IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. 2008-CA-00381-SCT

CITY OF JACKSON, MISSISSIPPI — APPELLANT

VERSUS

LYNDA KEY PRESLEY — APPELLEE

Appeal from the Circuit Court of Hinds County, Mississippi

APPELLEE'S BRIEF

ORAL ARGUMENT 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.

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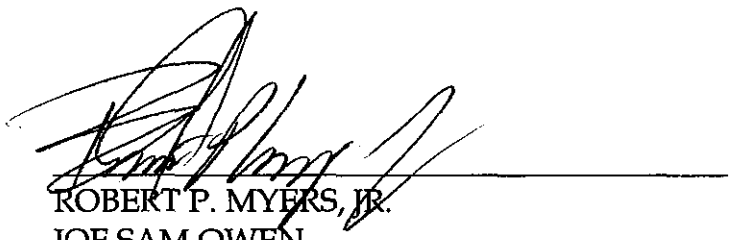

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The Circuit Court was acting well within its discretion when it adopted the Plaintiff's Proposed Findings of Fact and Conclusions of Law. *See, Rice Researchers, Inc. v. Hiter*, 512 So.2d 1259, 1266 (Miss. 1987); *see also, Thomas v. Scarborough*, 977 So.2d 393, 396 (Miss. Ct. App. 2007). Although the trial Court may have adopted the Plaintiff's Proposed Findings of Fact and Conclusions of Law, the applicable standard of review is "heightened scrutiny" and whether there is substantial, credible and reasonable evidence within the record to support the judgment, rather than a *de novo* standard of review. *Miss. Dep't of Wildlife, Fisheries & Parks v. Brannon*, 943 So.2d 53 (Miss. Ct. App. 2006). This reviewing Court should not apply a *de novo* standard of review in this matter under these circumstances, as it is contrary to Mississippi law and affords absolutely no deference to the trial Court's personal observations of the witnesses as they testified and the other nuances uniquely observed at the trial. Moreover, such a standard of review not only affords the Judgment of the trial Judge no deference whatsoever, but also negates the underlying trial all together and requires this appellate Court to decide the merits of the case based upon printed words on a page.

The judgment of the Circuit Court and its finding of reckless disregard are supported by substantial, credible and reasonable evidence within the record. As this Court will determine, there were serious issues of credibility involving one or more of the City's witnesses and specifically, the testimony of Officer Morton. The manner of Officer Morton's response to the call giving rise to this accident not only violated the General Orders issued by the City of Jackson Police Department, but her version of the

accident sequence does not comport with the physical evidence and eye-witness testimony. Moreover, Officer Morton, who was responding to a call that did not require such an urgent response, was attempting to navigate through one of Jackson's most notoriously dangerous intersections at peak rush hour, when at least one additional unit had been dispatched to the call. The intersection at issue, known as Five Points intersection, had been classified by the City of Jackson Police Department as a "high-risk intersection" because of the number of accidents and deaths occurring at that location. As evidenced by the testimony of Officer Morton's own supervisor, Sergeant Russell, Officer Morton was responding to a call that did not require such an urgent response, activation of her blue lights or siren or that she disobey a red traffic signal. According to General Order No. 600-1, Officer Morton was required to obey all traffic laws when responding to this call.

Five Points intersection is a very complex intersection, involving five streets controlled by numerous signals. As Officer Morton initially entered the intersection, traffic in the first two lanes to the immediate left of Officer Morton began to stop. However, in the second of three lanes, a Bobcat truck, similar to an eighteen-wheeler, completely blocked her view of the third lane and the oncoming westbound traffic of Woodrow Wilson Boulevard. Conversely, Lynda Presley was traveling in the third westbound lane of Woodrow Wilson Boulevard, obeying the speed limit and all traffic laws as she approached the intersection with a green traffic signal. She had no reason to suspect Officer Morton's presence in the intersection. Likewise, Presley's view of the

right half of the intersection, including Officer Morton's cruiser, was completely obscured by the large truck in the center lane.

