IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

TIPPAH COUNTY, MISSISSIPPI	**APPELLANT**
VS.	**2007-CA-01843**
DANIEL CHILDERS	**APPELLEE**

BRIEF OF APPELLEE, DANIEL CHILDERS

ON APPEAL FROM THE CIRCUIT COURT
OF TIPPAH COUNTY, MISSISSIPPI

(ORAL ARGUMENT IS NOT REQUESTED)

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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. Honorable Henry L. Lackey
   Circuit Court Judge
   P.O. Box T
   Calhoun City, MS 3891

2. Hon. B. Sean Akins
   Fortier & Akins, P.A.
   108 Jefferson Street
   Ripley, MS 38663

3. Daniel Childers
   220 C.R. 415
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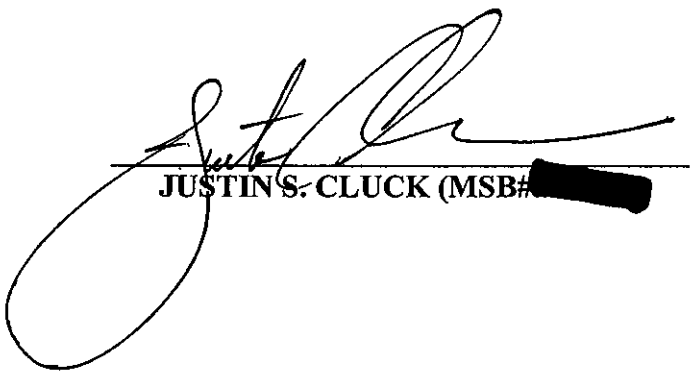
7. Tippah County, Mississippi



JUSTIN S. CLUCK (MSB#[redacted])

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would not be helpful in this case, as it would not aid in offering additional facts, law or argument in support of these issues. The issues before the Court are straightforward issues of law applied to the facts of this case. As such, oral argument would not be of benefit and is not requested.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion by overruling Tippah County's motion to set aside default judgment.

STATEMENT OF THE CASE

A. Nature of the Case

This is a suit for personal injuries Appellee Daniel Childers sustained when he was attacked with a taser weapon by two deputy sheriffs from Tippah County, Mississippi. After Tippah County failed to file a responsive pleading to the complaint, Childers moved for a default judgment, which was entered by the lower court and a hearing for damages was conducted. The lower court entered a default judgment for Childers. Tippah County moved to set aside the default judgment pursuant to Miss. R. Civ. Pro. 60(b). The lower court, after an evidentiary hearing, overruled the motion finding that Tippah County failed to present sufficient evidence to establish a colorable defense, and further found that each prong of the balancing test weighed in favor of Childers.

B. Statement of the Facts Relevant to the Issues Presented for Review.

While Appellee Daniel Childers ("Childers") was still a minor, he was involved in an automobile accident in 1991, wherein he sustained an L-1 spinal cord injury which rendered him permanently disabled and caused him to suffer from multiple psychiatric disorders including paranoid schizophrenia. [R. 53, 298].[1] He sustained no injury to his left elbow in the 1991 automobile accident. [R. 53]. As part of the settlement of that action, Childers' parents, Lee and Joyce Childers, were appointed to serve as his

[1] Throughout the Appellee's brief, the following abbreviations used when making a citation to the record:
R – Reference to the court record
EH – Reference to the exhibits introduced at the hearing on Tippah County's motion to set aside default judgment
Tr. –Reference to August 16, 2007, and September 19, 2007, hearing transcripts

guardians. Childers reached the age of majority in 1993 and the guardianship was dissolved by operation of law. [E.H. 29, 30] [Tr. 22].

On January 30, 2006, Childers' aunt, Doris Moffitt, filed a civil commitment proceeding in the Chancery Court of Tippah County, requesting that Childers be taken to a mental health facility for a mental health screening.[E.H. 1-4]. In the Application for Commitment, Moffitt alleged that Childers had been exhibiting erratic behavior as of late, due to the fact that Childers had either stopped taking his psychotropic medication, or that he had acquired a tolerance to the medication which rendered it ineffective in treating his disorders. Id. Pursuant to this request, the Tippah County Chancery Clerk issued a civil Writ to Take Custody permitting the County to temporarily detain the mentally ill person until he completes a mental health screening to determine what treatment is necessary to correct his condition.[E.H. 19].

Later that day, Childers was doing yard work at his home in Ripley, Mississippi, when he noticed vehicles from the Tippah County Sheriff's Department arrive at his home. Two Tippah County Sheriff's deputies exited their vehicles and approached Daniel Childers. [R. 143, 145]. According to the deputies, they told Daniel that they "had a Writ for him." Id. Evidencing a lack of understanding about what was happening to him, Childers asked the deputies why they were trying to arrest him, told the deputies that he was going in the house and turned his back to them. [R. 2, 3]. As soon as Childers turned his back, deputy Tim Wilbanks drew his taser weapon from his holster and intentionally shot Childers in the back, even though he knew that Childers was mentally ill and was not accused of having committed any crime. [R. 143, 145]. The taser pierced his skin and began to electrocute him, causing Childers to lose control of his body.

Childers body went limp causing him to fall on his outstretched left hand, which in turn caused his left elbow to hit the ground and crushed his left elbow. [R. 2.3]. The deputies then handcuffed Childers, took him into custody and transported him to the Tippah County Jail. [R. 143, 145]. The deputies' report indicates that they refused to provide Childers with medical care because they alleged that he had hurt his left arm before the incident occurred. Id. At the time of the assault by the deputies there were no warrants for Childers arrest and he was not under any suspicion for having committed any crime, either felony or misdemeanor. [R. 2,3] [Tr. 12-13]. Childers has never been charged with any crime associated with this incident. Daniel Childers' mother, Joyce Childers, was present during the assault and was an eyewitness to the events of that day. [R. 161-162

Despite the sworn testimony offered in their affidavits, that Tippah County does not provide medical treatment to persons who sustain an injury prior to an arrest, several days later Childers was transported by the Tippah County deputies for treatment with Dr. Johnny Mitias in New Albany, Mississippi. [R. 35]. Dr. Mitias diagnosed Childers as having sustained a complex fracture of the proximal radius in his left elbow with dislocation and displacement. Id. This was caused when Childers fell with his elbow bent causing the full axial weight of his body to transfer to his elbow two and one-half days before his visit with Dr. Mitias. Id. Dr. Mitias then performed reconstructive surgery on his elbow and outfitted Childers with a permanent support brace. [R. 36-37]. Dr. Mitias also prescribed extensive physical therapy in order to rehabilitate Childers' elbow, but this treatment failed to return full use of Childers' left arm. [R. 29-34].

Childers was then evaluated by Dr. Tewfik Rizk, a medical doctor and senior social security disability specialist, who opined that Childers had a left radial head

fracture and reflex muscular dystrophy of the left upper extremity which was caused by the injuries he received from the January 30, 2006, attack by the Tippah County Sheriff's Department. [R. 128-129]. Dr. Rizk found that Childers would develop post traumatic osteoarthritis of the left elbow and that it would lead to more pain and more stiffness and less range of motion in the future. Id. Rizk assigned Childers a twenty-five percent (25%) impairment to his upper left extremity and a fifteen percent (15%) impairment to the body as a whole. Id. Dr. Rizk also gave Childers permanent restrictions of no repetitive movement involving his upper left extremity and no pushing, lifting or pulling of more than fifteen pounds (15lbs). Id.

Prior to the attack on Childers, the Tippah County Sheriff's Department had been under investigation by the Federal Bureau of Investigation for repeated and systematic assaults on persons through the illicit use of taser weapons. [R. 179-180]. On June 12, 2007, Tippah County resident Jimmy Dale Hunsucker was arrested and incarcerated in the Tippah County Jail when he was handcuffed to a chair and repeatedly shot with a taser weapon by members of the Tippah County Sheriff's Department. Id. Due to the similarity of the attacks, Daniel Childers has also been contacted by the Federal Bureau of Investigations and has been working with an FBI special agent regarding the January 30, 2006, attack. [R. 165]

C. Course of the Proceedings

After the attack, Daniel Childers sent a notice of claim to Appellant Tippah County, Mississippi ("Tippah County" or "the County") pursuant to the Mississippi Tort Claims Act on December 20, 2006. [R. 181]. Pursuant to the statute, the notice of claim included a list of persons known by the Plaintiff who could be potential witnesses for

discovery purposes and at trial or hearing. [R. 181-182]. This list of witnesses included Joyce Childers. [R. 181]. By way of a letter sent through its attorney, Tippah County acknowledged: (1) receiving the notice of claim; (2) forwarding the claim to its insurance carrier; and (3) that its insurance carrier had conducted an investigation of Daniel Childers' allegations. [R. 183] [E.H 21]. Tippah County and its insurance carrier denied liability for the claim. Id.

