

IN THE SUPREME COURT OF MISSISSIPPI

TIPPAH COUNTY, MISSISSIPPI

APPELLANT

VS.

CASE NO. 2007-CV-01843

JOYCE CHILDERS, as guardian of
DANIEL CHILDERS AND DANIEL
CHILDERS, individually

APPELLEES

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. Tippah County, Mississippi, Appellant
2. B. Sean Akins, Attorney for Tippah County, Mississippi
3. Joyce Childers, Appellee
4. Kent Smith, Attorney for Appellees
5. Justin Cluck, Attorney for Appellees
6. Henry Lackey, Circuit Court Trial Judge
7. Tippah County Board of Supervisors, Representatives of Appellant
8. Daniel Childers, Appellee

This the 4th day of June, 2008.



B. SEAN AKINS, MSB NO. [REDACTED]
ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUES ON REBUTTAL

- I. TIPPAH COUNTY HAD LEGITIMATE REASONS FOR ITS DEFAULT**
- II. TIPPAH COUNTY HAD MERITORIOUS DEFENSES**
 - A. TIPPAH COUNTY DID NOT WAIVE ITS TORT CLAIMS ACT DEFENSES**
 - B. TIPPAH COUNTY DID NOT INTENTIONALLY INJURE CHILDERS**
 - C. TIPPAH COUNTY WAS NOT REQUIRED TO SHOW THAT CHILDERS
 WAS ENGAGED IN CRIMINAL ACTIVITY**
- III. CHILDERS WOULD NOT SUFFER PREJUDICE IF THE DEFAULT JUDGMENT
 WAS SET ASIDE**

UNDISPUTED FACTS

In his Appellee's Brief, Childers does not dispute the essential facts necessary to adjudicate matter. The core facts are repeated here for convenience.

Daniel Childer's (hereinafter "Childers") family filed a commitment proceedings in Chancery Court due to his repeated failure to take his medicine and obtain ongoing treatment for his mental conditions. The Chancery Clerk responded to the affidavit by issuing a "Writ to Take Custody" to the Tippah County Sheriff's Department requiring them to take custody of Childers to have him pre-screened as part of the commitment process.

Later that day, Officers Tommy Garrett and Tim Wilbanks proceeded to Childers' residence to take him into custody. According to their sworn affidavits which were admitted into evidence, the officers went around to the back of the house and encountered Childers. They ordered him to place his hands on the house. Childers started to run. Officer Garrett then deployed his TAZER which stopped Childers immediately. Childers claims that he broke his arm when he fell to the ground.

Childers properly filed Notice of Claim pursuant to the Mississippi Tort Claims Act and later filed a lawsuit to which the County failed to respond. The Circuit Court issued a default judgment against the County for \$250,000.00

STANDARD OF REVIEW

The Supreme Court reviews motions to set aside default judgments under an abuse of discretion standard. *Tatum v. Barrentine*, 797 So.2d 223 (Miss.2001). The trial court applies a three-prong balancing test in reviewing a motion to set aside a default judgment, pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure. *Stanford v. Parker*, 822 So.2d 886 (Miss.2002)

The Supreme Court reviews errors of law *de novo*, including the proper application of the Mississippi Tort Claims Act. *City of Jackson v. Brister*, 838 So.2d 274 (Miss.2003).

ARGUMENT ON REBUTTAL

The Mississippi Supreme Court has found that the trial court must consider three factors in determining whether to set aside a default judgment:

When faced with a Miss. R. Civ. P. 60(b) motion, the trial court must consider: “(1) the nature and legitimacy of the defendant's reasons for his default ..., (2) whether the defendant in fact 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 default is set aside.” *Id.* The test “boils down almost to a balancing of the equities—in whose favor do they preponderate, the plaintiff or the defendant?” *Guaranty Nat'l Ins. Co.*, 501 So.2d at 388. Furthermore, “[w]here there is a reasonable doubt as to whether or not a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on its merits.”

McCain v. Dauzat, 791 So.2d 839 at 843 (Miss.,2001)

The Trial Court found that all three prongs of the test favored Childers. However, the Trial Court's decision lacked a basis in fact or law.