With full knowledge that a driver in the far left westbound lane of Woodrow Wilson Boulevard could not view her police cruiser and would have no chance to avoid a collision, Officer Morton blindly entered that portion of the intersection. Upon entering that portion of the intersection, her police cruiser struck the passenger side of Presley's vehicle causing it to flip and come to rest upside down.[1] Officer Morton appreciated the risks of her actions but engaged in highly dangerous and unnecessary conduct, which constitutes reckless disregard.

While the City attempts to argue the trial Court erred by failing to apportion comparative negligence to Presley, there was no evidentiary support for such a finding. All evidence introduced at trial indicated that Presley's view of Officer Morton's police cruiser was totally obscured at the time of the accident, that she had no chance to avoid the collision and that she was obeying all traffic laws, including speed limit. Presley was faced with a green traffic signal at the time she entered the intersection and she could not hear the police cruiser's buzzer. There was absolutely no testimony offered at trial that Presley could have in some way avoided this accident. Consequently, there is no evidentiary basis upon which the lower Circuit Court could have assessed comparative negligence to Presley.

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[1] The City has not raised any assignments of error relating to the injuries and damages of Presley or the amount.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR BY ADOPTING THE PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AS THE EVIDENCE SUPPORTS THE TRIAL COURT'S JUDGMENT.

The City's argument, as phrased, is not supported by Mississippi law, as it is well established that a trial Court may, within its discretion, adopt a party's Findings of Fact and Conclusions of Law verbatim. *Thomas v. Scarborough*, 977 So.2d 393, 396 (Miss. Ct. App. 2007); *see also, Rice Researchers, Inc. v. Hiter*, 512 So.2d 1259, 1266 (Miss. 1987). The Mississippi Rules of Civil Procedure do not prohibit the trial Court from substantially adopting, or adopting *in toto*, the party's submission. Miss. R. Civ. P. 52(a). The verbatim adoption of a party's submission is not error in and of itself.

Although the trial Court may adopt verbatim a party's Findings of Fact and Conclusions of Law, Mississippi Courts have held that those Findings are not independent and as such, should not be given the same deference afforded to Findings actually drafted by the trial Court. *Thomas v. Scarborough*, 977 So.2d 393, 396; *University of MS Medical Center v. Pounders*, 970 So.2d 141, 145 (Miss. 2007). "However, less deference is afforded to the chancellor's findings when the chancellor adopts verbatim or 'almost verbatim' one party's findings of fact and conclusions of law." *Thomas v. Scarborough*, 977 So.2d 393 *citing Brooks v. Brooks*, 652 So.2d 1113, 1118 (Miss. 1995). As the Court is well aware, ordinarily when the trial Court sits without a jury, his Findings will be upheld where there is substantial, credible and reasonable supporting evidence within the record. *Norris v. Norris*, 498 So.2d 809, 814 (Miss. 1986); *see also, Donaldson v. Covington County*, 846 So.2d 219, 222 (Miss. 2003) (A Circuit Judge sitting without a jury

is accorded the same deference as a Chancellor.) Stated differently, a trial Court's Findings of Fact and Conclusions of Law will not be disturbed unless is it clear that a mistake was made. *Harkins v. Fletcher*, 499 So.2d 773, 775 (Miss. 1986). *See also, Miss. Dep't of Transp. v. Trosclair*, 851 So.2d 408 (Miss. Ct. App. 2003).

While it is clear from the case law of this state that verbatim Findings are not provided the same deferential treatment as "independent" Findings, the standard of review to be applied during these circumstances is less than clear. The seminal case in Mississippi on this issue appears to be *Rice Researchers, Inc. v. Hiter*, 512 So.2d 1259 (Miss. 1987), wherein the appellant assigned error by the trial Court because the Findings of Fact and Conclusions of Law proposed by a party were adopted verbatim by the trial Court. The Mississippi Supreme Court declined to find that this practice constituted reversible error, but did hold that the Findings were not independent and therefore subject to a "more careful analysis" with a "more critical eye". *Id.* When discussing the standard of review to be applied where the Findings are adopted verbatim or substantially in verbatim, the Court expressly stated it would not apply a *de novo* standard of review. *Id.* at 1265. ("Still, we cannot and will not review this case *de novo*.")