After receiving the denial letter, Daniel Childers filed suit against Tippah County on March 26, 2007, in the Circuit Court of Tippah County, Mississippi.[R. 184]. On April 4, 2007, the summons and complaint were personally served on the Chancery Clerk for Tippah County, Daniel Shackleford, who personally signed the summons acknowledging receipt of the same. [R. 191-192]. Tippah County forwarded the complaint to its insurance agent, Ripley Insurance Agency, but the agent did not forward the complaint to the insurance carrier. [E.H. 21] [Tr. 9]. With no answer having been filed, the Circuit Clerk of Tippah County entered a default on May 18, 2007, and Childers filed his motion for default judgment on May 22, 2007. [R. 193-195]. A hearing (formerly known as a Writ of Inquiry) on the Plaintiff's motion for default judgment was held on August 16, 2007. [R. 196, Tr. 2-7]. At hearing, sworn testimony was adduced from Childers and medical proof from his treating physicians were submitted to the Honorable Henry L. Lackey, Tippah County Circuit Judge. [R. 197-299]. After conducting the hearing, Judge Lackey awarded Daniel Childers a default judgment against Tippah County. [R. 300]. The Court did not award any judgment to Joyce Childers. Id. Every single pleading filed by Childers was received and stamped "filed" by the Tippah County Circuit Clerk, a duly elected public official and an agent of Tippah

County. [See Trial Court Docket]. Accordingly, the defendant itself, Tippah County, Mississippi, had actual knowledge of every single pleading filed by Childers. Id.

On August 21, 2007, Tippah County filed a motion to set aside default judgment pursuant to Mississippi Rule of Civil Procedure 60(b). [R. 137-141]. Prior to filing the motion to set aside default judgment, Tippah County had never entered an appearance, either *pro se* or through counsel, or filed any pleading whatsoever even though it had actual knowledge of every pleading filed by Childers. [See Trial Court Docket]. Childers then filed a suggestion for writ of garnishment on September 14, 2007, with said writ of garnishment being issued that same day. [R. 154-155]. The writ of garnishment sought to garnish the proceeds of the insurance policy issued to Tippah County from its liability insurer, Travelers Property Casualty Insurance Company of America. Id.

The hearing on Tippah County's motion to set aside default judgment was held on September 19, 2007, at the Tippah County Courthouse in Ripley, Mississippi. [R. 149]. At the hearing the parties stipulated that the technical prerequisites to the default judgment were proper and that there was no dispute in that regard. [Tr. 9-10]. During argument, Tippah County represented to the trial judge that it should set aside the default judgment based upon four grounds: (1) Tippah County was entitled to three days notice before the default judgment was entered or the application for default judgment; (2) the default judgment was entered due to excusable neglect on behalf of Tippah County's insurance company or attorney; (3) Tippah County possessed a meritorious defense to the allegations of the complaint; and (4) Childers would suffer no prejudice if the default judgment was set aside. [Tr. 10]. No other grounds for relief from the default judgment were raised in Tippah County's motion to set aside default judgment or at the hearing

including, but not limited to any sovereign immunity argument or that the award was excessive or unreasonable. Id. Although Tippah County had a number of witnesses present at the hearing and the hearing was held at the Tippah County Courthouse in Ripley, Mississippi, no witnesses were actually called by the County to give live testimony. [Tr. 11, 21-23, 25, 40] [R. 149].

STANDARD OF REVIEW

"The decision to grant or set aside a default judgment is addressed to the sound discretion of the trial court." Windmon v. Marshall, 926 So.2d 867, 870 (Miss. 2006)(citing Tatum v. Barrentine, 797 So.2d 223, 227 (Miss. 2001)). The standard of review for setting aside a default judgment is whether the trial court committed an abuse of discretion. McCain v. Dauzat, 791 So.2d 839, 842 (Miss. 2001). "[T]he trial court's exercise of its discretion may be disturbed only where it has been abused." Guaranty National Insurance Co. v. Pittman, 501 So.2d 377, 388 (Miss. 1987).

Counties, cities and incorporated municipalities are treated the same as any other litigant and are vested with the same rights *and responsibilities*. City of Jackson v. Presley, 942 So.2d 777, 792 (Miss. 2006)(citing Bell v. City Bay St. Louis, 467 So.2d 657 (Miss. 1985))(emphasis added). "As such, a trial court judge has the authority to enter a default judgment against the city as a party to a civil action." Id. "When a judgment by default is entered, it is treated as a conclusive and final adjudication of the issues necessary to justify the relief awarded and is given the same effect as a judgment rendered after a trial on the merits." Id. at 793.

SUMMARY OF THE ARGUMENT

At hearing on Tippah County's motion to set aside default judgment, it was stipulated that there were no procedural issues leading up to the default judgment which were improper. Accordingly, Tippah County moved to set the default judgment aside pursuant to Miss. R. Civ. Pro. 60(b) and the three-prong balancing test set forth in Capital One Services, Inc., v. C.J. Rawls, 904 So.2d 1010, 1015 (Miss. 2004), claiming that its reliance on its insurance carrier to defend the suit was excusable neglect. Tippah County also claimed that its attorney committed excusable neglect when he failed to follow up on the litigation for five months after the answer was due. The County also argued that it had a colorable defense to the claim and that Daniel Childers would suffer no prejudice if the default judgment was set aside. The lower court overruled the County's motion, finding that Tippah County failed to present sufficient evidence at hearing to satisfy any of the three prongs of the balancing test, and that due to the insufficient proof, each prong weighed in favor of Daniel Childers.

Over the years Mississippi has established a long line of precedent which has consistently rejected the argument that reliance on an insurance carrier constitutes excusable neglect for purposes of setting aside a default judgment pursuant to Miss. R. Civ. Pro. 60(b). See Pointer v. J.D. Huffman, 509 So.2d 870 (Miss. 1987); H&W Transfer and Cartage Service, Inc. v. Griffin, 511 So.2d 895, 899 (Miss. 1987); Guaranty National Insurance Co. v. Pittman, 507 So.2d 377 (Miss. 1987); and Leach v. Shelter Insurance Company,909 So.2d 1283, 1285 (Miss. App. 2005). The Courts have also held that "relief from a judgment is not to be granted under Rule 60(b) simply because its entry may have resulted from *incompetence or ignorance* on the part of an attorney

employed by the party seeking relief." Stringfellow v. Stringfellow, 451 So.2d 219, 221 (Miss. 1984).

The lower court did not abuse its discretion in failing to set aside the default judgment based on Tippah County's new immunity argument contained in its appellate brief because the County waived this argument. Tippah County never raised the Mississippi Torts Claims Act as a defense in its motion to set aside default judgment and never argued lack of reckless disregard or criminal activity to the trial judge at hearing. Tippah County also failed to present any evidence at hearing that Childers was not intentionally shot with a taser by the deputy sheriffs, or that he was engaged in a criminal act at the time of the attack. The lower court was also correct when it found that Childers would suffer prejudice should the default judgment be set aside. The only witnesses for Childers who would be available to recount the facts of the attack would be Daniel Childers, a person who is admittedly mentally ill, and his mother Joyce Childers who is sixty-five years old and has debilitating medical conditions which impair her memory. "Prejudice is found upon a delay in the proceedings in terms of loss of memory of witnesses and the fact that the plaintiff is without resolution for a long period of time." Capital One Services, Inc., 904 So.2d at 1017 (citing Guar. Nat'l Ins. Co. v. Pittman, 501 So.2d at 388).

The lower court did not abuse its discretion when overruling Tippah County's motion to set aside default judgment.

ARGUMENT

"There is a three-prong balancing test for trial courts to consider in determining whether to set aside a default judgment pursuant to Miss. R. Civ. P. 60(b)." Capital One Services, Inc., v. C.J. Rawls, 904 So.2d 1010, 1015 (Miss. 2004)(citing Stanford v. Parker, 822 So.2d 886, 887-88 (Miss. 2002)). "The court must consider: (1) the nature and legitimacy of the defendant's reasons for default; (2) whether the defendant has a colorable defense to the merits of the claim; and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the judgment is set aside." Id. Further, "Rule 60(b) provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances. Stringfellow v. Stringfellow, 451 So.2d 219, 221 (Miss. 1984) (citing Clarke v. Burkle, 570 F.2d 824, 831 (8th Cir. 1978).

