

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
Circuit Court No. 2003-0094*

BRIEF OF APPELLANT

[Oral Argument Requested]

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant 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. Chamberlin, Jr., Circuit Judge, Third Circuit Court District, Hernando, Mississippi.
2. J. Kirkham Povall, S. Todd Jeffreys and W. Hunter Nowell, Povall & Jeffreys, P.A., Cleveland, Mississippi, Attorneys for Appellant, Michael A. Thompson.
3. Edward J. Currie, Jr., Currie Johnson Griffin Gaines & Myers, P.A., Jackson, Mississippi, Attorney for Appellee, Rizzo Farms, Inc.
4. Appellant, Michael A. Thompson, Gunnison, Mississippi.
5. Appellee, Rizzo Farms, Inc., Cleveland, Mississippi; President - Phillip Rizzo.

CERTIFIED this the 13th day of October, 2008.

W. Hunter Nowell

W. Hunter Nowell, MS Bar No. 102342
Attorney of Record for Appellant,
Michael A. Thompson

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BRIEF OF APPELLANT

I. Statement of the Issues

This appeal arises from an adverse judgment against the Appellant rendered by the Circuit Court of the Second Judicial District of Bolivar County, Mississippi. The Appellant, Michael A. Thompson, herein referred to as "Deputy Thompson" or "Thompson" presents the following issues for consideration by this Court:

1. Whether the trial court erred in denying Deputy Thompson's Motion for Directed Verdict and Deputy Thompson's proposed jury instruction (P-13) based upon Rodney Brown's negligence.
2. Whether the trial court erred in denying Deputy Thompson's Motion for New Trial based on jury bias.
3. Whether the trial court erred in denying Deputy Thompson's Motion for Partial Summary Judgment on the issue of Deputy Thompson's standard of care.

II. Statement of the Case

A. Nature of the Case

This personal injury action involves an automobile accident between Deputy Thompson and Rodney Brown, herein referred to as "Brown", an employee acting within the course and scope his employment with Rizzo Farms, Inc. on August 28, 2002. Deputy Thompson, who was responding

to an emergency call and who testified that he had his lights and siren activated, was proceeding east in his vehicle on Highway 8 towards Cleveland, Mississippi. As Deputy Thompson attempted to overtake Brown, who was also in his vehicle traveling east on Highway 8, Brown made a left hand turn in front of Deputy Thompson, which caused an automobile accident.

B. Course of Proceedings and Disposition in Court Below

On October 15, 2003, Deputy Thompson filed his Complaint against Rizzo Farms, Inc. in the Circuit Court of the Second Judicial District of Bolivar County, Mississippi. (R. 1). On October 31, 2003, Rizzo Farms, Inc. filed its Answer to Deputy Thompson's Complaint. (R. 5). After a lengthy discovery process, the parties set the case for trial beginning September 12, 2006. (R. 107).

On August 1, 2006, Deputy Thompson filed a Motion for Partial Summary Judgment as to Issue of Law regarding the standard of care applicable to Deputy Thompson, who was acting within the course and scope of his employment as a Deputy with the Bolivar County Sheriff's Department, for purposes of Rizzo Farms, Inc.'s comparative negligence claim. (R. 122). Particularly, due to protections afforded to a county employee by the Mississippi Tort Claims Act, Deputy Thompson asserted that Rizzo Farms, Inc. should have been required to show reckless disregard on Deputy Thompson's part before comparative negligence would apply. (R. 122). On August 4, 2006, Rizzo Farms, Inc. filed a Motion for Partial Summary Judgment on the same issue, arguing that the standard of care in an ordinary negligence case should apply. (R. 137). On August 17, 2006, attorneys for Deputy Thompson and Rizzo Farms, Inc. came before the Honorable Robert P. Chamberlin to argue their respective Motions for Partial Summary Judgment. (R. 498). Following arguments from both attorneys, Judge Chamberlin denied Deputy Thompson's motion and granted Rizzo Farms, Inc.'s motion. (R. 522).

The trial court presided over a jury trial of this matter on September 12, 13, 14 and 15, 2006. At trial, Rodney Brown, who was acting within the course and scope of his employment with Rizzo Farms, Inc. at the time of the accident, testified that prior to commencing his left-hand turn into his private driveway off of Highway No. 8 he did not see any vehicles in front or behind him. (T. 290, 293). Given the fact that it was undisputed at trial that Deputy Thompson's vehicle and another vehicle were behind Brown's vehicle, it follows that Mr. Brown did not look before initiating his turn. Thompson, therefore made a motion for directed verdict based on Rodney Brown's negligence and filed and submitted a peremptory jury instruction (P-13) (R. 349), both of which were denied. (T. 694, 754-55).