The reasoning articulated for the refusal to apply a *de novo* standard of review under these circumstances was the trial Judge's unique opportunity to observe the demeanor of the witnesses, nuances of the trial testimony and exhibits. Considering such, his determination of who prevailed is entitled to some deference, although not as much as where the Findings were independently drafted by the Court. *Id.* This

rationale was affirmed in the decisions of *Thomas v. Scarborough,* 977 So.2d 393 (Miss. Ct. App. 2007) and *Sanderson v. Sanderson,* 824 So.2d 624, 625-26 (Miss. 2002), as well as, the line of cases that merely state those Findings are subject to "heightened scrutiny." *See, In Re: Estate of Grubbs,* 753 So.2d 1043 (Miss. 2000); *Kerr-McGee Chem. Corp. v. Buelow,* 670 So.2d 12 (Miss. 1995); *Univ. of Miss. Med. Ctr. v. Pounders,* 970 So.2d 141 (Miss. 2007).

On the other hand, there does exist a line of cases that expands the scope of review under these circumstances to a *de novo* review. *See Brooks v. Brooks,* 652 So.2d 1113 (Miss. 1995); *Miss. Dep't of Transp. v. Johnson,* 873 So.2d 108 (Miss. 2004); and *Univ. of Miss. Med. Ctr. v. Johnson,* 977 So.2d 1145 (Miss. Ct. App. 2007). Still, some authorities suggest under these circumstances that the appropriate scope of review of matters of law is *de novo* and for factual matters is heightened scrutiny. *Omni Bank of Mantee v. United Southern Bank,* 607 So.2d 76, 83 (Miss. 1992).

This conflict in the case law was discussed at length in *Miss. Dep't of Wildlife, Fisheries & Parks v. Brannon,* 943 So.2d 53 (Miss. Ct. App. 2006). In *Brannon, supra,* the appellant relied upon *Johnson,* 873 So.2d 108 arguing a *de novo* standard of review was appropriate, and while the Court of Appeals acknowledged this argument had a basis, explained that the confusion on this issue stemmed from an "inaccurate statement of law" contained in *Brooks v. Brooks,* 652 So.2d 1113 (Miss. 1995). Ultimately, the Court in *Brannon,* 943 So.2d 53, analyzed the long line of cases on this issue and expressly rejected a *de novo* standard of review favoring the heightened scrutiny review as was originally articulated in *Rice Researchers, Inc. v. Hiter,* 512 So.2d 1259 (Miss. 1987).

For the reasons articulated in *Rice Researchers, Inc.*, 512 So.2d 1259, and *Brannon*, 943 So.2d 53, this Court should again reject the argument that a *de novo* standard of review is appropriate where the trial Court adopts verbatim a party's proposed Findings of Fact and Conclusions of Law. While understandably this Court should not provide the same deference as it would to independently drafted Findings of Fact and Conclusions of Law, the trial Court's Judgment should be given some amount of deference as it had the unique opportunity to observe the credibility and demeanor of all witnesses, which is not available to this Appellate Court. These observations are very personal and cannot be gleaned from printed words on a page. After all, the trial Judge, after hearing all of the evidence and considering the arguments of counsel and examining the exhibits, was of the opinion that one party prevailed over another and his decision should not be completely disregarded by an Appellate Court.

The standard of review to be applied in this case should be heightened scrutiny and whether the record provides substantial, credible and reasonable evidence to support the lower Court's Judgment.

B. THE OVERWHELMING WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL SUPPORTS THE CIRCUIT COURT'S FINDING OF RECKLESS DISREGARD.

