

IN THE SUPREME COURT OF MISSISSIPPI

CITY OF JACKSON, MISSISSIPPI

APPELLANT

VS.

CAUSE NO. 2008 CA-00381

LYNDA KEY PRESLEY

APPELLEE

**On Appeal From The Circuit Court
of Hinds County, Mississippi
Cause Number 251-99-465CIV
Honorable Swan Yerger**

Reply Brief

ORAL ARGUMENT NOT REQUESTED

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SUMMARY OF THE REPLY ARGUMENT

The lower court's decision should be given the least amount of deference possible due to the fact that there is no indication that the court made any independent findings of facts or conclusions of law. Indeed, the document entered by the lower court is entitled "**Plaintiffs** Findings of Fact and Conclusions of Law." More importantly, the lower court made no reference whatsoever to the testimony offered by the only non-party witness, which was unrebutted at trial. Mr. Cartouche Body testified that he witnessed Officer Morton entering the intersection with her blue lights engaged and was crossing the intersection, lane by lane, activating her buzzer to alert the surrounding traffic. These actions are not indicative of one acting with reckless disregard. At worst, Officer Morton's actions constitute negligence, for which the City is statutorily immune from liability.

Furthermore, Presley relies upon the testimony of Sergeant Russell to support her contention that Officer Morton acted in reckless disregard. However, Sergeant Russell's testimony actually reveals that it was within Officer Morton's **discretion** as to the manner in which she responded to the call. Specifically, Officer Morton received a call that a white male was lying unresponsive and bleeding in the Georgetown neighborhood. Georgetown is a predominately African-American neighborhood with a known high murder and drug rate. In Officer Morton's opinion, this was an emergency call where someone's life was at stake. Therefore, it was within her discretion to enter the intersection. Moreover, Sergeant Russell testified that Morton's blue lights were engaged while

crossing the intersection; and this was done pursuant to general orders. Thus, there is no testimony in the record that reveals that Officer Morton was acting contrary with general orders.

ARGUMENT

- I. **The lower court's decision should be given the least deference possible due to the fact that it adopted Plaintiff's Findings of Facts and Conclusions of Law verbatim.**

While Presley is correct that this Court must view the lower court's ruling with heightened scrutiny, the least amount of deference should be given to said ruling due to the fact that the lower court clearly adopted **Plaintiff's** version of the facts and **Plaintiff's** conclusions of law verbatim. The findings of a circuit court judge sitting without a jury "will not be reversed on appeal where they are supported by substantial, credible and reasonable evidence." ***Donaldson v. Covington County***, 846 So.2d 219, 222 (Miss. 2003) (citing ***Maldonado v. Kelly***, 768 So.2d 906, 908 (Miss. 2000)). However, where a trial judge adopts, verbatim, findings of fact and conclusions of law prepared by one of the parties to the litigation, this Court analyzes those findings with greater care, and the evidence is subjected to heightened scrutiny. ***Brooks v. Brooks***, 652 So.2d 1113, 1118 (Miss. 1985) (citing ***Omnibank v. United Southern Bank***, 607 So.2d 76, 83 (Miss. 1992)). Because the trial judge adopted Presley's findings of facts and conclusions of law verbatim, without any edits made by the trial judge,

the deference afforded to the trial judge must be substantially lessened. *City of Jackson v. Spann*, --- So.2d ---, ¶ 9 (Miss. 2009).

Here, the proposed Findings of Fact and Conclusions of Law which Presley's attorney submitted to the judge were remiss of superficial edits or any edits at all. Indeed, the Findings of Facts and Conclusions of Law that is incorporated into the Final Judgment is entitled "**Plaintiff's** Proposed Findings of Fact and Conclusions of Law." R. at 16. The lower court did not even change the name of the document submitted by the Plaintiff. Further, there is no evidence whatsoever from the record that demonstrates that the trial judge made any independent and impartial findings of fact and conclusions of law in this matter.

The most important piece of evidence that the lower court failed to take into consideration was the testimony offered by the only non-party witness to the accident, Mr. Cartouche Body. Mr. Body's testimony was unrebutted, yet the lower court completely ignores this evidence.¹ In Presley's Brief, she states that Officer Morton's testimony "does not comport with the physical evidence and eye-witness testimony." Appellee's Brief p. 2. However, the record reveals otherwise. Mr. Body's testimony confirms Officer Morton's testimony that she was proceeding through the Five Points intersection with caution, lane by lane, and sounding a buzzer. T.T. at 163-66. Specifically, Mr. Body testified that he observed the officer's blue lights at the intersection and heard Officer Morton activate her buzzer while she attempted to proceed through an intersection. T.T.