A. There Was No Excusable Neglect By The Defaulting Defendant, Tippah County, Which Would Justify Relief From The Default Judgment Pursuant To Miss. R. Civ. Pro. 60(b).

Tippah County argues that the lower court committed error when it found that no excusable neglect may be attributed to Tippah County for failure to file a responsive pleading based on two acts and/or omissions: (a) Tippah County's reliance on its insurance carrier to provide a defense; and (b) Tippah County's reliance on its attorney to follow up on the litigation. Contrary to the arguments of Tippah County, the lower court did analyze this argument and did not abuse its discretion in finding that neither of these acts and/or omissions constitute excusable neglect pursuant to Mississippi Rule of Civil Procedure 60(b) and the applicable case law.

1. Reliance On An Insurance Carrier Does Not Constitute Excusable Neglect

Over the years Mississippi has established a long line of precedent which has consistently rejected the argument that reliance on an insurance carrier constitutes excusable neglect for purposes of setting aside a default judgment pursuant to Miss. R. Civ. Pro. 60(b). See Pointer v. J.D. Huffman, 509 So.2d 870 (Miss. 1987); H&W Transfer and Cartage Service, Inc. v. Griffin, 511 So.2d 895, 899 (Miss. 1987); Guaranty National Insurance Co. v. Pittman, 507 S0.2d 377 (Miss. 1987); and Leach v. Shelter Insurance Company, 909 So.2d 1283, 1285 (Miss. App. 2005). As discussed below, each defaulting party in these cases have argued, albeit unsuccessfully, that they committed excusable neglect by relying on their insurance carrier to answer and defend.

First is the case of Pointer v. J.D. Huffman, where the Mississippi Supreme Court held that a defendant's reliance on its insurance carrier to provide a defense does not constitute excusable neglect. The Plaintiff perfected personal service on the Defendant, Monroe Pointer, with a summons and complaint. Pointer, 509 So.2d at 872. Pointer then mailed the suit papers to his insurance carrier but took no further action to follow up on the suit. Id. at 876. Pointer later learned that his insurance carrier had failed to provide a defense and a default judgment had been entered against him. Id. Of course, Pointer contended that his default was unintentional and was solely attributable to his reliance on the insurance carrier to answer and defend. Id. In its opinion, the Court observed that Pointer never took any follow-up action to determine whether the suit papers were received by the insurance company officials or whether an answer had actually been filed. Id.

In determining whether Pointer's dilatory actions were reasonable under the circumstances, the Court considered the following factors: (1) Pointer was an astute businessman with years of experience in dealing with insurance claims and litigation; (2) Pointer was less than ten minutes away from the courthouse where the suit was filed; (3) Pointer could have made a telephone call to the Circuit Clerk and check the status of the suit; and (4) Pointer made no effort to seek local counsel or ask for an extension of time to file a responsive pleading. Id. The Court finally held that based at least in part on the factors listed above, Pointer could, and should, have been more diligent in taking necessary action to defend the suit. Id. The Court, therefore, found that Pointer's reliance on his insurance carrier did not constitute excusable neglect. Id. The Court upheld the lowers court's decision overruling the motion to set aside the default judgment, but remanded the case for a hearing on damages, which had not yet occurred. Id.

The Court's analysis of the factors contributing to Pointer's default are equally applicable in the instant case. First, the Court in Pointer found no excusable neglect because Pointer was an astute businessman with years of dealing with insurance claims and litigation. Since its inception as a governmental entity, Tippah County has dealt with litigation in real estate transactions, eminent domain proceedings, tort claims, insurance issues, municipal law, government bonds, etc. Second, the court found that Pointer's proximity to the courthouse was a factor. Well, Tippah County owns the courthouse, employs a host of people who work at the courthouse and the County business is handled through the courthouse. Third, Pointer could have called the Circuit Clerk to check the status of the suit. Here, there is no question that the Circuit Clerk received all original pleadings filed by Childers in the case, stamped them as "filed" and initialed the

pleadings to acknowledge actual receipt of the pleadings. Lastly, Pointer made no effort to seek local counsel or ask for an extension. Tippah County had already employed counsel to handle the pre-suit aspects of the case and was waiting on insurance defense counsel to be assigned to the case. The County's local counsel could have at least filed a Notice of Appearance after the claim was handed over to the insurance agent to ensure that it received notice when pleadings were filed. As the Court held in Pointer, Tippah County could have definitely been more diligent on taking action to defend the suit given its experience and knowledge of the litigation process.

Next is the case styled H&W Transfer and Cartage Service, Inc. v. Griffin, where the Mississippi Supreme Court addressed a situation factually similar to Pointer, in that a party defendant claimed that reliance upon its insurance carrier established excusable neglect for his default. H&W Transfer, 511 So.2d at 899. The facts of H&W Transfer show that after the appellant was served with the summons and complaint, H&W forwarded the suit papers to its insurance agent, Midland Insurance Company which, the Court found, was what a prudent defendant should do. Id. Thereafter, "H&W did nothing, made no follow-up inquiry, and for all practical purposes let the matter drop until some five months later when it found out about the default judgment." Id. Midland also took all prudent steps before suit was filed, when it contacted the plaintiff's attorney and retained counsel to defend the suit. Id. The suit was then sent by Midland to the insurance defense attorney, but thereafter both H&W, Midland and the insurance defense attorney "dropped the ball." Id. The Court refused to consider any action taken by the insurance agent as grounds for excusable neglect because H&W was the party defendant, therefore H&W's conduct, not its insurance agent or carrier, was the only proof properly considered. Id.

The Court held that the lower court did not abuse its discretion in refusing to set aside the default judgment and reiterated the mandate that "defendants must take seriously their duty to answer." Id. at 896.

After Childers' complaint had been filed, Tippah County did nothing to defend the matter at bar and "for all practical purposes let the matter drop until some five months later when it found out about the default judgment." Id. at 899. Just as the Supreme Court refused to consider any action taken by the insurance agent as grounds for excusable neglect in H&W Transfer, so too did the lower court refuse to consider any neglect committed by Ripley Insurance Agency because Tippah County was the party Defendant, not Ripley Insurance Agency or Travelers Insurance.

In Guaranty National Insurance Co. v. Pittman, the Mississippi Supreme Court found no abuse of discretion when the lower court refused to set aside a $400,000.00 default judgment when the defendant failed to answer the plaintiff's complaint due to a coverage issue with its insurance carrier. Pittman, 507 So.2d at 379. The case arose from a motor vehicle negligence suit where the plaintiff properly served the defendant with a summons and complaint, but no answer was filed by the defendant. Id. The plaintiff's attorney sent notice of the suit to the defendant and asked the defendant to turn the suit over to its liability insurance carrier for a defense. Id. The insurance carrier took the position that no coverage existed for the claim and thus provided no defense. Id. After the plaintiff obtained a default judgment, the defendant moved to set it aside on the basis that the defendant "may have been confused about whether he had insurance coverage." Id. at 388. The Court found that although the appellant may have been confused about whether he had insurance coverage, he should not have been confused "about the fact that he has

been sued and should respond" Id. The Supreme Court affirmed the lower court's order finding no abuse of discretion and issued a metaphorical warning to all future litigants stating that:

> [i]t may be that people will miss fewer trains if they know the engineer will leave without them rather than delay even a few seconds. Although we are not about to inaugurate a policy of entering irrevocable defaults where no answer has been filed by the thirty-first day, we are equally resolved that people know that the duty to answer must be taken seriously. At some point the train must leave.

Id. at 388-389.

During the hearing and in its brief, Tippah County presented proof that the insurance agency was confused about whether it had sent the suit papers to the insurance carrier. [E.H. 21]. The lower court found that the actions, or inaction, of the insurance carrier was not excusable neglect. However, just as the Court found in Pittman, Tippah County should not have been confused about the fact that it had been sued and should respond.