On September 15, 2006 a duly sworn and empaneled jury of twelve persons of Bolivar County, Mississippi heard the evidence of the parties and after being instructed by the Court, deliberated and returned a verdict in favor of Rizzo Farms, Inc. (T. 843-44).¹

Following the trial, attorneys for Deputy Thompson discovered that certain jurors had not responded to relevant questions during voir dire and filed a Motion for New Trial, or in the Alternative, Motion for Judgment Notwithstanding the Verdict. (R. 416). Further, Thompson filed a Motion for Leave to Take Certain Jurors' Depositions. (R. 490). On July 20, 2007, attorneys for Deputy Thompson and Rizzo Farms, Inc. came before the Honorable Robert P. Chamberlin to argue Deputy Thompson's motions. (T. 874). Certain Jurors were present at the July 20, 2007 hearing and it was discovered that members of their families had an arrest history with the Bolivar County

¹ When the Jury returned the Special Verdict Form given by the trial court, they only answered the first question on the form. (R. 405). "Do you find Defendant, Rizzo Farms, Inc., by and through its employee, Rodney Brown, guilty of negligence which proximately caused damages to the Plaintiff?" Id. The jury answered "NO". Id. Therefore, the jury did not answer the question as to whether they found Deputy Thompson to be negligent. Id.

Sheriff's Department. (T. 874-95). Deputy Thompson also presented proof that the jury foreman, who at the time of the post-trial motion hearing was beyond the subpoena power of the court, had been arrested before the trial in this case by a sheriff's deputy who was listed as a potential witness in the case. (E. 1276). However, the trial judge denied Plaintiff's Post-Trial Motions. (R. 625).²

III. Statement of the Facts

On the morning of August 28, 2002, Deputy Michael A. Thompson went in to work at the Bolivar County Sheriff's Department. (T. 457). While doing paperwork at the station, Thompson was informed by dispatcher April Hayes that another officer needed assistance with a domestic disturbance at the Hyman Lucas Apartments in Renova, Mississippi. (T. 457-458). Thompson had been trained at the police academy, and during subsequent training, that a domestic violence call is one of the most dangerous calls to which officers can respond. (T. 458). Therefore, Thompson treated this domestic disturbance call as an emergency call. (T. 458).

After Thompson was dispatched, he immediately got up from his desk, went out the front door and got into his patrol vehicle. (T. 458). Before leaving the parking lot of the Sheriff's Department, Thompson turned on all of his warning lights and his siren. (T. 459). After engaging his lights and siren, Thompson pulled out of the parking lot and proceeded east on Highway 8. (T. 460). Shortly after pulling out of the Sheriff's Department parking lot, Thompson passed Boyle, Mississippi police chief Murry Roark, who was traveling west on Highway 8. (T. 374). At the time Murry Roark passed Thompson, Roark noticed that Thompson's blue lights were blinking. (T. 376).³

² In his post-trial motions, Deputy Thompson also argued the other issues presented in this appeal.

³ Deputy Thompson drove an "unmarked" patrol car. (T. 343). His patrol car did not have a light bar on the roof of the vehicle, but did have a dash light and "wigwag" lights in the headlights and grill. (T. 344). (E. 23-26).

Shortly after passing officer Roark, Thompson checked the passing lane for oncoming traffic. (T. 461). Seeing no oncoming traffic, Thompson accelerated to 65 or 70 miles per hour and pulled into the passing lane. (T. 461). Deputy Thompson began to pass a C.P. House Gas truck and was overtaking Rodney Brown's vehicle when Brown turned north into the lane Thompson was occupying. (T. 461). In an effort to avoid hitting Brown in his door, Thompson slammed on the brakes and attempted to go around the front of Brown's vehicle. (T. 461-462). After colliding with Brown's vehicle, Deputy Thompson's vehicle went off into a ditch on the easterly side of Brown's driveway. (T. 463).

Around 11:00 a.m. on August 28, 2002, the morning of the accident, Rodney Brown, who was acting within the course and scope of his employment with Rizzo Farms, Inc., was driving from the Rizzo Farms, Inc. headquarters on Highway 8 towards his home, which was approximately one mile to the east on Highway 8. (T. 286). Brown, who works at night checking the oxygen in Rizzo Farms, Inc.'s catfish ponds, had gone into work some time between 7:00 p.m. and midnight on August 27, 2002. (T. 272, 278). Being that it was August and was hot outside, Brown used the opportunity to use the air-conditioner in his truck. (T. 286). In addition, Brown had the radio on in his truck. (T. 287). Prior to commencing a left hand turn into his driveway, Brown testified that he did not see any vehicles either in front of him or behind him. (T. 290). There are no hills or curves in the road where the accident occurred. (T. 305).⁴ Brown testified that he looked into his side mirror and immediately began his turn in one big motion. (T. 291). Further, Brown testified that he would not have made a left hand turn if he had seen a vehicle passing him. (T. 290). Brown

⁴ At trial Brown was asked if his view was unobstructed both towards Cleveland, east, and all the way back down Highway 8 to the west. (T. 305). Brown responded, "That's right." Id. Counsel for Deputy Thompson followed up with the question, "No curves, no hills?". Id. To which Brown replied, "No sir." Id.

acknowledged that it was his obligation to make sure he could make a left hand turn safely before commencing the turn. (T. 294).

Prior to the accident, Jerry Jackson and Tony Jones, who were in a heavy duty one-ton C.P. House Gas pickup truck, were following directly behind Brown's vehicle. (T. 586, 588). Jackson testified that he saw Deputy Thompson in his rear-view mirror before Deputy Thompson passed him. (T. 589). Jackson saw Deputy Thompson's vehicle in his rear-view mirror because he was looking at the rear view mirror. (T. 597).⁵ At one point prior to the collision, Deputy Thompson's vehicle was right beside the C.P. House Gas truck in the passing lane. (T. 599). In addition to the C.P. House Gas truck being behind Brown's vehicle, rural mail carrier, Jeffrey West, who was in his vehicle, was facing Brown's vehicle on the shoulder of the road. (T. 658, 660). Jeffrey West had pulled his vehicle onto the north shoulder of Highway 8 approximately 720 feet from Brown's driveway and was facing west when he observed the accident. (T. 660, 665). When Mr. West observed Deputy Thompson's vehicle, it was directly beside the gas truck and Brown's vehicle was still facing him. (T. 666, 669).