The evidence presented at trial, especially when viewed in conjunction with several issues of credibility that arose during the trial, clearly supports the Circuit Court's finding of reckless disregard. Recovery is allowed against a municipality under these circumstances when its law enforcement officer has acted in "reckless disregard of the safety and wellbeing of any person not engaged in a criminal activity at the time of

incident." Miss. Code Ann. § 11-46-9(1)(c). Here, there was neither an allegation made nor any evidence presented at trial indicating Presley was engaged in any criminal activity at the time of this accident. Consequently, the focus is now whether Officer Morton was acting in reckless disregard for the safety and wellbeing of Presley at the time of this collision.

Before a determination can be made of whether an individual was acting in reckless disregard for the safety of others, the term "reckless disregard" must be defined. While behavior constituting "reckless disregard" is something more than that which would constitute mere negligence, it does not rise to the level of an intentional act meant to cause harm. *Miss. Dep't of Public Safety v. Durn*, 861 So.2d 990, 994 (Miss. 2003), *citing, City of Jackson v. Brister*, 838 So.2d 274, 281 (Miss. 2003); *see also, Scott v. City of Goodman*, 997 So.2d 270 (Miss. Ct. App. 2008). The term "reckless disregard" has also been defined as "the voluntary doing by [a] motorist of an improper or wrongful act . . . [with] heedless indifference to results which may follow and the reckless taking of a chance of [an] accident happening without intent that any occur." *Davis v. Latch*, 873 So.2d 1059, 1061-62 (Miss. Ct. App. 2004) (*quoting, Turner v. City of Ruleville*, 735 So.2d 226, 229 (Miss. 1999).

Mississippi Appellate Courts, when attempting to reconcile cases involving the standard of reckless disregard, have noted, "a common denominator in these cases is that the conduct involved evinces not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved." *Maldonado v. Kelly*, 768 So.2d 906, 910-11 (Miss. 2000). *See also, Morton v. City*

of Shelby, 984 So.2d 323, 331 (Miss. Ct. App. 2007). Similarly stated, reckless disregard is the appreciation of an unreasonable risk of danger but a conscious indifference to the consequences of that risk. *Davis v. Latch*, 873 So.2d 1059, 1062. Obviously, the question of whether conduct rises to the level of reckless disregard is fact intensive and unique to each case.

In the case *sub judice*, the evidence clearly establishes that Morton not only appreciated the risk of blindly entering this intersection, but that she most assuredly knew of the probable harm caused to someone in Presley's position. As the trial Court determined, Morton "appreciated the consequences of entering this intersection during rush hour with an obstructed view . . . ." [R. 16-26, R.E. 1-11] This finding was based, in part, upon Morton's admission that it is "unsafe," "extremely dangerous," and "ill-advised" to blindly enter this intersection. [T.T. p. 46]

The probability of harm that would follow from blindly entering the intersection or third lane of westbound Woodrow Wilson Boulevard is also overwhelmingly supported by the evidence. Five Points intersection is widely known as a complex and very dangerous intersection, which has a history of injuries and fatalities. [T.T. 22-24, 74-76]

The likelihood of potential harm to others, including Presley, caused by Morton blindly entering the third lane of the intersection was substantially increased when Morton attempted to cross at peak rush hour. The traffic at this intersection during rush hour is often "backed up" for a mile in all directions. [T.T. 76] Morton even admitted that the traffic was "extremely heavy" at the time of this accident when she

attempted to cross. [T.T. 28] Moreover, as Presley and Morton's views were totally obstructed neither one had an opportunity to avoid the collision. [T.T. 47, 123-124, 147-151] Morton knew this. Notwithstanding her knowledge and appreciation of the potential consequences of blindly entering the third lane of traffic at peak rush hour and knowing there was a substantial probability of a serious collision, Morton elected to blindly proceed into Presley's lane of travel anyway.