I. TIPPAH COUNTY HAD LEGITIMATE REASONS FOR ITS DEFAULT

Tippah County had good cause for the existence of the default. The summons and complaint were delivered to its insurance agent who failed to forward it to the insurance carrier and no answer was filed. Simultaneously, the Attorney for the Board of Supervisors who would have ordinarily followed up with the insurance company was helping care for his terminally ill father who died shortly after an answer would have been due. The County acknowledges that either of these previous grounds alone would be insufficient to establish excusable neglect. However, these combined grounds constitute legitimate reasons for the default. This issue was fully briefed by Tippah County in his prior brief which cited law in support of its arguments.

II. TIPPAH COUNTY HAD MERITORIOUS DEFENSES

The core and most disputed issue is whether Tippah County has meritorious defenses to Childers' complaint.

A. TIPPAAH COUNTY DID NOT WAIVE ITS TORT CLAIMS ACT DEFENSES

First, Childers argues that Tippah County waived its claims of sovereign immunity. Childers argues that Tippah County never raised sovereign immunity as a defense until its appeal.

A copy of Childers' complaint is attached in the Record Excerpts to the Reply Brief. Paragraph five of the Complaint specifically states, "This is a civil action seeking damages pursuant to the Mississippi Tort Claims Act, M.C.A. § 11-46-9, et al." Mississippi Code Ann § 11-46-9 is the list of exemptions to liability pursuant to the Mississippi Tort Claims Act. Later in his complaint, Childers cited the exemption language when stated in paragraph 11, "The Tippah County Sheriff and his deputies used excessive force and unlawful force on Daniel Childers and acted with reckless disregard for his safety and well being." While Childers didn't cite the exemption which allowed him to proceed with his lawsuit, his Complaint tracked the language of Miss. Code § 11-46-9 which says:

(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.

Pursuant to this language, the County cannot be sued unless the claimant can prove that the County's actions fall outside of one of the enumerated exemptions outlined in Miss. Code Ann § 11-46-9. Childers recognized that he could not pursue his claim unless his claim fell outside the exemptions. Childers recognized this distinction in his complaint when he stated that he was seeking relief pursuant to the Mississippi Tort Claims Act, M.C.A. § 11-46-9. However, Childers suggests that since the word "immunity" was not used in the arguments or in the Motion to Set Aside Default Judgment, then Tippah County somehow waived its defense pursuant to the Tort Claims Act. However, Childers' arguments fail to recognize the unique features of the Act.

In a normal negligence suit, the plaintiff asserts a cause of action and then the defendant asserts his affirmative defenses which may include immunity. However, pursuant to the Tort Claims Act, the process is reversed. The statutory scheme of the Tort Claims Act creates a waiver of immunity for certain torts pursuant to Miss.Code Ann. § 11-46-5(1) (Supp.1998); "However, certain circumstances are exempted from this waiver of immunity. Miss. Code Ann. § 11-46-9 (Supp.1998)." *L.W. v. McComb Separate Municipal School Dist.*, 754 So.2d 1136, 1139 (Miss.,1999). Thus, the State may not waive its immunity if it is protected by one of the exemptions.

Childers believes that since Tippah County did not label its defenses as "immunity" then all defenses pursuant to the Tort Claims Act were waived. However, the plain language of the Tort Claims Act creates the exemption unless the claimant can find a way to get around it. Mississippi Code Ann § 11-46-3 says:

(1) The Legislature of the State of Mississippi finds and determines as a matter of public policy and does hereby declare, provide, enact and reenact that the "state" and its "political subdivisions," as such terms are defined in Section 11-46-1, ***are not now, have never been and shall not be liable, and are, always have been*** and shall continue to be immune from suit at law or in equity on account of any wrongful or tortious act or omission. . . (Emphasis added).

All of the evidence presented at the hearing on Tippah County's Motion to Set Aside Default Judgment claimed that Tippah County, through its officers, did not act with reckless disregard for the safety and well-being of Daniel Childers. The two specific allegations levied against the County were that Childers was arrested without any warrant or court order and that the use of the TAZER to subdue Childers was excessive. The County presented affidavits which dispute both counts. The evidence was clear that Childers was taken into custody based upon a valid "Writ To Take Custody" properly issued by the Chancery Clerk. Likewise, the affidavits confirm that Childers resisted arrest and that the TAZER was properly used to subdue him. With no dispute as to those facts, the question before this court is a question of law.