At the trial, Deputy Thompson's expert accident reconstructionist, Brett Alexander, testified that using the "lane change formula", at 70 miles per hour, Deputy Thompson's vehicle would have traveled 324 to 396 feet to change from the eastbound lane to the passing lane. (T. 547). Essentially, one's vehicle cannot be in one lane and automatically in the other lane instantaneously. (T. 548). Further, Mr. Alexander testified that assuming Deputy Thompson was traveling 70 miles per hour and was 80 yards away from the point of impact while Brown was turning into his driveway at 10

⁵ At trial, Mr. Jackson and Mr. Jones both testified that they did not see Deputy Thompson's flashing lights or hear Deputy Thompson's siren. (T. 589, 610).

miles per hour, Thompson would have been in the passing lane before Brown began making his turn. (T. 552).

Following the accident a number of vehicles stopped at the scene to render assistance. (T. 464). One of the first people on the scene was Bolivar County Undersheriff Charles Anderson. (T. 401). Undersheriff Anderson approached Deputy Thompson's vehicle and got within five to ten inches of Deputy Thompson's face. (T. 404). While Undersheriff Anderson's face was in the vehicle, he noticed the blue dash light laying on the floorboard of the patrol car, and it was still flashing. (T. 404). Around the same time Undersheriff Anderson arrived on the scene, Conservation Officer, Lee Ellington, stopped to render assistance as well. (T. 390). While Ellington was inside Thompson's patrol car looking for the release button to the trunk, he too noticed the blue dash light flashing on the floorboard. (T. 392). After Ellington collected various firearms that had been thrown from Thompson's vehicle, he noticed that the vehicle was smoking. (T. 393). Therefore, Ellington disconnected the battery cable of Thompson's vehicle. (T. 393). As for the siren, which was mounted right behind the front bumper, it was apparently destroyed during the collision. (T. 344-45).

As a result of this collision, Deputy Thompson suffered severe injuries, including, but not limited to, a broken hip, a dislocated ankle and a blowout of the orbital socket. (T. 466, 469). Deputy Thompson's medical expenses totalled Sixty-Three thousand Five Hundred Fifty-Five dollars and Thirty-Nine cents (\$63,655.39). (T. 475). Deputy Thompson's pain and suffering did not end when he left the hospital. (T. 484-487). Four (4) years after the accident, Deputy Thompson had developed progressive glaucoma and continued to walk with a severe limp. (T. 477). Deputy Thompson will take these injuries to the grave with him. (T. 482).

During the voir dire of J. Kirkham Povall, one of the attorneys for Deputy Thompson, he prefaced his questions by stating:

There may be some questions that I ask where I touch on a subject that 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'm not – I'm subject to doing that today, and I'd like for you – if you think I'm 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? Is that agreeable? We are all trying to get to the same point, and that is to select a jury that is fair and impartial.

(T. 159). Deputy Thompson's counsel later during the voir dire posed the following question:

Thompson has been in law enforcement ten years, as I mentioned, in different capacities working for the people of Bolivar County. Mack Grimmitt 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 had to, for instance, investigate you or your family member for some kind of alleged problem?

(T. 165). None of the ultimate members of the jury responded to this question. Id. Deputy Thompson's counsel went on to ask the following question:

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 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 outside the presence of everyone else. Has anyone been in that situation? Okay I had to ask that question. We'll go to something else.

(T. 164-65). No member of the jury panel responded to this question. Id.

During the trial court's voir dire, the Honorable Robert P. Chamberlin went over a list of potential witnesses and asked the venire to respond if they knew each witness or were related to each of the witnesses. Included in the names of the witnesses were the names Charles Gilmer and Frazier

Nash, both of whom were Bolivar County Sheriff Deputies along with Deputy Thompson. (T. 145). No member of the jury panel responded as knowing either Deputy Gilmer or Deputy Nash. (T. 140, 146).

After the conclusion of the trial, when Deputy Thompson, through counsel, realized that certain jurors had not been truthful during voir dire, attorneys for Deputy Thompson and Rizzo Farms, Inc. came before the Honorable Robert P. Chamberlin to argue Deputy Thompson's Motion for New Trial and Motion for Leave to Take Depositions of Certain Jurors. (T. 874). Present at said hearing were Rachel Ramiz and Chedra Bolden, two of the jurors in Deputy Thompson's trial. (T. 881). Due to fact that he had moved out of state and was unable to be served with a subpoena, jury foreman Leon Hollaman was not present at the hearing. (T. 881). Based on the booking records at the Bolivar County Sheriff's Department, Leon Hollaman was arrested for forgery by Bolivar County Sheriff's Deputy Frazier Nash, a witness listed by Deputy Thompson, on September 29, 2003. (E. 1276).