Finally, in Leach v. Shelter Insurance Company, the appellee insured the driver of a vehicle who was involved in an automobile accident with the appellant, Alice Leach. Leach, 909 So.2d at 1285. Shelter then filed a complaint against Leach to recover proceeds paid out under its policy of automobile insurance with its insured. Id. Leach was served with the summons and complaint and delivered it to her liability insurer for a defense. Id. However, Leach's personal automobile policy had lapsed, meaning that she had no coverage under the policy and would not be provided a defense. Id. Receiving no answer or other responsive pleading from Leach, Shelter obtained a default judgment which Leach later moved to set aside. Id. Leach's motion to set aside the default judgment was overruled by the lower court. Id. On appeal, Leach argued that her delay in

filing an answer was caused by her reliance on her insurance carrier to determine whether she had coverage for the accident and if so, to provide a defense. Id. at 1286. In affirming the lowers court's order, the Court of Appeals found that while Leach may have been unsure whether she had insurance coverage, she was not confused about the fact that she had been sued and was required to respond. Id. The Court of Appeals also held that her reliance on her insurance carrier was misplaced, as there was no guarantee that the insurer would even provide a defense due to the coverage issues which existed. Id. at 1287. Accordingly, the lower court did not abuse its discretion in overruling the motion to set aside the default judgment.

Although we cannot be sure, Tippah County may have mistakenly assumed that it had insurance coverage for Childers' claim, or that the carrier received the suit papers when they were delivered to Ripley Insurance Agency. However, there was no guarantee that there was in fact coverage and that defense counsel would be provided to defend the claim. The prudent course of action would have been for the County to hire local counsel to file a notice of appearance until any insurance coverage or defense issues were resolved. Just as the appellee in Leach failed to take prudent action to defend the suit, so did Tippah County.

In support of its argument, Tippah County refers this Court to the treatise, *Federal Practice and Procedure*, for the proposition that a "combination of good causes may constitute excusable neglect." See App. Brief in Chief, p. 11. Tippah County's reliance on this treatise is misplaced, as its brief quotes *Federal Practice and Procedure* § 2696, which is actually the section discussing excusable neglect as it applies to setting aside an entry of default, not a default judgment. This section does however state that "in various

situations a default entry may be set aside for reasons that would not be enough to open a default judgment." 10A Fed. Prac. & Proc. Civ.3d § 2696 (1998). Childers concurs with the authors of *Federal Practice and Procedure* that setting aside an entry of default is a lesser standard then setting aside a default judgment.

In the matter at bar, it is undisputed that Tippah County's insurance agent failed to submit the complaint to the carrier. [E.H. 21]. Specifically, Tippah County admitted into evidence the affidavit of Judd Chapman, an officer with Tippah County's insurance agent, Ripley Insurance Agency. Id. In his affidavit, Chapman admitted that Ripley Insurance Agency received Childers' notice of claim and forwarded it to Travelers Insurance, the insurance carrier who provided coverage for Tippah County. Id. at ¶ 3-4. Chapman next admitted that Ripley Insurance received the complaint filed by Childers. Id. at ¶5. He then admitted that through a mistake made by Ripley Insurance Agency, not Tippah County, the complaint was not sent to Travelers Insurance for a defense. Id. at ¶6. He finally admitted that Tippah County was relying on Travelers Insurance to provide a defense pursuant to the terms of the policy. Id. at ¶7. Nowhere in the affidavit does Chapman attribute Tippah County with any act of negligence or neglect, in failing to file a responsive pleading to Childers' complaint. Chapman's affidavit provided a sufficient evidentiary basis for the lower court to find no excusable neglect because "the County did everything it should have done to notify the proper entity, its insurance carrier." [R. 305]. There is no excusable neglect which may be attributed to Tippah County.

2. Negligence Of An Attorney Is Not Grounds For A Finding Of Excusable Neglect.

Tippah County next argues that it committed excusable neglect in failing to file a responsive pleading due to the fact that its attorney was negligent in not following up on the disposition of the case. Despite this argument, it is abundantly clear that Mississippi jurisprudence does not recognize attorney neglect as a reason to set aside an order pursuant to Rule 60(b). The Courts have consistently held that "relief from a judgment is not to be granted under Rule 60(b) simply because its entry may have resulted from *incompetence or ignorance* on the part of an attorney employed by the party seeking relief." Stringfellow v. Stringfellow, 451 So.2d 219, 221 (Miss. 1984) (citing Clarke v. Burkle, 570 F.2d 824, 831 (8th Cir. 1978) (emphasis in original); See also Accredited Surety and Casualty Co. Inc. v. Bolles, 535 So.2d 26 (Miss. 1988) (ignorance of the rules or law, gross negligence, or an attorney's carelessness are not grounds for relief from judgment); and Department of Human Services v. Rains, 626 So.2d 136 (Miss. 1993) (neither an attorney's ignorance or carelessness will provide grounds for relief under Rule 60(b)).

In Stringfellow, the lower court issued a final judgment against the defendant arising out of a divorce proceeding. Stringfellow, 451 So.2d at 221. During the course of the litigation, counsel for the defendant conducted only limited discovery and did not introduce any medical evidence which would rebut the plaintiff's claim causing the lower court to enter a judgment for the plaintiff. Id. Once the judgment was entered, the plaintiff petitioned the lower court to set the judgment aside pursuant to Rule 60(b), based in part on the defense attorney's negligence in failing to properly litigate the claim. Id. The lower court overruled the motion. Id. On appeal, the Court in Stringfellow, flatly

rejected the appellant's argument and established the bright line rule that "[i]ncompetence or ignorance on the part of a party's attorney does not give rise to Rule 60(b)(2) relief." Id. at 222.

Although counsel for Tippah County may have been imprudent in failing to follow up with the County's insurance carrier, this is not grounds for setting aside the default judgment. At hearing and in his Brief in Chief, counsel for Tippah County attributes his carelessness to the issues involving his father's illness which ultimately lead to his death on May 15, 2007. While condolences for counsel opposite are certainly in order, the amount of time which passed after an answer was due and when Childers was actually awarded a default judgment cannot be attributed solely to the death of counsel opposite's father. The answer was due on May 4, 2007, two weeks before death of counsel opposite's father. [R.191-192]. Childers filed his motion for default judgment on May 22, 2008, which was only one week after his father's death, but no further action was taken until August 16, 2007, when the hearing on damages was held. This lapse of time gave counsel for Tippah County over three months to recover from the tragedy of his father's death and file a responsive pleading. Surely counsel opposite did not close down his law practice and retire all of his files during these three months.

Further belying this argument is the fact that even if counsel opposite did not properly follow up on the litigation, Tippah County itself had actual knowledge that an answer was due, that Childers had moved for an entry of default, that an entry of default was granted by the Tippah County Circuit Clerk and that a motion hearing had been scheduled to assess damages. [R. 184, 191-195, 196]. All of the pleadings filed by Childers, as reflected in the record, show that Tippah County itself stamped "filed" on

copies of every pleading filed by Childers in the Circuit Clerk's office and each were acknowledged as actually having been received by Tippah County when they were initialed by a deputy clerk. Tippah County cannot with good conscience ask its attorney to take the blame for failing to defend the case, when it clearly had actual knowledge of every pleading filed by Childers.

Finally, Tippah County seems to argue that it was entitled to three days notice before the hearing on Childers motion for default judgment.[2] This is directly contrary to established precedent which has long held that: "when a defaulting party has failed to appear, thereby manifesting no intention to defend, he is not entitled to notice of the application for default judgment under this rule [M.R.C.P. 55(b)]." City of Jackson v. Presley, 942 So.2d at 794. The court docket indicates that no formal notice of appearance was ever filed by Tippah County. However, this entire argument is a moot point as the record clearly shows that Tippah County had actual knowledge of every pleading filed by Childers. No clearer evidence of this is required other than the Circuit Clerk's stamp and initials, acknowledging Tippah County's receipt of every pleading filed by Childers from the inception of the litigation. [R. 184, 191-195, 196].

The lower court was manifestly correct when it found no excusable neglect. The first prong of the analysis weighs in favor of Childers.

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[2] Childers would also point out, that Honorable B. Sean Akins, attorney for the Tippah County Board of Supervisors, would most likely have not even been retained to defend Childers' complaint, since the insurance carrier typically always refers their cases to outside insurance defense counsel. If Tippah County did not even know who would be assigned to defend the case, the how can the Plaintiff be charged with the duty of notifying a yet unknown attorney.

B. Tippah County Did Not Present Sufficient Evidence To Establish A Colorable Defense.

The second prong of the test is whether Tippah County has a colorable defense to the merits of the claim. "Here the law demands more than a mere wish and a prayer." Rush v. North Am. Van Lines, Inc., 608 So.2d 1205, 1210 (Miss. 1992). Tippah County makes three arguments regarding its colorable defense. First, it argues that it is entitled to sovereign immunity for its acts against Childers. Second, it argues that it was not acting with a reckless disregard for Childers rights and that Childers was engaged in a criminal activity at the time of his assault. Finally, Tippah County argues that Childers' injuries were not caused by the deputies who assaulted him. Each of these arguments is without merit.