Tippah County's entire meritorious defense arguments were based upon the reasonable conduct of its officers such that they remained protected by their exemption. This fact was recognized by Childers' counsel when he stated, "We've got a colorable claim. *They've got a colorable defense*, but it's no more than a coin toss in argument to this Court." (Transcript at page 35, line 15). (emphasis added.) Childers' counsel was acknowledging that the trial court would be required to resolve the legitimate legal question which was whether Tippah County's officers acted in reckless disregard to Childers' rights when they shot him with a tazer to take him into custody. Childers' counsel characterized the evidence a "coin toss." Clearly, Tippah County presented evidence pursuant to the Tort Claims Act allegations from the Plaintiff's Complaint. Tippah County did not waive its defenses under the Act.

B. TIPPAAH COUNTY DID NOT INTENTIONALLY INJURE CHILDERS

In his Appellee's brief, Childers alleges that because the deputy shot Childers with the TAZER, then his actions were intentional noting that the Tort Claims Act does not give the County protection against intentional injuries. Citing *City of Jackson v. Perry*, 764 So.2d 373, 379 (Miss. 2000). Childers cites *City of Jackson v. Calcote*, 910 So.2d 1103, 1110 (Miss. App. 2005) in support of his claims. In *Calcote*, a police officer shoved the victim's face into a concrete floor causing three of his teeth to break. The Court reasoned that the although the officer did not intend to break his teeth, the officer's actions demonstrated an indifference to the victim and that there existed a high probability of injury based upon the officer's actions. Childers argues that the actions of the Tippah County Sheriff's Department are similar.

There are no similarities whatsoever. The *Calcote* case turned on the issue of foreseeability. Clearly, it was foreseeable that someone's teeth would shatter when their head was shoved into concrete. Conversely, Childers' injuries were not foreseeable. Childers was shot with a TAZER and then fell onto the ground, not concrete. The Court can take judicial notice that an individual who

falls onto the ground does not normally shatter his arm.

Childers also argues that since no threat existed against the officers, then the use of the TAZER was excessive. On page 29 of his brief, Childers acknowledges that the Tippah County officers had a knowledge of Childers' history of mental illness which included "paranoid schizophrenic fear of police officers." All of the parties agree that Childers turned to return into his home after he was confronted by the officers and that he was mentally ill. What were the officers supposed to do? Were they simply supposed to chase him into the house where a weapon might be? Were they supposed to tackle him which could have equally resulted in his arm injury? Were they supposed to simply let him go and see what would happen?

Sheriff Vance's affidavit which was admitted into the evidence and confirmed that the use of the TAZER by the officers was within the policy of the Tippah County Sheriff's Department. It is uncontradicted in the evidence that the officers were properly trained and used the TAZER in accordance with the established policy.

Childers claims that Tippah County presented no evidence that its deputies "were acting to protect their own life or prevent serious harm to themselves." Childers cites *Holland v. Martin*, 56 So.2d 398, 400 (Miss. 1952) for the proposition that a police officer "can not take the life of the accused or inflict upon him great bodily harm except to save his own life or to prevent a like harm to himself." (Appellee's Brief p. 29). However, Childers conveniently left out the complete quote which says:

A police officer, in making an arrest or preventing an escape, "may exert such **physical force as is necessary to effect the arrest by overcoming the resistance he encounters**, but he can not take the life of the accused or inflict upon him great bodily harm except to save his own life or to prevent a like harm to himself." *Holland v. Martin*, 214 Miss. 1, 9, 56 So.2d 398 at 400 (1952).

Webb v. Jackson, 583 So.2d 946 at 951 (Miss., 1991) (emphasis added.)

The core question concerning the whole case is whether the officer's use of a TAZER under these circumstances constituted reckless disregard for the rights of Childers. Clearly, the officer's actions did nothing more than protect himself and Childers from greater injury that could have resulted from a chase, direct physical encounter or worse. While Childers' injuries are unfortunate, they were in no way intentional or foreseeable.

Next, Childers argues that Tippah County did not present any live testimony and that there exists a presumption that since the officers did not testify live then their testimony would be adverse. *Henderson v. State*, 367 So.2d 1366 (Miss 1979). Childers also alleges that the statements in the affidavits offered by Tippah County were merely conclusory. He cites *Capital One Services v. C. J. Rawls*, 904 So.2d 1010, 1016 (Miss. 2004) for the proposition that in order to establish a colorable defense, Tippah County must "show facts, not conclusions, and must do so by sworn affidavit or other sworn form of evidence."