Another juror in Deputy Thompson's trial, Rachel Ramiz, admitted that her sister, Jessica Ramiz, had an arrest history with the Bolivar County Sheriff's Department prior to Deputy Thompson's trial. (T. 884). Ms. Ramiz further admitted that her cousin, Terry Ramiz, had been arrested for rape and was held at that Bolivar County Correctional Facility. (T. 887). Coincidentally, Deputy Thompson was the investigator on Terry Ramiz's rape charge. (T. 887).

A third juror in Deputy Thompson's trial, Chedra Bolden, acknowledged that she is the first cousin of Centrea Bolden, who lives in the same apartment complex as her. (T. 891). Ms. Bolden admitted to knowing her cousin "had served time" but denied knowing that Chief Deputy Charles Gilmer, a witness for Deputy Thompson, was the officer who had arrested her cousin on obstruction charges in 2004. (T. 892) (E. 1290). When questioned further, Ms. Bolden acknowledged that she

was also related to Jacqueline Bolden, another first cousin. (T. 893). Ms. Bolden admitted that her cousin Jacqueline had been arrested prior to the trial of this case. (T. 893-94).

IV. Summary of the Argument

During the trial, Rodney Brown testified that he looked in his rear view mirror prior to beginning the turn into his driveway. Further, Rodney Brown testified that he did not see anything in front or behind him. However, it was undisputed by both sides at trial that not only was Deputy Thompson's vehicle behind him, a C.P. House Gas truck was also behind Mr. Brown, and a rural mail carrier, Jeffrey West, was in front of him. The only logical conclusion is that Brown did not look prior to beginning his turn. If Brown did not look before beginning his turn, he was negligent as a matter of law. Therefore, the trial court should have granted Deputy Thompson's proposed jury instruction, P-13, and/or Deputy Thompson's motion for directed verdict on Brown's negligence.

After the trial had concluded, Deputy Thompson and his attorneys discovered that certain jurors, who ultimately served on the jury, failed to respond to relevant questions during voir dire. Particularly, certain jurors failed to speak up when asked if they knew certain witnesses for Deputy Thompson or if they or their family members had ever been investigated by Deputy Thompson. Due to these jurors' failure to respond truthfully, Deputy Thompson was not given the opportunity to question them further during voir dire. Following the conclusion of the trial, it was discovered that Leon Hollaman, the jury foreman, had been arrested for uttering a forgery by one of Deputy Thompson's potential witnesses. Further, two more members of the jury had close family members, including one who lived with a juror during the trial, who had either been arrested by Deputy Thompson or by one of his witnesses. Had these jurors been truthful during voir dire they certainly would have been stricken for cause from the venire. Therefore, Deputy Thompson's Motion for New

Trial, or in the alternative, Motion for Judgment Notwithstanding the Verdict should have been granted.

Prior to the trial of this case, Deputy Thompson filed a Motion for Partial Summary Judgment on an Issue of Law. Deputy Thompson argued that Rizzo Farms, Inc. should be required to show reckless disregard on Deputy Thompson's part prior to any assignment of comparative negligence. Essentially, to do otherwise would place two separate standards of care on a law enforcement officer responding to an emergency call. Under the Mississippi Tort Claims Act, Rizzo Farms, Inc. certainly would be required to show reckless disregard on the part of Deputy Thompson if it stepped into the shoes of a plaintiff. Deputy Thompson submits that had this motion been granted, his proof and arguments at trial would have been different at every stage of the proceedings. Therefore, Deputy Thompson's Motion for Partial Summary Judgment should have been granted.

V. Argument

A. The Trial Court Erred in Denying Deputy Thompson's Motion for Directed Verdict and Thompson's Proposed Jury Instruction (P-13) Based Upon Rodney Brown's Negligence.

Denials of motions for directed verdict, judgment notwithstanding the verdict, and a request for a peremptory instruction are each reviewed under the same standard of review. Jenkins v. State, 913 So.2d 1044, 1051 (Miss.Ct.App. 2005) (citing Nunnally v. R.J. Reynolds Tobacco Co., 869 So.2d 373, 378-79 (Miss. 2004)). The Court will consider the evidence in the light most favorable to the appellee. Id. In doing so, the Court must give that party the benefit of all inferences that may be reasonably drawn from the evidence. Id. If the facts as considered point so overwhelmingly in favor of the appellant, so that reasonable jurors could not have arrived at a contrary verdict, the court is required to reverse and render. Id. 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, the Court must affirm. Id. at 1052.

At trial, Rodney Brown unequivocally testified that prior to commencing his left-hand turn into his private driveway off of Highway No. 8, he did not see any vehicles in front or behind him. (T. 290, 293). The inescapable conclusion that must be reached in light of this testimony is that Mr. Brown simply did not look in his rearview or side mirrors at any time near the time that he started to commence his left-hand turn. If he had looked, he would have seen not only Deputy Thompson's vehicle in the passing lane, but the C.P. House Gas truck directly behind him. As such, he was guilty of negligence as a matter of law in the following respects: 1) in failing to keep and maintain a proper lookout, 2) in failing to yield the right-of-way to the 1997 Ford motor vehicle driven by the Plaintiff, and 3) in violating Section 63-3-707 of the Mississippi Code of 1972, as amended, which requires that no person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal continuously to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