While the City of Jackson attempts to frame the issue as Morton did everything possible to avoid a collision by using her lights, buzzers and slowly inching forward, this argument overlooks the totality of the circumstances of this accident. *See, City of Ellisville v. Richardson*, 913 So.2d 973, 978-79 (Miss. 2005) ("The Court will look to the totality of the circumstances when considering whether someone acted in reckless disregard.") As stated by her supervising officer, Morton was responding to a call that did not require her to disobey a red light, let alone disobey a red light and attempt to traverse an extremely dangerous intersection with an obstructed view. Her response to this call for assistance was inappropriate and inconsistent with her General Orders. [T.T. 80-81; *see also*, R.E. 12-16] Consequently, had Morton not ignored her General Orders she would never have been confronted with the option of blindly entering Presley's lane of travel. Morton's assertion that the call was a "life or death situation" requiring a "silent" but urgent response and that she was the only unit responding to

this all-important call is contradicted by her own testimony. [T.T. 25-28, 46][2] An ambulance unit was also dispatched. [T.T. 46]

It is also questionable why Morton chose to cross this particular intersection given the time of day and high level of traffic. Accordingly, the focus should not necessarily be limited solely to Morton's actions in entering this intersection and Presley's lane of travel, but should start with her inappropriate response to the call for assistance.

The facts of *Maye v. Pearl River Co.*, 758 So.2d 391 (Miss. 1999) are closely analogous to the facts of this case. In *Maye, supra*, a deputy sheriff proceeded to back his vehicle up an inclined driveway knowing he could not visualize approaching traffic to his rear. *Id.* Consequently, traffic entering the driveway had no opportunity to avoid the deputy's vehicle as it backed up the driveway. *Id.* The Court held the deputy's actions constituted reckless disregard as the deputy showed a "conscious disregard for the safety of others when he backed up the inclined entrance to the parking lot knowing he could not be sure the area was clear." *Id.* at 395.

The Court in one of many decisions attempting to distinguish *Maye*, 758 So.2d 391, has drawn attention to the fact that those vehicles entering the parking lot would not have had an opportunity to avoid a collision with the deputy. *Maldonado v. Kelly,*

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[2] Q: The call that you were responding to in Georgetown, there was another police unit en route to that call, was there not?

A: Yes.

[T.T. 46]

768 So.2d 906 (Miss. 2000). Thus, the facts of *Maye, supra,* are strikingly similar and its holding is controlling in the case *sub judice.*

On the other hand, the City of Jackson argues that *Maldonado v. Kelly,* 768 So.2d 906, is controlling and that Morton's actions do not rise to the level of reckless disregard. Although *Maldonado, supra,* arose from an accident wherein a police officer caused a collision when he attempted to cross an intersection of which his view was obstructed by a water tower, the similarity stops there. The intersection involved in *Maldonado, supra,* had but two stop signs and was not especially dangerous or complex, but for the presence of a water tower fifty feet away, that *partially blocked* the view of oncoming northbound traffic. *Maldonado* at p. 906 (emphasis ours). The complexity of the intersection in *Maldonado, supra,* pales in comparison to the complexity of the Five Points intersection. In the instant case, the record reflects that Five Points was classified by the City of Jackson as a "high-risk intersection" at which many fatalities had occurred. [T.T. 74-75] The record in *Maldonado,* 768 So.2d 906, is silent as to the level of traffic or whether the accident occurred at peak rush hour, which may have substantially increased the likelihood of a serious collision. Most importantly, the officer in *Maldonado, supra,* was not violating his General Orders when attempting to cross the partially obscured two-way intersection, but rather was obeying the traffic laws at the time of this accident. *Id.* at p. 911. The same cannot be said for Morton. Lastly, there were other routes available to Morton in responding to this call, but she elected to blindly traverse this particular intersection at peak rush hour. Morton made

an already dangerous intersection even more dangerous by unnecessarily disobeying a red light and attempting to stop all traffic at peak rush hour.