Childers fails to recognize that the trial court was hearing a Motion to Set Aside a Default Judgment. The burden of proof was on Tippah County to establish that it had a meritorious defense. The hearing was not a trial. The affidavits confirm the facts, not conclusions, which have already been admitted by Childers in his brief and which are not in dispute. The officers were executing a valid "Writ to Take Custody." When the officers were making the arrest, Childers, who was mentally ill, turned and headed towards his home. The officers had no clue where he was going or what he was going to get. The officer shot him with a TAZER. Sheriff Vance's affidavit confirmed that their actions were proper and that they had been trained. None of these statements were conclusory. They were factual and constitute a meritorious defense to Childers' claims.

While Mississippi has never addressed the reasonableness of the use of a TAZER by a police officer, other jurisdictions have validated its use. For example, a Maryland federal district court said that officers did not use excessive force when they tazed a naked man who was resisting arrest while

he was held up in his closet. The Court reasoned that the alleged victim, "with knowledge of his own secret intentions on that night, may be sincerely aggrieved and consider the officers' response unnecessary and excessive. Nonetheless, police officers cannot be expected to read minds. They can only be required to act reasonably based on the information available to them." *Nero v. Baltimore County, MD*, 512 F.Supp.2d 407 (D. Md. 2007). Only Childers knew what he was going to get from the house.

The United States Supreme Court has address the issue of excessive force in Fourth Amendment cases stating:

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

Graham v. Conner, 490 U. S. 386, 396-397 (1989)

If the Mississippi Supreme Court chooses to affirm this case based upon the default judgment or otherwise, the precedent would place police officers around the State in an untenable position. The Tippah County sheriff's deputies acted reasonably under the circumstances and whatever cause of action, immunity or otherwise that the trial court chose to consider, Tippah County has a meritorious defense and the default should be set aside to consider the case on its merits.

C. TIPPAH COUNTY WAS NOT REQUIRED TO SHOW THAT CHILDERS WAS ENGAGED IN CRIMINAL ACTIVITY

Next, Childers argues that he was not engaged in any criminal activity and, as such, could not be alleged to have resisted arrest. Childers cites Mississippi Code Ann. §97-9-73 which makes it unlawful for any person to "resist by force. . .or any other manner, his lawful arrest" by the

Sheriff's Department. Childers argues that he was never under "arrest" because there was no warrant against him. Childers wants to limit the meaning of the word "arrest" to be narrowly interpreted to include only a criminal arrest. Such an interpretation would limit the scope of any law enforcement officers authority to Mississippi whenever any circuit or chancery court issues an order for the Sheriff to take someone into custody whether they have committed a crime or not. Practically, every taking in to custody by the Sheriff is some form of an arrest. The Supreme Court acknowledged this distinction in *Stewart v. District Attorney for Eighteenth Circuit Court District for State*, 923 So.2d 1017 (Miss.App. 2005) which cited Miss. Code Ann. § 19-25-35:

The sheriff shall be the executive officer of the circuit and chancery court of his county, and he shall attend all the sessions thereof with a sufficient number of deputies or bailiffs. He shall execute all orders and decrees of said courts directed to him to be executed. He shall take into his custody, and safely keep, in the jail of his county, all persons committed by order of either of said courts, or by any process issuing therefrom, or lawfully required to be held for appearance before either of them.

Even though the word "arrest" never appears in the statute, the Supreme Court then stated, "As stated by this statute, the sheriff possesses the power to make arrests." *Id* at 1022. Thus, an "arrest" does not necessary involve a crime. Any taking of an individual pursuant to a circuit or chancery court order is deemed an "arrest."

In the case *sub judice*, Childers was being taking into custody pursuant to a chancery court writ and his failure to comply with the order resulted in his resisting arrest. When he failed to comply, the officers were required to take him by force as required by the order and statutes. The use of the TAZER as non-lethal force was within the reasonable actions of the officers.

Our Supreme Court has stated that "[t]o be sure, default judgments are not favored and trial [judges] should not be grudging in the granting of orders vacating such judgments where showings within the rules have arguably been made." *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So.2d 377, 387 (Miss.1987).

Underlying all of the allegations in the oral arguments and again in his brief, Childers and the Trial Court seem to be attempting to take advantage of the circumstances under which the default judgment was granted. The trial court and Childers place the blame for the default on Tippah County's insurance company and despite the clear meritorious defenses presented, the trial court seems to be comfortable with the default judgment because it knows that Tippah County's insurance carrier's E & O coverage will likely pay the judgment because of its mistake. In rejecting all of Tippah County's arguments, the trial court is doing exactly what the Supreme Court said not to do. The fact that the ultimate authority paying this judgment might be Tippah County's insurance agent's E & O coverage should not be a consideration.