Mr. Brown admitted during his testimony that it was his obligation to make sure before he made his left-hand turn that he could do so safely. (T. 294). Mr. Brown also testified that immediately after looking in his side mirror, he proceeded to make his turn. (T. 295). This simply could not have occurred because it was undisputed by both sides at trial that not only was Officer Thompson's vehicle behind Rodney Brown's vehicle but a C. P. House Gas truck was also directly behind his vehicle. (T. 461). It is also undisputed that Jeffrey West, a witness called by the Defendant, was some 720 feet in front of Mr. Brown's vehicle and Mr. Brown stated that he did not

see Mr. West's vehicle either. (T. 660, 665). Mr. West testified that he in fact saw the accident occur (albeit from some 720 feet away). He testified that the first time he saw Mr. Thompson's vehicle, said vehicle was in the passing lane on Highway No. 8. (T. 661). At that time it was directly beside the C. P. House gas truck. (T. 661). Additionally, at the time Mr. West saw Officer Thompson's vehicle, Rodney Brown's vehicle was still facing him. (T. 666). The observations of Mr. West, a witness called by Rizzo Farms, Inc., are consistent with the conclusions reached by Deputy Thompson's expert accident reconstructionist, Brett Alexander. At trial Brett Alexander testified that using the "lane change formula", at 70 miles per hour, Deputy Thompson's vehicle would have traveled 324 to 396 feet to change from the eastbound lane to the passing lane. (T. 547). Essentially, one vehicle cannot be in one lane and then automatically in the other lane instantaneously. (T. 548). Further, Mr. Alexander testified that assuming Deputy Thompson was traveling 70 miles per hour and was 80 yards away from the point of impact while Brown was turning into his driveway at 10 miles per hour, Thompson would have been in the passing lane before Brown began making his turn. (T. 552). Thus, Rodney Brown did not see the vehicles behind him because he simply did not look. If he did not look, he was negligent. He stated he would not have turned if he had seen the cars behind him. (T. 316). Brown offered no explanation as to why he did not see the one-ton, heavy duty C.P. House Gas truck in his rear view mirror. Therefore, his actions were a proximate cause or proximate contributing cause of the accident.

In the case of Campbell v. Schmidt, a wrongful death action arose out of a collision between a southbound motorist and an eastbound truck. Campbell v. Schmidt, 195 So.2d 87 (Miss. 1967). The facts of this case indicated that Mrs. Schmidt looked right and left when she approached an intersection, but didn't see the other vehicle involved in the accident until it hit her. Id. 195 So.2d

at 88. Even though Mrs. Schmidt claimed that she had looked both ways at trial, the Court noted that:

It is apparent that if the defendant had looked to the west, she would have seen the truck approaching the intersection for some distance. *She is of course charged with seeing that which she should have seen.* But, more than that, under the facts shown here, *the failure to look was negligence as a matter of law.*

Id. at 89. (emphasis added). Therefore, the Supreme Court affirmed the trial court's decision to grant the plaintiff's peremptory instruction on the defendant's negligence. Id. Essentially, even though the defendant testified that she looked, the Court found that she could not have looked if she did not see the approaching vehicle.

Given the testimony in the case *sub judice*, there can be no doubt that Rodney Brown was negligent on the day of the subject accident and that his negligence, at least in part, contributed to Mr. Thompson's undisputed and unquestioned injuries. This is so even if Rizzo Farms, Inc.'s witness testimony regarding the lack of flashing lights and siren from Deputy Thompson's vehicle is taken as true. The trial court therefore should have granted Plaintiff's motion for a directed verdict on the issue of Rodney Brown's negligence. (T. 754-55). Further, the trial court should have given Plaintiff's peremptory Jury Instruction, P-13, pertaining to Rodney Brown's negligence. (R.349, T. 694).

B. The Trial Court Erred in Denying Thompson's Motion for New Trial Based on Jury Bias.

A motion for new trial goes to the weight of the evidence. In determining whether a jury verdict is against the overwhelming weight of the evidence, the appellate court will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Walker

v. State, 881 So.2d 820, 831 (Miss. 2004) (citing Grant v. State, 762 So.2d 800, 804 (Miss.App.2000)).

During the voir dire of J. Kirkham Povall, one of the attorneys for Deputy Thompson, he prefaced his questions by stating:

There may be some questions that I ask where I touch on a subject that 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'm not – I'm subject to doing that today, and I'd like for you – if you think I'm 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? Is that agreeable? We are all trying to get to the same point, and that is to select a jury that is fair and impartial.

(T. 159). Deputy Thompson's counsel later during the voir dire posed the following question:

Thompson has been in law enforcement ten years, as I mentioned, in different capacities working for the people of Bolivar County. Mack Grimmert 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 had to, for instance, investigate you or your family member for some kind of alleged problem?

(T. 165). In response to this question, one of the members of the jury panel, who was not ultimately selected as a juror, answered a question regarding her cousin in Gunnison. Id. None of the ultimate members of the jury responded to this question. Id. Deputy Thompson's counsel went on to ask the following question:

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 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 outside the presence of everyone else. Has anyone been in that situation? Okay I had to ask that question. We'll go to something else.

(T. 164-65). No member of the jury panel responded to this question. Id.

During the trial court's voir dire, the Honorable Robert P. Chamberlin went over a list of potential witnesses and asked the venire to respond if they knew the witness or were related to the witness. Included in the names of the witnesses were the names Charles Gilmer and Frazier Nash, both of whom were Bolivar County Sheriff Deputies along with Deputy Thompson. (T. 145). No member of the jury panel responded as knowing either Deputy Gilmer or Deputy Nash. (T. 140, 146).