The City also relies upon *Kelley v. Grenada County*, 859 So.2d 1049 (Miss. Ct. App. 2003). *Kelley, supra*, involved a deputy who attempted to pass a truck turning into a gas station and subsequently collided with a vehicle exiting the gas station and entering the highway. *Id.* The Court held there was an absence of reckless disregard on the part of the deputy and stated that while the deputy might have "failed to anticipate" the presence of a vehicle exiting the gas station, the deputy's decision to steer around the truck turning into the gas station was nothing more than mere negligence. *Id.* Again, the facts of *Kelley*, 859 So.2d 1049, are distinguishable from those of the case *sub judice*. In *Kelley*, the deputy's view was apparently only partially obstructed since he failed to anticipate a vehicle exiting the gas station, but apparently had a view of potential oncoming vehicles in the northbound lane. Moreover, the relative levels of traffic do not compare. The probability of a collision in *Kelley, supra*, is vastly different from the probability of a collision at Five Points during peak rush hour. Morton unnecessarily and knowingly exposed Presley and others to an increased and unreasonable risk of a serious collision.

While at first glance the facts of *Reynolds v. County of Wilkinson, State of MS*, 936 So.2d 395 (Miss. Ct. App. 2006) may seem similar to those involved here, *Reynolds* is not only distinguishable because of the same reasons articulated above, e.g. level of traffic at Five Points during peak rush hour, but also because here, Morton actually created the dangerous situation giving rise to the collision. In *Reynolds*, 936 So.2d 395, the Court

noted that the deputy encountered an already dangerous situation. The deputy's view of the intersection was partially blocked due to a legally parked vehicle and the deputy, when confronted with this situation was forced to turn right and into the oncoming vehicle's path of travel. *Id.* As the Court suggested, the deputy had no choice but to blindly enter the intersection and there were no reasonable measures available to him to avoid such a situation. Here, Morton made an already dangerous intersection even worse. Morton was not confronted with a pre-existing blind intersection, but rather created a blind intersection by responding in an inappropriate manner inconsistent with her General Orders. The City's argument that Morton was somehow forced to blindly enter Presley's lane of travel over which she had no control ignores the totality of the circumstances. Morton could have waited for the traffic signal to change to green. She could have followed her General Orders in responding to the call. The City should not be allowed to escape liability for a dangerous situation its police officer created in violation of its own policies and procedures. For these reasons, *Reynolds v. County of Wilkinson*, 936 So.2d 395 (Miss. Ct. App. 2006), is distinguishable.

As stated earlier, the trial Court's Judgment should be provided some degree of deference in this case, as opposed to a *de novo* review. The trial Court had the unique opportunity to pass on the credibility of witnesses. Weighing the credibility of witnesses is something every trial Judge must do when conducting a bench trial and often it affects the outcome of a decision on the merits. For instance, the issue of credibility influenced the trial Judge's decision in a Mississippi Torts Claim Act case involving a police officer and whether his actions amounted to reckless disregard. *See,*

Miss. Dep't Public Safety v. Durn, 861 So.2d 990, 996 (Miss. 2003). ("There were inconsistencies in [Officer Latern's] testimony concerning his speed that cast doubt on his entire testimony.") Such inconsistencies, or issues of credibility, abound in the case *sub judice*, discussed below are but a few that arose during the trial.

Although Officer Morton previously testified in her deposition that the Five Points intersection was a notoriously dangerous intersection and had been previously classified by the City of Jackson as a "high-risk intersection" she refused to admit this at trial until impeached with her own deposition testimony. [T.T. 21-22].

Likewise, Officer Morton repeatedly testified that she could not see Presley's vehicle prior to the collision as her view was totally obstructed by a Bobcat truck; however, she inexplicably stated in her May 20, 1998, memorandum to Sergeant L.C. Russell that Presley's green truck entered the intersection, at a "very high rate of speed." [R.E. 17]

Officer Morton was steadfast in her testimony at trial that the collision occurred in the middle lane of the intersection and that Presley's vehicle veered to the right entering the middle lane to cause the collision, rather than Officer Morton entering Presley's lane of travel, the third lane. [T.T. 32-33, 37]. However, Officer Morton's version of the mechanics of this particular accident defy the physical evidence, as well as, her own previous statement describing the accident and her supervisor's investigatory findings. Officer Morton testified before the trial Court that Presley inexplicably veered to the "right" and struck her cruiser while in the center lane, but stated in her May 20, 1998, memorandum to Sergeant Russell "the driver [Presley]