¹ Additionally, Presley fails to address the testimony of Mr. Body in their brief. No where in Presley's brief does it rebut the City's assertion that the only non-party eyewitness to the accident clearly supports the proposition that Officer Morton was acting in a caution manner when attempting to cross the intersection.

at 163. He further testified that the cars at the intersection began stopping as they saw the officer's lights, and that he witnessed Officer Morton "ease out" and cross two lanes of traffic, stopping and activating the buzzer each time. T.T. at 164. Mr. Body then witnessed Officer Morton attempt to cross the third lane, but the Bobcat truck appeared to block her view the next lane. *Id.* Mr. Body noticed Presley approaching in the third lane, beside the Bobcat truck, and neither Officer Morton nor Presley appeared to see each other. *Id.* When Presley collided with Morton, Mr. Body testified that Officer Morton was "less than five miles per hour" at the time of the collision. T.T. at 166. Mr. Body's testimony was unrebutted at trial.

The Plaintiff's Findings of Fact and Conclusions of Law, which the lower court adopted verbatim, do not give any consideration to the aforementioned testimony. In fact, there is no mention of the witness's testimony whatsoever in the final judgment. Mr. Body's testimony is significant because he was the only non-party witness that testified at trial, and his testimony supports Officer Morton's testimony that she was slowly proceeding through the intersection one lane at a time (which is **not** indicative of reckless behavior), rather than speeding through the intersection (which is indicative of reckless behavior). When one views all of the evidence in the record, as a whole, the lower court's finding that Morton acted in reckless disregard is against the overwhelming weight of the evidence presented at trial. This is because the lower court adopted the **Plaintiff's** findings verbatim. Thus, the findings of the lower court must be analyzed with greater care, and the evidence upon which the lower court relied must be analyzed with heightened scrutiny.

II. Presley failed to demonstrate that Officer Morton's actions were done in reckless disregard.

The record before this Court does not indicate that Morton acted with a "conscious indifference to consequences, amounting to almost a willingness that harm should follow." *Maye v. Pearl River County*, 758 So.2d, 391, 394 (Miss. 1999). The evidence presented at trial and the testimony elicited certainly does not indicate that Morton failed or refused to exercise any care. At worst, the evidence simply indicates that she failed to exercise due care.

Presley's assertion that Officer Morton acted in reckless disregard hinges upon two arguments: 1) that Officer Morton's supervisor, Sergeant Russell, thought that her response to the call leading up to the accident was improper (the response was for a non-responsive, bleeding, white male lying in the street in the Georgetown neighborhood, a predominantly African American neighborhood known for its high murder rate and drug activity); and 2) that the cases submitted by the City of Jackson to support its argument are distinguishable from the case *sub judice*. However, both of Presley's arguments are misplaced.

First, Presley misrepresents Sergeant Russell's testimony and instead, offers arguments that were offered by Plaintiff's counsel at trial rather than witnesses. Presley asserts that Sergeant Russell testified that the call did not require her to disobey the red light and attempt to traverse an "extremely dangerous intersection," and that Morton "blindly" entered Presley's lane of travel. Appellee's Brief. p. 10. However, on direct examination, Sergeant Russell actually explained the officer's actions in the following testimony:

Once the officer made it to the red light, she made a complete stop, blue lights on proceeding through the red light cautiously. But being the fact that three lanes to cross, and one lane had her completely blocked, which is the big truck, she made it across the first lane, the second lane had her blocked, she could not see. She proceeded out is guess assuming trying to look down to see if you see anything, then the truck came along and bumped her front bumper.

T.T. at 83-74 (emphasis added). This is direct testimony from her supervising officer that clearly indicates that Officer Morton was not acting with reckless disregard. Stated another way, based on testimony from her supervising officer and from an eye-witness, Officer Morton did not proceed through the intersection haphazardly or at an improper rate of speed. Rather, she cautiously proceeded through, with her blue lights on, one lane at a time. She was not speeding, she was paying attention to her surroundings, and she simply inched out and was hit by Presley's oncoming vehicle.

Further, when asked on direct examination about whether it was safe for Morton to cross the intersection, Sergeant Russell gave the following testimony:

Q: Sergeant Russell, it was not safe for her to cross this intersection at the time and in the place and in the manner in which she crossed it, was it?

A: Yeah. Once looking back at it, assuming it weren't. But the only way she had to find out is to stick it [her vehicle] out there -- stick her nose out there to find out, and she had to do that.

Q: Well, you wouldn't have crossed this -- you didn't consider it safe to cross this intersection in the manner and at the time and place in which she did, did you?