Following the conclusion of the trial of this matter, it came to the attention of Deputy Thompson and his attorneys that certain members of the jury and certain family members of members of the jury had an arrest history with the Bolivar County Sheriff's Department and/or with Deputy Thompson. Due to the fact that Deputy Thompson and his counsel were cognizant of privacy issues, they submitted to the trial court that the best way to address this issue would be to come before the Court and counsel opposite on the record and present documentation related to the above. On July 20, 2007, attorneys for Deputy Thompson and Rizzo Farms, Inc. came before the Honorable Robert P. Chamberlin to argue Deputy Thompson's Motion for New Trial and Motion for Leave to Take Depositions of Certain Jurors. (T. 874). Present at said hearing were Rachel Ramiz and Chedra Bolden, two of the jurors in Deputy Thompson's trial. (T. 881). Due to fact that he was no longer residing in Mississippi and was unable to be served with a subpoena, jury foreman Leon Hollaman was not present at the hearing. (T. 881). Based on the booking records at the Bolivar County Sheriff's Department, Leon Hollaman was arrested for forgery by Bolivar County Sheriff's Deputy Frazier Nash on September 29, 2003. (E. 1276). Even though Deputy Nash was listed as a potential witness during the court's voir dire and his name was mentioned throughout the trial,

Leon Hollaman did not find it pertinent to disclose that he had been arrested by Frazier Nash, a Bolivar County Sheriff's Deputy. (T. 881).

During the examination of juror Rachel Ramiz, Ms. Ramiz stated that her sister is Jessica Francine Ramiz. (T. 883) Ms. Ramiz further admitted that her sister Jessica had an arrest history with the Bolivar County Sheriff's Department prior to Deputy Thompson's trial. (T. 884). Ms. Ramiz further admitted that her sister, Jessica, was living with her in an apartment in Pace, Mississippi during Deputy Thompson's trial. (T. 886). The truth is that juror Rachel Ramiz's sister and roommate was arrested by Deputy Thompson for uttering a forgery just two years prior to the trial. (E. 1280). Following Ms. Ramiz's questioning regarding her sister, Jessica, she was questioned about another family member, Terry Ramiz. Id. During questioning Ms. Ramiz acknowledged that Terry Ramiz is her first cousin. Id. Ms. Ramiz denied knowing that the Bolivar County Sheriff's department was the agency who arrested her cousin, but was well aware that he had been arrested for a rape charge and was held at that Bolivar County Correctional Facility. (T. 887). Coincidentally, Deputy Thompson was the investigator on Terry Ramiz's rape charge. (T. 887). Ms. Ramiz was also aware of her cousin, Terry Ramiz's, arrest before Deputy Thompson's trial, but yet, she did not feel the need to respond to voir dire questioning regarding the Bolivar County Sheriff's Department. (T. 888-889).

During the examination of juror Chedra Bolden, Ms. Bolden acknowledged that she is the first cousin of Centrea Bolden, who lives in the same apartment complex as she does. (T. 891). Ms. Bolden admitted to knowing her cousin "had served time" but denied knowing that Chief Deputy Charles Gilmer, a witness for Deputy Thompson, was the officer who had arrested her cousin on obstruction charges in 2004. (T. 892) (E. 1290). When questioned further, Ms. Bolden acknowledged that she was also related to Jacqueline Bolden, another first cousin. (T. 893). Ms.

Bolden's cousin Jacqueline lives across the street from her in Pace, Mississippi. Id. Ms. Bolden admitted that her cousin Jacqueline had been arrested prior to the trial of this case, but denied knowing that it was the Bolivar County Sheriff's Department who had arrested her. (T. 893-94). Like juror Rachel Ramiz, Ms. Bolden did not find it pertinent to respond to the relevant questions asked during Deputy Thompson's voir dire. (T. 894).

Once this information was brought to Judge Chamberlin's attention, the case of Odom v. State, 355 So.2d 1381 (Miss. 1978), governed the analysis. In that case the Court set forth that in the instance where a prospective 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, on a motion for a new trial, determine whether the question propounded to the juror was relevant to voir dire examination, whether it was unambiguous, and whether the juror had substantial knowledge of the information sought to be elicited; if the trial court's determination of these inquiries is in the affirmative, it should then determine if prejudice to the party in selecting a jury reasonably could be inferred from the juror's failure to respond, and, if so, a new trial should be ordered. Odom, 355 So.2d at 1383. In Odom, a particular juror's brother was a police officer but the juror failed to disclose such fact during voir dire when asked whether any member of the panel had a close relative who was involved in law enforcement. Id. at 1383. The evidence in the case indicated that the juror's brother was a policeman in the area where the crime for which the defendant in that case was being tried occurred, which gave the defendant a rational basis upon which to challenge the juror peremptorily, if not for cause. Id. at 1383-84. The court held in Odom that the defendant successfully established the fact from which prejudice to him in selecting the jury might reasonably have been inferred, and he was entitled to a new trial. Id. at 1384.

