parker v. City of Philadelphia*, 725 So. 2d 782, 784 (Miss. 1998). Under the applicable law when *Andrews* was decided the government enjoyed absolute immunity, while its officials only enjoyed limited immunity[14]. *See,*

13

The jury was instructed that if they "find that such negligence of Michael A. Thompson, if any[,] was the sole proximate cause of the accident, then it is your sworn duty to return a verdict in favor of the Defendant, Rizzo Farms, Inc." (R. 376).

14

In *Pruett v. City of Rosedale*, the Mississippi Supreme Court abolished common law sovereign immunity. *Pruett v. City of Rosedale*, 421 So. 2d 1046 (Miss. 1982). However, this ruling was not effective until July 1, 1984. *Pruett*, 421 So. 2d at 1052. The cause of action in *Andrews* accrued on May 2, 1984. *Andrews*, 537 So. 2d, 448. Since the cause of action accrued prior to the *Pruett* ruling taking effect, common law immunity still controlled. Additionally, the legislature enacted the original version of Miss. Code Ann. §11-46-1, *et seq.*, in 1984. While most of the statute did not become effective until 1993, the Miss. Code Ann. §11-46-6 provision that required the application of pre-*Pruett* common law sovereign immunity was effective. *Parker*, 725 So. 2d at 784.

Grantham v. Miss. Dept. of Corrections, 522 So. 2d 219 (Miss. 1988).

While it is true that this Court did not address the police officer's immunity status in *Andrews*, it can easily be inferred that the reason for this is because it was irrelevant, since the officer was the plaintiff as opposed to a defendant being sued for monetary damages. Under Mississippi common law at that time, the police officer in *Andrews* would have enjoyed qualified immunity as a defendant. The test for immunity was whether the act performed by the government employee was discretionary or ministerial. *Miss. Dept. Of Transportation v. Cargile*, 847 So. 2d 258 (Miss. 2003). In *Mosby v. Moore*, 716 So. 2d 551 (Miss. 1998), the Court held a police officer's driving decisions in pursuit of a vehicle to be discretionary and granted the police officer immunity. *Mosby*, 716 So. 2d at 558 (Miss. 1998). Similarly, the police officer's driving choice in *Andrews* was discretionary and he would have enjoyed immunity. *Id.* Even with this immunity, the *Andrews* police officer's negligence, as a plaintiff, was permitted to be submitted to the jury. *Andrews*, 537 So. 2d at 450. Using Thompson's flawed logic, the officer in *Andrews* could have argued that, by virtue of his immunity, he could not be held contributorily negligent at all. This Court's ruling in *Andrews*, *ipso facto*, renders such an argument meritless.

Although the Mississippi Tort Claims Act was not then applicable, the *Andrews* case, nonetheless remains helpful in evaluating this issue. In both the case at bar and *Andrews*, the plaintiffs were law enforcement officers who were engaged in the course and scope of their employment with their respective departments. Both plaintiffs enjoyed limited immunity for claims filed against them in their capacity as law enforcement officers. Both plaintiffs sued

---

So at the time of *Andrews*, the law was common law immunity, not the Mississippi Tort Claims Act.

another driver for monetary damages, and in both cases their negligence was based upon an ordinary standard of care was submitted to the jury, and the jury found for the defendant.

Importantly, the *Andrews* decision shows that, even though the plaintiff in that case enjoyed common law sovereign immunity, negligence could still be apportioned to him despite his common law protections. Likewise, Thompson, though he is protected from certain liability by the terms of the Mississippi Tort Claims Act, can still have fault apportioned to him as a result of his own negligence despite his immunity. Furthermore, at the time *Andrews* was decided, no amount of negligence or recklessness could pierce the qualified immunity of a discretionary act. This was even more protection than is provided by the Mississippi Tort Claims Act for law enforcement officials. Therefore, in the *Andrews* case an even higher standard of care would not generate liability for the officer, but fault was still allocated to him when he sued a third party.

Ignoring the clear guidance of *Tackett* and *Andrews* to determine the contributory negligence standard of care for a sheriff's deputy who sues a third party in an action based on an automobile collision, Thompson focuses on the courts of other states. *Smith v. Lamar*, 188 S.E.2d 72 (Va. 1972), cited by Thompson, is distinguishable for two reasons. First, there was no dispute in *Smith* that the police officer had engaged his emergency lights and siren. *Smith*, 188 S.E.2d at 73. The Virginia court held that the plaintiff "was a police officer in hot pursuit of a law violator, and was operating his vehicle under certain conditions prescribed by law. The standard of care expected of him was the 'standard of care of a prudent man in the discharge of official duties of a like nature under like circumstances.'" *Id.* at 74 - 75. The exemptions in that case applied "only when [the officer] displays a flashing, blinking or alternating red light and sounds a siren." *Id.* at 74. In the case at bar, there is overwhelming evidence that Thompson WAS NOT operating his vehicle under the conditions prescribed by law because he did not

activate his siren or emergency lights though he was still traveling in excess of the posted speed limit. The *Smith* case is also distinguishable because the defendant in that case was being pursued by the officer in a high-speed chase and not a third party, such as Brown, going about his or her business on the roads. *Id.* at 72 - 73.