1. Tippah County Waived Any Affirmative Defense Regarding Its Claims of Sovereign Immunity.

Now, for the first time during the course of this entire litigation, Tippah County argues that it is "protected by sovereign immunity in accordance with the Mississippi Tort Claims Act." See App. Brief in Chief, p. 13-14. This is premised on Tippah County's argument that it presented evidence that its deputies did not act with reckless disregard for the safety of Childers and that Childers was engaged in a criminal act at the time he was attacked. Despite Tippah County's recent revelations that it may be entitled to assert certain defenses, whether applicable or not, the Mississippi Tort Claims Act immunity is an affirmative defense. City of Ellisville v. Richardson, 912 So.2d 973, 975 (Miss. 2005); Miss. Code Ann. § 11-46-9. This Court may take judicial notice that Tippah County never filed an answer or any affirmative defenses in this case, never raised the Mississippi Torts Claims Act as a defense in its motion to set aside default

judgment and never argued reckless disregard or criminal activity to the trial judge at hearing.

"Failure to raise the issue in the trial court bars it from being raised for the first time on appeal." Traux v. City of Gulfport, 931 So.2d 592, 598 (Miss.App. 2005) (citing Zurich Am. Ins. Co. of Ill. v. Beasley Contracting Co., 779 So.2d 1132, 1134 (Miss.App. 2000). In Traux, the plaintiffs appealed an adverse ruling from the Gulfport City Council regarding a zoning change and a special use permit for the construction of an animal shelter. Id. at 594. On appeal, Traux argued that the Circuit Court of Harrison County erred in dismissing his appeal as the procedure applied by the Court did not conform to Rule 2(a)(2) of the Mississippi Rules of Appellate Procedure. Id. at 598. In affirming the lower court, the Court of Appeals held that "Traux failed to raise this issue at any point before the circuit court, although numerous opportunities were available. As such, this issue is procedurally barred." Id.

The Mississippi Supreme Court addressed this same issue in Gale v. Thomas and the City of Jackson, where the appellant argued for the first time on appeal, that the plaintiff had failed to comply with the notice provisions of the Mississippi Tort Claims Act. Gale v. Thomas and the City of Jackson, 759 So.2d 1150, 1159 (Miss. 1999). The Court refused to address this argument stating that the City of Jackson was "precluded from raising this issue for the first time on appeal. As this Court has stated, time and again, an issue not raised before the lower court is deemed waived and is procedurally barred." Id.

"A trial judge will not be found in error on a matter not presented to him for decision." Mississippi Gaming Commission v. Baker, 755 So.2d 1129 (Miss.App. 1999)

(citing Smith v. State, 572 So.2d 847, 848 (Miss. 1990). The case in Baker began when the Mississippi Gaming Commission and two of its agents were sued for false arrest, wrongful imprisonment, wrongful detention, malicious prosecution and abuse of process. Id. at 1131. After the lower court entered a judgment for the plaintiff on his claim of malicious prosecution, the Mississippi Gaming Commission appealed arguing for the first time during the proceedings that it was entitled to qualified immunity pursuant to the Mississippi Torts Claims Act. Id. The Court of Appeals found that this assignment of error without merit and stated:

> [T]he agents argue that they should be entitled to qualified immunity under the Mississippi Tort Claims Act, Mississippi Code Annotated Section 11-46-9. Although the agents asserted that they were protected by this provision in their answers and defenses pleadings, no further mention of the Tort Claims Act or qualified immunity exists in the record. The agents failed to make oral or written motions with regard to qualified immunity. The failure of the agents to give the circuit judge an opportunity to decide the issue at trial level precludes appellate review now. Since the appellants failed to raise the issue in the court below, they have waived the issue of qualified immunity for purposes of this appeal.

Id. at 1133.

In The Estate of Grimes v. Warrington, Helen Grimes filed a complaint for wrongful death against Dr. James Warrington alleging medical malpractice. The Estate of Grimes v. Warrington, __ So.2d __, 2008 WL 451714, *1 (Miss.). After five years of litigation, the defendant moved for summary judgment arguing that it was entitled to immunity under the Mississippi Tort Claims Act. Id. The lower court found that the defendant waived this defense as it was never brought on for hearing during the past five years of litigation. Id. The Mississippi Supreme Court affirmed the lower court's denial of summary judgment finding that "[a] defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right

which would serve to terminate or stay the litigation ... would ordinarily serve as a waiver. Id. at *5 (quoting Miss. Credit Ctr. Inc., v. Horton, 926 So.2d 167, 181 (Miss. 2006). "This Court advised that to pursue an affirmative defense meant to plead it, bring it to the court's attention, and request a hearing. Id.

At hearing on Tippah County's motion to set aside default judgment, the trial judge read into the record every issue contained in the County's motion and asked counsel for both parties to object if he omitted any issue that was being brought on for hearing that day. [Tr. 10]. None of the counsel present lodged any objection. [Tr. 10, 25-26]. The County's motion to set aside default judgment and the thirty-four page transcript of the hearing are completely devoid of any mention to, or reference of, the County's sovereign immunity argument. However, the record from the hearing on the motion to set aside the default judgment indicates that Tippah County's colorable defense argument raised only two issues: whether the use of the taser by the deputies was proper police procedure; and whether Childers' injuries were from this attack, or from a previous incident. Neither of these arguments addressed the issue of sovereign immunity. No evidence, such as a criminal arrest warrant or a criminal abstract showing that Childers was charged with a crime was presented to the lower court for consideration.

Now on appeal, Tippah County argues that the lower court abused its discretion by rejecting its "defense of sovereign immunity under the Tort Claims Act" and would have committed reversible error "to find that the firing of a taser by a police officer to subdue a fleeing individual with a history of mental illness, drug use and violence towards officers could possibly constitute reckless disregard for the suspect's safety." See App. Brief in Chief, p. 14-15. In response, Childers respectfully submits that in order to

have a defense rejected, it first has to be presented. Tippah County cannot in good faith argue that it is entitled to a defense it never asserted and that the lower court abused its discretion or committed reversible error on an issue it was never asked to decide.

2. Tippah County Presented Insufficient Proof To Meet Its Burden of Raising A Colorable Defense

Should this Court find that Tippah County has not waived its MTCA defense, then Childers would show that Tippah County is not immune from suit. Tippah County argues that there shall be no liability for the act or omission of an employee of a governmental entity engaged in the performance or execution of duties relating to police protection unless the employee acted in reckless disregard for the safety and well being of any person not engaged in a criminal act. Contrary to the County's arguments, it put forward no proof that its deputies did not act intentionally or in reckless disregard to Childers' safety and there was no proof that Childers was engaged in a criminal act at the time of the attack.

a. Tippah County Intentionally Injured Childers

The MTCA was not designed to protect tortfeasors from liability when their actions are grossly negligent, willful, wanton *or intentional.* City of Jackson v. Perry 764 So.2d 373, 379 (Miss. 2000). (emphasis added). Willful and wanton conduct indicates degrees of fault somewhere between intent to do wrong and the mere risk of harm involved in ordinary negligence. City of Jackson v. Calcote, 910 So.2d 1103, 1110 (Miss.App. 2005). In Calcote, the plaintiff presented evidence that a Jackson police officer shoved the victim's face into a concrete floor, causing three of his front teeth to break. Id. The City then presented evidence from the officer that he never set out to break the victim's teeth or cause him injury. Id. at 1111. Finding the City's argument rather

specious, the Court held that although the officer did not intend the ultimate injury of knocking his teeth out, shoving someone's face into a concrete floor involves a high degree of probability of harm and that proceeding involves a deliberate disregard of that risk. Id. Although the officer did not intend to knock out his teeth, he did intend to cause some degree of physical harm to the victim and it was reasonably foreseeable that those actions could cause significant injuries. Id.

Assault and battery are intentional torts. See Miss. Code. Ann. § 15-1-35; City of Mound Bayou v. Johnson, 652 So.2d 1212, 1217-1218 (Miss. 1990); WEEMS & WEEMS, Miss. Law of Torts, §§2-1, 2-2. If a law enforcement officer commits assault and battery he may not claim qualified immunity since a governmental actor is not immune from liability when he has committed an intentional tort. Webb v. City of Jackson, 583 So.2d 946, 951 (Miss. 1991).

The lower court, having heard argument of counsel and reviewed the affidavits submitted by Tippah County, specifically found in his order that although the County claimed that it has exhibited "a colorable defense to the merits of the claim ...the affidavits of the officers who took Daniel into custody indicate to the contrary." [R. 305-306]. Tippah County presented the affidavits of two deputy officers who were involved in the attack on Childers, Tommy Garrett and Tim Wilbanks. [R. 142-145].