Applying the Odom test to the case *sub judice*: 1) The questions asked by Deputy Thompson's attorney during voir dire were relevant, as they were intended to determine whether any jurors or their family members had been arrested by Deputy Thompson or any of his witnesses; 2) Deputy Thompson's attorney was both direct and unambiguous when he asked, "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 had to, for instance, investigate you or your family member for some kind of alleged problem?" (T. 165). (emphasis added). Further, Judge Chamberlin was both direct and unambiguous when he asked the venire if anyone knew Deputy Frazier Nash or Deputy Charles Gilmer; 3) It is undisputed that none of the ultimate members of the jury responded to these questions during voir dire even though certain members of the jury and their family members had been arrested by Deputy Thompson, Deputy Frazier Nash and Deputy Charles Gilmer prior to Deputy Thompson's trial.

Deputy Thompson submits that after this Court reviews documentation pertaining to the arrest history of certain of the jurors and/or their family members, and the testimony referenced above, it will feel compelled to remand this case for a new trial. The mere fact that the jury foreman, Leon Hollaman, failed to respond to the court's voir dire when asked if he knew Deputy Frazier Nash, who had arrested him for forgery less than three years earlier, should itself be enough evidence to show the obvious bias of this jury against the Bolivar County Sheriff's Department. In addition, there were two other jurors who had close family members who were arrested by Deputy Thompson and/or Deputy Thompson's witnesses at trial. In his closing argument, counsel for Rizzo Farms, Inc. told members of the jury that they had an opportunity "to police the police". (T. 813). Given certain jurors' history and knowledge of their family member's arrest histories, they no doubt took this opportunity.

C. The Trial Court Erred in Denying Deputy Thompson's Motion for Partial Summary Judgment on the Issue of Deputy Thompson's Standard of Care.

The appellate standard for reviewing the grant or denial of summary judgment is the same standard as that of the trial court under Rule 56(c) of the Mississippi Rules of Civil Procedure. City of Jackson v. Sutton, 797 So.2d 977, 979 (Miss. 2001). The Mississippi Supreme Court employs a de novo standard of review of a lower court's grant or denial of summary judgment and examines all the evidentiary matters before it, including admissions in pleadings, answers to interrogatories, depositions, affidavits, etc. Id. The evidence must be viewed in the light most favorable to the party against whom the motion has been made. Id. 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. Id. Otherwise, the motion should be denied. Id. Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite. Id. In addition, the burden of demonstrating that no genuine issue of fact exists is on the moving party. Id. That is, the non-movant should be given the benefit of the doubt. Id. (quoting Heigle v. Heigle, 771 So.2d 341, 345 (Miss. 2000)).

On August 1, 2006, Deputy Thompson filed a Motion for Partial Summary Judgment as to Issue of Law regarding the standard of care applicable to Deputy Thompson for purposes of a comparable negligence situation. (R. 122). On August 4, 2006, Rizzo Farms, Inc. filed a Motion for Partial Summary Judgment on the same issue. (R. 137). On August 17, 2006, attorneys for Deputy Thompson and Rizzo Farms, Inc. came before the Honorable Robert P. Chamberlin to argue their respective Motions for Partial Summary Judgment. (R. 498). Following arguments from both

attorneys, Judge Chamberlin denied Deputy Thompson's motion and granted Rizzo Farms, Inc.'s motion. (R. 522).

The Mississippi Tort Claims Act, specifically, Miss. Code Ann. § 11-46-9, provides in pertinent part:

(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. See also Smith vs. Brookhaven Police Department, 914 So.2d 180, 183, (Miss. App. 2005).

It is undisputed that in an action by Rodney Brown against the Bolivar County Sheriff's Department, alleging fault on behalf of Deputy Thompson, Mr. Brown, in order to prevail, would have to prove that Mr. Thompson acted in reckless disregard of the safety and well-being of Mr. Brown and/or others. At issue in the present case is whether Mr. Brown must show Mr. Thompson's actions amounted to reckless disregard in order to have the jury apportion fault to Mr. Thompson under comparative negligence principles. Plaintiff avers that this Court must answer the question in the affirmative.

Counsel for the Plaintiff can find no Mississippi authority directly on point with the issue presented in this appeal; however, cases from other jurisdictions provide guidance and support the

rule that police officers in the course and scope of their employment are held to a different standard of care than the ordinary motorist.

In Smith v. Lamar, a police officer brought an action against a motorist after an accident involving a hot pursuit. Smith v. Lamar, 188 S.E.2d 72, 73 (Va. 1972). The issue in Smith was to what standard was the police officer to be held. Smith, 188 S.E.2d at 74. The Virginia Supreme Court found that the standard of care required of the driver of an emergency police vehicle was that standard of care of a prudent man in the discharge of his official duties of a like nature under the circumstances. Id. 188 S.E.2d at 75. The Court noted that the standard of care which would customarily be required of an ordinary motorist did not apply to the police officer. Id. The Court reasoned that the same standard of care must apply regardless of whether the operator sues or is being sued. Id. See also Scogin v. Nugen, 464 P.2d 166, 174 (Ka. 1970)(holding that the proper standard of care required of the driver of an emergency police vehicle is the standard of care for a prudent man in the discharge of official duties of a like nature under like circumstances); McKay v. Hargis, 88 N.W.2d 456, 459 (Mi. 1958)(same).