slightly turned left ot (sic) follow the path of the street when her rear end collide (sic) with the bumper of my patrol car." [R.E. 17] The diagram contained within the accident report for this accident also indicates that Presley, if following the "path of the street" would have been veering to the "left" rather than the "right" as sworn to by Officer Morton at trial. [R.E. 18-19] Also inconsistent with Officer Morton's version of the accident were the investigatory findings of Sergeant Russell, who determined that the accident occurred as Officer Morton was attempting to cross the third lane of Woodrow Wilson Boulevard. He specifically determined that the collision occurred in the third lane. [T.T. 85-87][3] Even an independent witness, Catouche Body, testified the impact occurred in the third lane, or Presley's lane of travel. [T.T. 171]

The photographs of the damage sustained to the respective vehicles also indicates, more likely than not, Officer Morton actually struck Presley's vehicle in the area immediately to the rear of the passenger side door. [R.E. 20-26] Even in the City of Jackson's Appeal Brief it, too, acknowledges that the accident occurred in the third lane. ("There are specific facts that were uncontested at trial that are highlighted for the

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[3] Q: Now, your investigation revealed that Officer Morton was attempting to cross the third lane, the far left lane, at the time of this accident happened, didn't it?
A: Yes.
Q: And in fact, I think you alluded to it earlier, she, I think in your words, stuck the nose of her cruiser out into that third lane, didn't she?
A: Yes, uh-huh.
Q: . . . This accident occurred in the third lane, did it not?
A: I would assume, yes. If the bob truck was in the second lane it would have to.

[T.T. 85-86]

Court: . . . the collision occurred immediately after Morton began proceeding through the third lane of the intersection.") [T.T. 59-60; *see also*, Appellant's Brief at p. 14]

The appropriateness of Officer Morton's response to the call leading up to this accident was also a contested issue to be resolved by the trial Court. Officer Morton testified that she was responding to 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. [T.T. 54] According to Officer Morton, she viewed the call as a "life or death situation" or "priority one call" as classified under her General Orders. [T.T. at p. 55, 65] Knowing all of these circumstances about the call to which she was responding, Officer Morton did not initially activate her blue lights and siren when responding. [T.T. p. 66] For some unknown reason, she felt initially it would be "safer" to respond "silent" and without activating her blue lights. [T.T. 66] This response defies common sense and is in violation of her General Orders. [R.E. 12-16] The manner of Officer Morton's initial response to this call undercuts her testimony that she was required to proceed to the location of the call by disobeying a red traffic signal at a notoriously dangerous intersection during peak rush hour. The veracity of Officer Morton's testimony regarding the circumstances of this call was questioned at trial in light of her previous testimony. [T.T. 68-69] Sergeant Russell's investigation also contradicts the manner of Officer Morton's response.

Q: So when you completed your investigation, Officer Morton was en route to a call that did not require blue lights or a siren, nor did the call require her to proceed through a red light. Did I read the last line of your memo correctly?

A: Yeah, you read it.

[T.T. 81; *see also,* R.E. 21]

Such inconsistencies continue to exist within the City of Jackson's Brief. While it is argued that Officer Morton activated her buzzer at different "volumes" to alert traffic at Five Points, the testimony does not support such a statement. [Appellant's Brief at p. 13; T.T. 58, 163] The City of Jackson also asserts that Officer Morton was the only officer responding to the call giving rise to this accident. "Officer Morton was attempting to proceed through the Five Points intersection, on the way to a call for which she was the only officer dispatched." [Appellant's Brief at p. 14] Officer Morton testified otherwise:

Q: The call that you were responding to in Georgetown, there was another police unit en route to that call, was there not?

A: Yes.

Q: And you were advised of that?

A: I don't remember, but I'm sure it was.

Q: It's standard procedure to have two units respond to a call?

A: Right.

[T.T. 46]

While this Appellate Court may read the testimony, it is without benefit of personal observations of the witnesses as they testified and therefore, the trial Court's Judgment must be afforded some degree of deference. These issues of credibility, and

there are others within the transcript, provide just a portion of the substantial evidence supporting the Judgment of the trial Court in favor of Presley.