First, the affidavits plainly state that the purpose of the call to Childers residence was to serve a "Writ to take Custody," which was issued by a Chancery Court pursuant to a civil action. [E.H. 2 – civil coversheet]. It is undisputed that the deputies were not called to the Childers' residence to investigate a criminal complaint or to arrest Childers for a criminal act. Prior to arriving at the residence, the officers both had actual

knowledge that Childers had "a history of mental illness." [R. 142-145]. Due to his mental illness, including paranoid schizophrenic fear of law enforcement officers, Childers may have been confused about this sudden confrontation by the deputies. [E.H.10 – "Daniel admits to being paranoid of police"]. Childers then informed the deputies that he was going in the house and turned his back to them. [R. 142-145]. As soon as Childers turned his back, one of the deputies pulled his taser and intentionally shot Childers in the back, at which point his body went limp and fell to the ground on his outstretched hand shattering his left elbow. What is noticeably absent from these affidavits is any conduct engaged in by Childers showing that he attempted to physically harm either of the officers by threat or actual use of force. Deputy Garrett stated in his affidavit that he fired the taser to "stop his acts against us", but offers no description of what these alleged "acts" were. In contrast, Deputy Wilbanks' affidavit makes no mention of any "acts" taken against the officers and simply states that Childers turned his back and attempted to enter his house. As Tippah County admits in its Brief in Chief, "a police officer, in making an arrest[3] ... can not take the life of the accused or inflict upon him great bodily harm except to save his own life or prevent a like harm to himself." See App. Brief in Chief, p. 14 (citing Holland v. Martin, 56 So.2d 398, 400 (Miss. 1952)). There was absolutely no evidence presented to the trial judge by Tippah County which would indicate that the deputies were acting to save their own life or prevent serious bodily harm to themselves.

Tippah County was afforded the opportunity to offer testimony from the deputies regarding what imagined physical threat they faced from Childers, but surprisingly, failed

[3] Appellee Childers disputes any contention that the officers were engaged in making an lawful arrest as the term is construed in Tippah County's Brief in Chief.

to offer any live testimony from the deputies, both of whom were in the court house and could have testified. Accordingly, the only evidence presented to the trial judge was the affidavits of the deputies, neither of which presented any factual evidence justifying the shooting of an unarmed, mentally ill and non-aggressive person while his back was turned to them. The officers' affidavits also make a conclusory statement that Childers had a history of violence towards officers, but the affidavits offer no factual support for this conclusion, *i.e.* specific instances of this alleged violence, which would verify the veracity of the statement. The affidavits of the officers are therefore contrary to the County's position that the officers acted in a reasonable manner by intentionally shooting Childers in the back with a taser. The fact that the officers intended to harm Childers with the taser, but did not intend to shatter his elbow is of no consequence using the rationale set forth in City of Jackson v. Calcote.

Tippah County attempted to justify the deputies actions by introducing the affidavit of Tippah County Sheriff Brandon Vance. [E.H. 20]. This affidavit offered one conclusory statement regarding the propriety of the officers actions, "I conducted an investigation into the actions of the officers who participated in the arrest of Daniel Childers on January 30, 2006 and determined that they acted properly." [E.H. 20]. His conclusion that the officers acted properly is not enough to satisfy the County's burden of proving a colorable defense. "In order 'to show a creditable defense in the present setting, a party must show facts, not conclusions, and must do so by sworn affidavit or other sworn form of evidence." Capital One Services, Inc., 904 So.2d at 1016 (citing Rush, 608 So.2d at 1210). Unsubstantiated allegations that a meritorious defense exists is insufficient as a matter of law to sustain the burden of Rule 60(b). Leach at 1287

(quoting American Cable Corp. v. Trilogy Communication, Inc., 754 So.2d 545, 554 (Miss.App. 2000).

Again, at hearing, which was held in Tippah County, the County had every opportunity to put Brandon Vance on the stand for live testimony as he was present at the hearing that day. But again, for some mysterious reason, Vance, the chief law enforcement officer in Tippah County, was not called to testify. His affidavit did not include a copy of the training manual used to certify the officers in the use of taser weapons, did not include the procedure manual adopted by the County for the use of taser weapons on the mentally ill, nor did it provide any factual explanation for why Vance concluded that the officers "acted properly." Childers presumes that the reason none of officers or Sheriff Vance testified is because the use of taser weapons on the mentally ill, when serving a civil writ, is strictly prohibited. This presumption is not merely argument of counsel, but is soundly supported by law. In civil cases, "if a party fails to call an available witness, who is presumed to be friendly, that this arises a presumption that their testimony would be adverse to the party failing to call them." Henderson v. State, 367 So.2d 1366, 1637 (Miss. 1979) (citing Bunckley v. Jones, 29 So. 1000 (Miss. 1901); Fuller v. Sloan, 230 So.2d 574 (Miss. 1970)).

"An affidavit is not a mere formality that guarantees a motion to set aside a judgment will be granted. Still necessary is that the affidavit addresses the substantive legal requirements for having a default judgment set aside." Capital One at 1017. Given the complete dearth of any factual basis for Vance's conclusory statement, coupled with the presumption that Tommy Garrett, Tim Wilbanks and Brandon Vance's testimony would have been adverse to Tippah County, the trial judge was manifestly correct when

he found that "there was insufficient proof or evidence introduced to meet the County's burden of raising a colorable defense." [R. 305-306].

b. Tippah County Presented No Evidence That Childers Was Engaged In Criminal Activity

The second issue related to Tippah County's belated immunity argument is whether Childers was involved in a criminal activity at the time he was assaulted by the Tippah County deputy sheriffs. At the time of the incident, the officers were not responding to a criminal complaint at the Childers' residence. Instead, they were present at the scene for the sole reason of serving a civil writ, issued by the Chancery Clerk, in a civil action, upon an unarmed person known in the community to be mentally ill. It is undisputed that at the time of service of the Writ, there were no warrants for Childers arrest and he was not under any suspicion for having committed a crime, felony or misdemeanor.

The offense of resisting arrest is set forth in Miss. Code Ann. § 97-9-73, which states:

> It shall be unlawful for any person to obstruct or resist by force, or violence, or threats, or in any other manner, his lawful arrest or the lawful arrest of another person by any state, local or federal law enforcement officers, and any person or persons so doing shall be guilty of a misdemeanor.

Under this standard, Tippah County had the burden to offer factually specific evidence which proved: (1) Childers was under lawful arrest; and (2) he resisted said arrest by force, violence, threats or other means. This analysis fails with regard to the first element because Childers was not under lawful arrest, but instead was in the process of being served with a civil custody order [E.H. 2]. The distinction between a lawful criminal arrest and service of a civil writ was recognized by the lower court when it specifically

found that the officers "were dispatched to execute the Writ" and were present at his home to take "Daniel into custody." [R. 303-304, 306].

However, assuming *arguendo* that it was an "arrest" this argument also fails because the County offered no proof, live or otherwise, that Childers used any force, violence or threatened the officers, he simply turned his back to them. Regardless of whether Tippah County contends that it should be entitled to summary judgment should the lower court be reversed, "[w]hether a defendant will likely prevail is not the measure of a meritorious defense." Leach at 1287 (citing Bieganek v. Taylor, 801 F.2d 879, 882 (7th Cir. 1986).

The County's arguments are similar to those made by the City of Jackson in a similar case. In City of Jackson v. Perry, the Plaintiff was attempting to drive an automobile out of a parking lot when a police officer, who was operating his police car at a high rate of speed and without his blue lights turned on, crashed into his vehicle causing personal injury. City of Jackson v. Perry, 764 So.2d at 375. At the time of the collision, the Plaintiff did not have a valid drivers license. On appeal the City of Jackson contended that because the Plaintiff was operating his vehicle without a valid license, this fact should be construed to mean that he was engaged in criminal activity at the time of the accident. Id. This Court refused to make such a far-fetched leap of logic and found that the Plaintiff was not engaged in a criminal activity as defined by Miss. Code Ann. §99-37-1(a) which states in pertinent part that "[c]riminal activities shall mean any offense with respect to which the defendant is convicted or any other criminal conduct admitted by the defendant" Id. at 378 (citing Miss. Code Ann. § 99-37-1(a)). In coming to this

conclusion, the Court found that the Plaintiff was never issued a citation for driving without a license, nor was he ever charged with any crime. Id.