It is anticipated by Deputy Thompson that Rizzo Farms, Inc. will rely on the case of Andrews v. Jitney Jungle Stores of America, Inc.. Andrews v. Jitney Jungle Stores of America, Inc., 537 So.2d 447 (Miss. 1989). During the oral arguments on the Motions for Partial Summary Judgment, Rizzo Farms, Inc.'s attorney argued that the Andrews case stood for the proposition that an ordinary care standard is imposed upon an officer responding to an emergency call. (T. 15). However, Rizzo Farms, Inc. ignores the fact that the jury in the Andrews case found the officer/plaintiff to be the sole proximate cause of the accident. Id. 537 So.2d at 450. The court in Andrews further stated that, "Mississippi's comparative negligence statute has no application where the negligence of the injured person was the sole proximate cause of the injury." Id. Further, the Andrews decision was in 1989,

pre-Mississippi Tort Claims Act, and the Court never discussed what standard would have been applied to the officer had he not been the sole proximate cause of the accident. Therefore, the issue presented to this Court is an issue of first impression in Mississippi.

The cases cited by Deputy Thompson stand for the proposition that a police officer engaged in his official duties should be held to the same standard of care whether he is being sued or whether he is a Plaintiff. In this case, it is undisputed that if Deputy Thompson had been sued by Rodney Brown, Mr. Brown, in order to prevail, would have to show that Mr. Thompson acted in reckless disregard for the safety and well-being of Mr. Brown and/or others. It makes perfect sense, therefore, that in order for the Defendant to have the jury apportion fault to Mr. Thompson in this case, it must likewise show and meet this reckless disregard standard. To hold otherwise would place upon Mr. Thompson two different standards of care while operating a vehicle for the Bolivar County Sheriff's Department. This double standard presents a policy concern as it pertains to law enforcement officers across the State of Mississippi. If law enforcement officers are to be held to the standard of care of an ordinary individual, this could create a chilling effect on the manner in which law enforcement officers respond to emergency calls.

If Deputy Thompson's Motion for Partial Summary Judgment on this issue had been granted by the trial court, Deputy Thompson's strategy would have changed dramatically at every step during the trial. For example, Deputy Thompson would have discussed the reckless disregard standard with the jury during voir dire, during opening statements and during closing arguments. Further, Deputy Thompson would have presented testimony through his expert witness, Brett Alexander, that his actions on the day of the accident did not rise to the level of reckless disregard. Finally, the jury would have been presented with relevant jury instructions regarding the Mississippi Tort Claims Act

and the reckless disregard standard. Therefore, this Court should reverse and remand this case on the issue of Deputy Thompson's standard of care.

VI. Conclusion

After reviewing all of the relevant testimony at Deputy Thompson's trial, the only conclusion is that Rodney Brown simply did not look prior to commencing his left hand turn into his driveway. If Brown had looked he would have seen Deputy Thompson's vehicle in the passing lane, the C.P. House Gas truck directly behind him and Jeffrey West's truck facing him. Regardless of Rizzo Farms, Inc.'s contention that Deputy Thompson did not have his lights and siren on, Rodney Brown was negligent as a matter of law if he failed to look prior to commencing his turn.

After reviewing the transcript of the voir dire proceedings and the transcript of certain jurors' testimony following the trial, at least three of the jurors failed to respond to relevant questioning during voir dire. Given the fact that the jury foreman, Leon Hollaman, had been arrested by one of Deputy Thompson's potential witnesses, while jurors Rachel Ramiz and Chedra Bolden had close family members that had an arrest history with Deputy Thompson and/or Deputy Thompson's witnesses, certain members of the jury apparently had an axe to grind with the Bolivar County Sheriff's Department and Deputy Thompson. During Rizzo Farms, Inc.'s closing arguments the jury was told, "this is your opportunity to police the police." Unfortunately, it appears that the jury attempted to do so.

Prior to the trial, Deputy Thompson filed a Motion for Partial Summary Judgment on the issue of Deputy Thompson's standard of care. Particularly, that Rizzo Farms, Inc. should have been required to show that Deputy Thompson's actions rose to the level of reckless disregard prior to any comparative negligence being assigned. Had the trial court granted Deputy Thompson's motion, his strategy at trial would have shifted significantly.

Therefore, Deputy Thompson respectfully requests that this Court reverse and remand this case for a new trial based on Rodney Brown's negligence and the bias of the jury. Further, Deputy Thompson respectfully requests that this Court reverse and render the trial court's denial of Deputy Thompson's Motion for Partial Summary Judgment on the issue of Deputy Thompson's standard of care.

RESPECTFULLY submitted on this the 14th day of October, 2008.

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CERTIFICATE OF SERVICE

I, W. Hunter Nowell, attorney of record for Michael A. Thompson, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF APPELLANT** to the following persons:

Edward J. Currie, Jr., Esq.
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The Honorable Robert P. Chamberlin, Jr.
Circuit Judge, Third District
P. O. Box 280
Hernando, MS 38632

This 14th day of October, 2008.

W. Hunter Nowell
W. HUNTER NOWELL

CERTIFICATE OF FILING

I, **W. Hunter Nowell**, do hereby certify that I have this day mailed by first class U.S. Mail, postage prepaid, the original and three (3) copies of the **BRIEF OF APPELLANT** to Mrs. Betty Sephton, Mississippi Supreme Court Clerk.

This the 14th day of October, 2008.

W. Hunter Nowell
W. HUNTER NOWELL