The overwhelming evidence presented at trial, together with issues of credibility that the trial Judge was obligated to decide, clearly establishes that Officer Morton's actions rise to the level of reckless disregard.

C. THERE IS NO EVIDENTIARY BASIS TO SUPPORT A FINDING OF COMPARATIVE NEGLIGENCE ON BEHALF OF PRESLEY.

There is no evidentiary basis for a finding of comparative negligence in this case. While the City of Jackson argues the lower Court erred by failing to assess comparative negligence against Presley, the City struggles to provide this Court with any supporting evidence.

It is undisputed that Presley had a green traffic signal upon entering the intersection and that she was traveling at a lawful rate of speed at the time of the collision. [T.T. 39, 84, 123, 125, 149] Likewise, it is undisputed that Presley's view of Officer Morton's police cruiser was totally obscured prior to the accident by a large truck located in the center lane. [T.T. 39, 83, 148, 150, 153] Neither Presley nor Officer Morton had a chance to avoid the collision once Officer Morton elected to enter Presley's lane of travel. [T.T. 47] Presley did not see Officer Morton's police cruiser until it collided with her truck. [T.T. 150] As acknowledged by the City of Jackson, Presley did not have an opportunity to see the blue lights of the police cruiser due to the large truck and did not hear Officer's Morton's buzzer. Presley's windows were rolled up and her radio was playing. [T.T. 153] There was nothing to suggest that these

circumstances constitute negligence on behalf of Presley. Moreover, Presley saw no indications that it was unsafe for her to proceed through this intersection immediately prior to the accident. [T.T. 156].

The City of Jackson is unable to point this Court to any facts which would tend to suggest Presley failed to exercise due care at the time of this collision. Stated differently, there is a lack of substantial evidence to support a finding of comparative negligence on behalf of Presley.

The City of Jackson's reliance upon *Callahan v. Ledbetter*, 992 So.2d 1220 (Miss. Ct. App. 2008) is misplaced. The Court of Appeals upheld a finding of comparative negligence in *Callahan* because the Plaintiff failed to decrease her speed and otherwise take evasive action to avoid a large yellow, slow moving, school bus entering the roadway from a dead stop at a stop sign. *Callahan* at p. 1225. The Court in upholding the trial Court's finding of comparative negligence noted that the area of the accident is a "'flat piece of land with no trees around' for one half of a mile to a mile back." *Id.* at 1226. There was also discussion about the "incredible versions" of testimony concerning the sequence and timing of this particular accident. *Id.* at 1229. The facts of the case *sub judice* are in no way analogous to a case where the Plaintiff failed to exercise due care and attempt to avoid a slow moving large yellow school bus entering the roadway from a dead stop.

The trial Court correctly ruled that the sole proximate cause of this accident were the actions of Officer Morton.

CONCLUSION

The evidence within the record supports a finding that Officer Morton appreciated the unreasonable risk presented by her actions, but nonetheless elected to proceed in such a manner that harm was likely to follow. Such actions constitute reckless disregard and vitiates any immunities in favor of a governmental entity. It is not only Officer Morton's actions in attempting to traverse Five Points intersection that constitutes reckless disregard, but the inappropriate manner of her response to the call for assistance that led to this accident as well. This Court should provide the lower Court's Judgment some degree of deference as it had the opportunity to observe the demeanor of the witnesses as they testified and to weigh their respective credibility. For the reasons set forth above, including the authorities referenced, Lynda Presley respectfully requests that this Court affirm the lower Court's Judgment in her favor.

Respectfully submitted this the 10th day of February, 2009.

LYNDA KEY PRESLEY

BY: _____
ROBERT P. MYERS, JR.

CERTIFICATE OF SERVICE

I, ROBERT P. MYERS, JR., of the law firm of Owen, Galloway & Myers, P.L.L.C., do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing APPELLEE'S BRIEF to:

Honorable Swan Yerger
Circuit Court Judge
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Jackson, MS 39225-2711

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Dated this the 11th day of February, 2009

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