This analysis is equally applicable in the case at bar as the Tippah County deputy Sheriffs were not sent to arrest Childers for committing any crime, but only to exercise the administrative civil function of serving him with a writ for a mental health screening. When the incident occurred, Childers was never accused of committing any crime against the officers as is evidenced by the fact Childers has never been issued a citation for resisting arrest nor was he formally charged and convicted of resisting arrest. The lower court correctly recognized this fact in its Order when it found that the deputies were "executing a writ," not making a criminal arrest.

c. Tippah County Presented No Medical Evidence In Support of Its Colorable Defense Argument

Tippah County's final attempt to discredit Childers is presented through the use of five different misleading and factually inaccurate allegations regarding his past medical history, none of which offer any citation to the record to support said allegation. In support of its colorable defense argument, the County makes base allegations which seem to infer that Childers left elbow was not actually injured when he was attacked by the Tippah County deputies. Childers will address each of these misleading statements one by one.

1. "Both Officers' statements note that Childers told them to be careful when cuffing him because he had a prior injury to his arm from his wreck in the early 1990's." App. Brief in Chief, p. 3.

In his affidavit, Deputy Tommy Garrett alleged the following: "Daniel told us while we were placing cuffs on him to be careful he had hurt his arm several weeks ago."

[R. 143]. Officer Tim Wilbanks, who was also present for the entire incident, and stood side by side with Tommy Garrett when they attacked Childers offers a completely different version of Childers injury: "While I was putting the cuffs on the subject, he told me had broken his arm, in the past, that it still hurt him." [R. 145]. Neither of the officers allegations reflect how far back in time Childers allegedly injured his arm, or where it occurred. The fact that both officers give different accounts of what Childers allegedly said, casts their credibility into doubt. Had they testified at hearing, the officers would have had an opportunity to explain the differences in their statements, but since Tippah County did not call them to testify, the lower court was left no option other than to judge their credibility based solely on the conflicting accounts in their respective reports.

2. "Childers noted in his medical history to Dr. Medias [sic] that he fell on an outstretched hand with his elbow bent and all of his weight went onto that hand and elbow ..." App. Brief in Chief, p. 4.

This quote from Dr. Mitias' medical narrative is drawn from the February 2, 2006, initial evaluation of Daniel Childers. Tippah County's quote from the medical narrative conveniently omits the most crucial information from the report concerning the temporal aspect of Childers elbow injury, "**This injury occurred 2 ½ days ago.**" (emphasis added) [R. 35]. Contrary to the County's gross mischaracterization of the report, Dr. Mitias, the very first physician to treat Childers, and the physician hand-picked by Tippah County to render this treatment, specifically related the left elbow injury back to the accident which occurred on January 30, 2006, at 2:30 p.m., approximately two and one-half days before he was seen for an initial evaluation. This also directly contradicts the deputies' statements that the injury occurred several weeks or

years ago. Dr. Mitias' report regarding the timing and cause of his injuries was also corroborated by the medical report of Dr. Tewfik Rizk who similarly found:

> "Pt. related his symptoms to injury at the end of Jan. 2006 when he fell with his elbow bent and all of his weight went onto his hand and left elbow. Pt. stated that he was roughed up by a police office [sic]." [R. 128].
>
> "It is my opinion based on the patient history and reviewing the records available that his present condition is directly related to his injury at the end of Jan. 2006." [R. 129].

The County's argument that Childers' injury was caused well before the January 30, 2006, attack is specifically contradicted by the reports of Dr. Mitias and Dr. Rizk and has no basis in the factual accounts contained in the record.

3. "The Plaintiff's counsel then asked for $250,000.00 which included future medicals despite no evidence that future medical treatment would be necessary." App. Brief in Chief, p. 5-6.

Not only was medical evidence presented regarding Childers' current past medical treatment, but both Dr. Mitias and Dr. Rizk made specific findings that Childers' condition would dramatically worsen over time:

> "He is starting to get heterotopic ossification around his elbow." [R. 32].
>
> "X-rays show he is getting a lot of heterotopic ossification which is limiting his motion." [R. 31].
>
> "Prognosis-wise this patient's elbow condition reached maximum medical improvement at the present time and I do not expect any improvement in his range of motion. **On the contrary, most probably he will develop post-traumatic osteoarthritis of the left elbow and that will lead to more pain and more stiffness and less range of motion in the future**. Following the American Medical Association Guides to the Evaluation of Permanent Impairment he has a 25% impairment of his left upper extremity which is equivalent to 15% impairment of the whole person. Functionally this patient should not be involved in any kind of activity which necessitates repetitive left upper extremity movement as well as pushing, lifting or pulling more than 15 pounds." (emphasis added) [R. 129].

These medical assessments, which indicate that future medical treatment is not just possible, but is a forgone conclusion, speak for themselves.

4. "The medical records and history of Childers' prior injuries suggest that the fall was not of a nature that his injury would have required surgery but for the prior injury." App. Brief in Chief, p. 14.

Although Tippah County makes this allegation, which is completely factual in nature, it provides no citation to the record for factual support. After a meticulous review of the record, Childers cannot find any support for this allegation, which he surmises is exactly the reason that the County omitted any citation to the record after making this baseless accusation.

5. "It is also significant to note that Childers' re-injured his elbow which was crushed in an automobile accident in the early 1990's." App. Brief in Chief, p. 16.

Tippah County is correct when it argues that Childers had received other injuries to his person during his lifetime, but there was no medical evidence presented by the County, or by Childers for that fact, that he had previously sustained any type of injury to his left elbow.

> "Pt. states that he has had a hx of UE dysfunction including a humeral fx w/ rod placement in 1990. Pt. states that he was on disability secondary to that and a L1 spinal cord injury **which he has recuperated from** per pt's reports. **Pt reports no medical complications or contraindications** to physical agent modalities other than no ultrasound over hardware." (emphasis added) [R. 53].

Again, Tippah County cites nothing in the record which would substantiate the allegation that his left arm injury was pre-existing. Further, not only do the reports of the physical therapist show that Childers has fully recovered from the injury he received fifteen (15) years ago, they do not indicate that the prior injury was to his left elbow. Instead, the report shows that the injury was to his humeral bone (found in the upper

arm), as opposed to the radial head (elbow), and make no finding that the fracture of the humeral bone occurred in the left arm as opposed to the right arm. The reports from Dr. Mitias and Dr. Rizk make no mention whatsoever that the current injury resulted from a pre-existing condition. Even had the injury been pre-existing, the aggravation or exacerbation of a pre-existing condition is actionable under the eggshell plaintiff rule. See City of Jackson v. Estate of Stewart, 908 So.2d 703 (Miss. 2005) (holding that plaintiffs who are far more susceptible to a particular harm than the average person may nonetheless recover their full damages without reduction).

Childers would submit one other piece of conflicting evidence which is fatal to Tippah County's argument. In his affidavit, Tommy Garrett stated that, "no medical attention was given to him [Childers] for reason due to prior injuries he had occurred somewhere else." [R. 143]. From this statement it can be inferred that it is the policy of Tippah County to withhold medical treatment from inmates, or people incarcerated at its facilities, when their injuries do not occur while in police custody. If one believes Tommy Garrett's statement of County policy, then why did Tippah County transport Childers to see Dr. Mitias and permit him to undergo elbow reconstruction, while he was still in custody? The record also reflects that during treatment, Tippah County kept a law enforcement officer present at all times. [R. 35] (This is a 33-year-old white male who presents with a left elbow injury. He is incarcerated here in Union County. He is accompanied by a guard today. – February 2, 2006, report of Dr. Mitias). Childers respectfully submits that this seemingly inconsistent position led the lower court to doubt the veracity of Deputy Garrett's allegation that Childers' injury was not caused by the taser attack.

As the record clearly reflects, Tippah County offered no medical proof at hearing, or in its Motion to Set Aside Default Judgment, to support its speculative argument or to rebut the medical evidence as contained in the records of Dr. Mitias, the physical therapist and Dr. Rizk, directly linking the elbow injury to the 2006 attack by the deputies. In the absence of any such evidence, the lower court was presented with a prima facie case of reasonable and necessary medical evidence linking the injury to the 2006 attack. "Proof that medical, doctor and hospital bills were paid or incurred because of any illness, disease or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable." Miss. Code Ann. § 41-9-119. The lower court correctly followed its obligation under the law in finding that there was insufficient proof or evidence introduced to raise a colorable defense. Tippah County's defense is premised only on the argument of counsel and pure speculation that the injury may not have been caused when he was attacked with the taser weapon. To rebut the statutory presumption that medical, hospital or physician bills were necessary and reasonable, more than speculation and credibility attacks must be offered. Clark v. Deakle, 800 So.2d 1227 (Miss. 2001). Tippah County's alleged defense does not satisfy this standard.