When applying the balancing test to set aside the default judgment including the County's strong and likely dispositive defense, the Trial Court abused its discretion in refusing to set aside the default judgment.

III. CHILDERS WOULD NOT SUFFER PREJUDICE IF THE DEFAULT JUDGMENT WAS SET ASIDE

Childers again argues that he will suffer prejudice because his ailing mother's testimony may become stale. Tippah County responded to these arguments in his initial brief. The County maintains that the facts in this case are not in dispute and that the testimony of Ms. Childers is not necessary since the Childers and the County agree on what happened. However, the County is compelled to respond to the most offensive allegation of Childers brief when he alleges that the County should have called Ms. Joyce Childers as a witness to preserve her testimony rather than Childers taking his mother's deposition himself.

Childers stated in his brief that "Tippah County never seized upon this opportunity [to call Ms. Childers as a witness] 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." As the record reflects, Tippah County called Ms. Childers as a witness and she was

unable to testify because she could not climb the staircase in the courthouse. As a convenience to her, Tippah County allowed her counsel to stipulate that she was able to currently remember the events. Childers' stipulated that the only prejudice he was claiming was the risk that his mother's memory might fail. Now, Childers argues that Tippah County should have put her on the witness stand to ask her if she knew how long her memory was going to last. She is no more able to predict how long her memory will last than anyone else. The only thing that she could have confirmed was that her memory was good on the day the hearing was conducted. There is no legitimate reason that her video taped deposition could not be taken to present to any jury in the event she died or her memory failed. Childers' claim that Tippah County should have questioned her to preserve her testimony is unreasonable and Childers should not now be able to benefit from his unwillingness to preserve her testimony by deposition.

Every delay in the legal system constitutes some sort of prejudice and the two cases cited by both parties indicate that more prejudice occurs where the facts depend on the memory of eye witnesses. In *Guaranty Nat. Ins. Co. v. Pittman*, 501 So.2d 377 (Miss.,1987), the Supreme Court affirmed a default judgment, in part, because the Plaintiff would be substantially prejudiced by setting it aside where the trial would be delayed and the memory of split second events would determine the outcome. Conversely, in *Stanford v. Parker*, 822 So.2d 886, 893 (Miss. 2002), Justice Smith discussed the weakening of the rule in *Pittman* where medical records and other documents existed which would not be affected by the passage of time.

In the case *sub judice*, the facts cited by Childers and the Tippah County are identical. There is no evidence in the record that the Ms. Childers would testify to anything other than facts that are already admitted. The sole question to be resolved by the Court on remand would be a question of law, not fact -- Does a County have immunity where a police officer fires a TAZER at an individual who turns to resist arrest? The County does not deny that Childers was hit with a taser when he

turned to run away from officers who were there to arrest him. Childers acknowledges that his only claim of prejudice is his mother's memory. If his mother's testimony is not necessary then he has suffered no prejudice.

CONCLUSION

When applying the balancing test to set aside the default judgment including the County's strong and likely dispositive defense, the Trial Court abused its discretion in refusing to set aside the default judgment. Two of the three prongs weigh heavily in Tippah County's favor. There is no dispute as to the facts and the matters of law related to the Mississippi Tort Claims Act are resolved *de novo*. Most significantly, Childers admitted that Tippah County had colorable defenses, yet the Court found that no meritorious defenses existed. Likewise, without any dispute as to fact, Childers will suffer no prejudice. With Trial Court having abused its discretion, the Supreme Court should set aside the default judgment granted to Childers and remand the case to the Circuit Court of Tippah County for a trial on the merits.

THIS, the 4th day of June, 2008.

Respectfully submitted,

FORTIER & AKINS, P. A.

By: B. Sean Akins

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CERTIFICATE OF SERVICE

I, B. Sean Akins, attorney of record for Appellant, Tippah County, Mississippi, do hereby certify that I have this day mailed, through United States Mail, proper postage prepaid, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** to the following:

Justin Cluck, Esq.
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P. O. Drawer 849
Holly Springs, MS 38635-0849

Hon. Henry L. Lackey
P. O. Drawer T
Calhoun City, MS 38916

SO, CERTIFIED, this, the 4th day of June, 2008.



B. Sean Akins
Attorney for Tippah County, Mississippi