Similarly, the plaintiff in *McKay v. Hargis*, 88 N.W.2d 456 (Mich. 1958), cited by Thompson, was also a police officer who engaged his siren and light during a hot pursuit of the defendant driver. *McKay*, 88 N.W.2d at 457 - 58. As in the *Smith* case, the exemptions in *McKay* also had limited applicability. "The exemptions herein granted to an authorized emergency vehicle shall apply only when the driver of any said vehicle while in motion sounds audible signal by bell, siren or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating or rotating red light . . . ." *Id.* at 459. Again, in the case at bar, there is overwhelming evidence that Thompson WAS NOT operating his vehicle under the conditions prescribed by Mississippi law and Sheriff's Department regulations because he did not activate his siren or emergency lights while allegedly responding to an emergency call, though he was traveling in excess of the posted speed limit. Also similar to the *Smith* case, in *McKay* the defendant was being pursued in a high-speed chase. As such, this case is also distinguishable because Brown was not responsible for initiating the need for an alleged high-speed mission. *Id.* at 457.

The case of *Scogin v. Nugen*, 464 P.2d 166 (Kan. 1970), cited by Thompson, is also distinguishable because the plaintiff police officer was operating his police motorcycle with the siren and emergency lights activated. *Scogin*, 464 P.2d at 169. However, it is further distinguishable because the legislature in Kansas created four distinct areas in which the operator of an emergency vehicle specifically was held to a different standard. *Id.* at 173. With that in

mind, the Supreme Court of Kansas held that "negligence cannot be predicated upon a showing [a police officer] exceeded a set speed limit **if he is operating as an emergency vehicle under the statute.**" *Id.* (emphasis added). In order for the driver of an emergency vehicle to operate the vehicle "under the statute" he or she must "sound audible signal by bell, siren or exhaust whistle." *Id.* at 172. Again, in the case at bar, there is substantial evidence that Thompson was not operating his vehicle with the required emergency light and siren engaged.

When considering the appropriate standard of care to apply to contributory negligence in the context of a law enforcement officer who files suit against a third party, the most persuasive guidance available is the *Andrews* decision handed down by this Court. Furthermore, *Tackett* makes it clear that the issues of liability and negligence are separate questions to consider and that a plaintiff can be guilty of negligence even if liability does not attach for that negligence.

The trial court summarized the Mississippi Tort Claims Act well when it granted Rizzo Farms' motion for partial summary judgment: "I don't believe that the Mississippi Legislature, nor do I believe that our appeals court would allow the shield that is provided for these police officers in the course of their activities to be used as a sword in a personal injury action which they bring." Accordingly, the trial court committed no error when it denied Thompson's motion for partial summary judgment.

CONCLUSION

The Circuit Court of Bolivar County, Mississippi committed no reversible error. When considering the evidence in the light most favorable to Rizzo Farms, the jury verdict must stand. Moreover, the trial court did not abuse its discretion by denying Thompson's motion for a new trial.

As a result of the evidence, the law, and plain common sense, each assignment of error raised by Thompson must fail. Therefore, Rizzo Farms respectfully requests this Court affirm the decisions of the lower court that:

1) Denied the Thompson's motion for a directed verdict and refused Thompson's proposed peremptory jury instruction;

2) Denied Thompson's motion for a new trial based on alleged jury bias; and

3) Denied Thompson's motion for partial summary judgment as to the proper standard of care applicable to Thompson's fault.

RESPECTFULLY SUBMITTED THIS the 16th day of January, 2009.

Rizzo Farms, Inc.

Edward J. Currie, Jr., MSB [redacted]
Frank F. Farmer, MSB [redacted]
Linda F. Coleman, MSB [redacted]

OF COUNSEL:

CURRIE JOHNSON GRIFFIN GAINES & MYERS, P.A.
1044 River Oaks Drive
Post Office Box 750
Jackson, Mississippi 39205-0750
Telephone: (601) 969-1010
Facsimile: (601) 969-5120

LINDA F. COLEMAN ATTORNEY AT LAW
307 Cotton Row
Post Office Box 667
Cleveland, Mississippi 38732-0667
Telephone: (662) 843-5253
Facsimile: (662) 843-3972

CERTIFICATE OF SERVICE

I, FRANK F. FARMER, do hereby certify that I have this day caused to be mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing document to:

J. Kirkham Povall, Esq.
S. Todd Jeffreys, Esq.
W. Hunter Nowell, Esq.
Post Office Drawer 1199
Cleveland, Mississippi 38732

THIS the 16th day of January, 2009.

FRANK F. FARMER