In a final attempt to exhibit a colorable defense, Tippah County attempts to misconstrue the record and take statements by Childers' counsel out of context, to infer that counsel admitted Tippah County had a colorable defense. In actuality, counsel for Childers was discussing whether intentional acts by the County were covered by its insurance policy, and explained why Childers' complaint plead intentional conduct, as well as negligent conduct in order to invoke insurance coverage for the claim. Further, there has never been any stipulation that Tippah County had a colorable defense as this

was a hotly contested issue at hearing. The only matters stipulated by counsel were that the procedural aspects leading up to the default judgment were proper [Tr. 9-10] and that Joyce Childers could remember the attack on the day of the hearing [Tr. 37]. No other issues were stipulated by the parties. Regardless of any alleged admission, the lower court, unlike the court in Stanford v. Parker as cited by the County, heard evidence and did consider the merits of Tippah County's colorable defense argument, but found the evidence to the contrary. It is also important to note that this is a Mississippi Tort Claims case, which is tried to a judge, without the benefit of a jury. The judge is sitting as the trier of fact and should the case be remanded on some technical error, the outcome would likely be the same after trial given the deficiencies in the County's defense.

Since Tippah County has not presented sufficient evidence of a colorable defense, the second prong weighs in favor of Childers.

C. Childers Would Suffer Prejudice If The Default Judgment Is Set Aside

When the Tippah County deputies arrived at the Childers' residence to execute the Writ to Take Custody, they walked up to his home, told him to put his hands on the house and shot him in the back with the taser. While the record does not reflect with precision the total amount of time it took for these events to transpire, common sense dictates that it took, at the most, a matter of minutes. At the time Childers was shot with the taser weapon by the Tippah County deputies, there were five witnesses present at the scene, three deputies, Daniel Childers and his mother Joyce Childers. The only witnesses for Childers who would be available to recount the facts of the attack would be Daniel Childers, a person who is admittedly mentally ill, and his mother who is sixty-five years old. Joyce Childers suffers from heart disease, diabetes and experiences multiple strokes

per month. [R. 161-162]. At hearing on September 19, 2007, Joyce Childers' health had deteriorated to the point that she could not even ascend a flight of stairs to come into the courtroom. [Tr. 23]. Should she pass away, or suffer another debilitating stroke, Childers would be left with no corroborating witnesses who could testify on his behalf. This would leave a mentally ill individual on the stand to testify against three deputies, each of whom will give contradictory testimony.

"Prejudice is found upon a delay in the proceedings in terms of loss of memory of witnesses and the fact that the plaintiff is without resolution for a long period of time." Capital One Services, Inc., 904 So.2d at 1017 (citing Guar. Nat'l Ins. Co. v. Pittman, 501 So.2d at 388). "It takes no great insight to know that a year's postponement of a trial which will turn on witnesses' memories regarding a split second event ... will often substantially prejudice one or both of the parties in terms of the common human phenomenon of loss of memory of specific events over time, not to mention the fact that the injured plaintiff is without a resolution to her claim for that period of time." H&W Transfer, 511 So.2d at 899.

Despite the evidence of Joyce Childers rapidly deteriorating health, Tippah County argues that Childers will suffer no prejudice should this case be remanded to the lower court for trial. This argument is without merit. In addition to submitting an affidavit describing Joyce Childers' health concerns, the Appellee also brought Joyce Childers to the hearing on the motion to set aside default judgment so she could give testimony, if necessary. Despite her presence at hearing, Tippah County declined to put her up for testimony, just as it declined to present any other fact witnesses at the hearing. [Tr. 21-23]. Instead, the County requested a stipulation that she could remember the details of

the attack on her son as of the date of the hearing. [Tr. 37]. However, whether she could remember the details at hearing is not the standard for demonstrating prejudice under the test for setting aside default judgments. The standard is whether the witness could remember the facts of the case at a later trial date, which in this case, the lower court found would occur no earlier than late 2008, or early 2009.

In support of its position, Tippah County cites Justice Smith's opinion in Stanford v. Parker, 822 So.2d 886 (Miss. 2002), for the proposition that the memory of a witness, in all cases other than those involving automobile accidents, is not a factor to be considered when determining prejudice to the non-moving party. Childers would submit that the County's reliance on Stanford v. Parker, is misguided in that it quotes Justice Smith's dissent, not the majority opinion. Id. at 891-893 (dissent). As this Court is well aware, a dissenting Justice's opinion, regardless of how esteemed the Justice's reputation may be, is not binding on this Court. Further, both the majority and the dissent in Stanford v. Parker, made a critical distinction between any factual situation involving a split second event, and situations arising from a long series of commercial transactions which often turn not on the memory of a witness, but on transactional documentation which is recorded and preserved during the course of business. As noted by Justice Smith, the facts in Stanford v. Parker arose from a medical malpractice case, where the malpractice occurred over an extended time period, the plaintiff's proof would be recorded in the physicians medical records and charts, and the alleged malpractice would be proven through expert testimony and their interpretation of the standard of care as recorded in the records as opposed to witnessing a split second outcome. This type of documentary evidence is not present in the case *sub judice*.

An analogous situation is also discussed *infra*, in Leach v. Shelter Insurance. The Court in Leach noted that witnesses to accidents involving split actions occurring in a time frame of just a few seconds, are more likely to suffer from diminished memory, which evidences prejudice. Leach at 1288-1289. Leach distinguishes cases involving split second actions from those involving commercial, financial or contractual suits where the transactions at issue are typically recorded in the form of letters, statements, invoices and processed checks. Leach at 1288. In the matter at bar, had the attack on Childers been videotaped, such as an attack in a convenience store parking lot committed under the watchful eye of a surveillance camera, then there would be sufficient evidence, preserved for posterity, with which Childers could prosecute his claim. Since there is no such evidence in this case, Childers must rely solely on the memory of his only witness, Joyce Childers.

The County next argues that Childers created his own delay by failing to file his Complaint until March of 2006. The record is clear that Childers sent his notice of claim, and was required to wait ninety (90) days before filing suit. Had Childers not waited the ninety days, the County would complain that he did not comply with the MTCA notice requirements. In addition to the fact that Tippah County delayed the case for five months, and then waited an additional six weeks to bring it on for hearing, this Court should be aware of the inherent difficulties in finding counsel to represent Childers in this case. What attorney in Ripley would want to take the case of a mentally ill person and prosecute it against the County where they live and practice law? How hard must it have been for Childers to find an attorney to take on Tippah County and one who was willing to litigate a claim with all the procedural hurdles and hoops of a Torts Claims case?

Although not reflected in the record, Childers would argue to this Court, that he did in fact request appointments with several attorneys in Ripley, but each declined representation stating that he had to make a living in Tippah County and would not take a position adverse to the County. Truth be told, Childers could not find an attorney to take his case until he was referred by a social security consultant to the undersigned counsel who practices outside of Tippah County. Certainly Childers did not act in a dilatory manner under these circumstances.

Tippah County last argues that Childers should have taken Joyce Childers' deposition to preserve her testimony. Childers did better than that and took her to the hearing so that Tippah County would have ample opportunity to examine her on the witness stand. Tippah County never seized upon this opportunity and instead preferred to keep the record silent on this issue, when it could have rebutted any argument of prejudice made by Childers, by simply putting her up for live testimony. Childers submits that Tippah County refused to call Joyce Childers for fear that her account of the facts would discredit the affidavits of the deputies and thus eliminate any "colorable defense" it now claims to possess. Childers introduced the affidavit of Joyce Childers which presented evidence of prejudice, but Tippah County failed to rebut Childers' evidence although it had every opportunity to do so.

The third prong weighs in favor of Childers.

CONCLUSION

For the foregoing reasons, the Appellee, Daniel Childers, respectfully requests that this Honorable Court affirm the lower court's Order Overruling Motion to Set Aside Default Judgment.

RESPECTFULLY SUBMITTED, this the 18th day of April, 2008.

DANIEL CHILDERS, Appellee

By: _____
JUSTIN S. CLUCK, (MSB [redacted])

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CERTIFICATE OF SERVICE

I, the undersigned attorney of record, hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the **BRIEF OF APPELLEE, DANIEL CHILDERS**, to the following:

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Honorable Henry L. Lackey
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Calhoun City, Mississippi 38916

Trial Court Judge

THIS, the 16th day of April, 2008.

JUSTIN S. CLUCK