A: You know, if you got a call I probably would have. You've got to get to the call.

T.T. at 87. When pressed by Plaintiff's counsel on re-direct examination, the following testimony was given:

Q: When ever, Sergeant Russell, is it appropriate to pull into a lane of traffic at a notoriously dangerous intersection at peak rush hour when you can't see oncoming traffic and oncoming traffic can't see you?

* * *

A: Responding to a priority one or either priority two calls, to say exactly what the nature of the call once you get there, if the call involved a serious situation, you know, as far as just going through a red light that you – that's not's clear, it understand the fact that you won't want to do that. But if you got – on the other side of that light you've got to get through, you've got somebody's life in danger, you've got to make that decision. The decision was made by her to get over there.

T.T. at 101-02.

Thus, the testimony by Sergeant Russell does not demonstrate that Officer Morton "blindly" entered the intersection in violation of the general orders. Conversely, the testimony demonstrates that Morton was forced to make a judgment call as to how to get to a crime scene where a male was lying unconscious in a dangerous area of Jackson, known for a high drug and murder rate. Sergeant Russell testified that the general orders state that when the officer is responding to a priority two call, it is in the discretion of the officer whether to engage the blue lights if the situation warrants the use of such emergency equipment. T.T. at 98. He further testified that Officer Morton engaged her blue lights when attempting to cross the intersection, which is consistent with the general orders. T.T. at 99. Finally, Sergeant Russell testified that the decision of whether or not to proceed through the intersection was purely within Officer

Morton's discretion. *Id.* It cannot be said that Officer Morton proceeded through the intersection with a conscious indifference to the consequences; rather, she made a judgment call to proceed through the intersection, with her blue lights engaged, in order to respond to a call where human welfare was at stake. Therefore, Officer Morton's actions cannot be considered in reckless disregard of the safety and welfare of others. At most, Officer Morton's actions constitute negligence, for which the City is immune.

Finally, Presley argues that the cases cited by the City are distinguishable from the case *sub judice*. However, these distinctions are misplaced. Presley asserts that none of the cases relied upon by the City are applicable to the case at bar because none of the cases involved situations with heavy traffic. This argument must fail because the City of Jackson is the only urban area in the state of Mississippi with a population over 100,000. Thus, no other cases other than those involving the City will match perfectly. Is Presley suggesting that the City have the law applied uniquely to its situation? If so, this application of the law would violate the concept of fairness or due process.

Interestingly, Presley asserts that ***Maldonado***, ***Kelley***, and ***Reynolds*** do not apply to the case at bar due to the fact that they do not involve an officer entering a busy intersection, yet relies on ***Maye v. Pearl River Co.***, 758 So.2d 391 (Miss. 1999) as "closely analogous to the facts in this case." Appellee's Brief. p. 11. This case involved a deputy sheriff **backing up his vehicle on an inclined driveway**. The ***Mayes*** accident occurred at a place that was not an intersection, where there was no emergency call involved, where the officer did not have his blue lights engaged, did not have his siren engaged, and there were

no witnesses to the accident. Here, Officer Morton was entering an intersection, on her way to an emergency call, had her blue lights and sirens engaged, and there is an independent eye-witness that testified that Officer Morton was crossing the intersection, one lane at a time and activating her buzzer while she was crossing the intersection. She was not simply backing up out of a driveway. Of all of the cases cited by both parties, *Maye* is the least analogous to the case at bar.

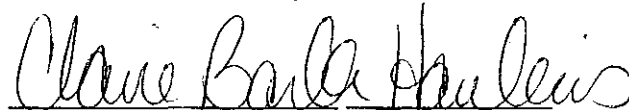
CONCLUSION

For the above reasons, the City of Jackson requests that this Court reverse the lower court's ruling and render a judgment in favor of the City. Mississippi statutory and case law states that public policy requires that governmental entities are not liable for mere negligence of law enforcement, rather their acts must be in reckless disregard for the safety of others. The overwhelming weight of the evidence demonstrates that Officer Morton was cautiously attempting to proceed through the intersection in a safe manner. Thus, the City is immune from liability under the MTCA because Officer Morton's actions do not rise to the level of reckless disregard. And the City of Jackson prays for such other relief as this Court deems appropriate.

Respectfully submitted this the 25th day of February, 2009.

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CERTIFICATE OF SERVICE

The undersigned does certify that he has this date mailed, via United States mail, postage pre-paid, and a true and correct copy of the above and foregoing Appellant's Reply Brief to the following:

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So certified, this the 25th day of February, 2009.


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