Case No. 2008-CA-00950

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ROBERT LEE GILES, ROBERTO GILES, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, ROBERT LEE GILES, AND ANTONIO GILES, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, ROBERT LEE GILES, APPELLANTS

v.

ROBERT A. BROWN, AND LEAKE COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS, APPELLEES

Appeal from the Circuit Court
of Leake County, Mississippi

BRIEF OF THE APPELLANTS

ORAL ARGUMENT REQUESTED

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ROBERTO GILES, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, ROBERT LEE GILES, AND ANTONIO GILES, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, ROBERT LEE GILES — **APPELLANTS**

VS. — **CASE NO. 2008-CA-00950**

ROBERT A. BROWN, AND LEAKE COUNTY, MISSISSIPPI, BOARD OF SUPERVISORS — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities 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.

I. Roberto Giles, a minor, by and through his father and next friend, Robert Lee Giles, Appellant;

II. Antonio Giles, a minor, by and through his father and next friend, Robert Lee Giles, Appellant;

III. Robert A. Brown, Appellee;

IV. Leake County, Mississippi, Board of Supervisors, Appellee

V. Judge Vernon Cotten, Circuit Court Judge of Leake County, Mississippi;

VI. Honorable Don H. Evans, Attorney for Appellants;

VII. Honorable Michael Wolf, Attorneys for Appellees;

RESPECTFULLY SUBMITTED, this the 5th day of November, 2008

BY: _____
DON H. EVANS

OF COUNSEL:

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STATEMENT OF THE ISSUES

1. Whether the trial court erred in finding the Appellees, Robert Brown and the Leake County Board of Supervisors, were liable to the Appellants on the grounds that Robert Brown was negligence in his pursuit of the Appellants and that Robert Brown's negligence amounted to a reckless disregard for the safety and well being of the Appellants as described under the applicable Mississippi law.

2. Whether the trial court erred in allowing Jerry Barrett to qualify as a police pursuit expert and to give numerous opinions based upon accident reconstruction as to how the accident happened, at to whose fault the accident was, and as to whether the Appellee, Brown's, behavior did or did not amount to a reckless disregard for the safety and well being of the Appellants when he was not accepted as an accident reconstruction expert and when he was not qualified under *Daubert* to testify as a police pursuant expert or on the question of what did or did not meet the standard of reckless disregard.

3. Whether the Court erred in denying the Appellants' Motion requesting that the Court to reimburse the Appellants with regard to the Court ordering the Appellants to pay one-half of the entire transcript which the Court ordered to be done before he rendered a decision on the case. At that time, it was not part of the cost of transcribing the record for the appeal.

STATEMENT OF THE CASE

A. Nature of the Case

This case is submitted to the Supreme Court of Mississippi to determine whether the lower Court erred in finding in favor of the Appellees in determining that the Appellants were engaged in criminal activity, in determining that the Robert Giles' actions were the "superceding cause" of the subject accident, and in determining that the Appellee, Brown, " was not found to have been pursing the [Appellants] with *reckless disregard* for the safety of [Appellants]...as described under applicable Mississippi law and is therefore entitled to all of the immunities prescribed under § 11-46-9(1)(c), *MCA*, and which immunity also extends to the Co-Defendant Leake County, Mississippi Board of Supervisors." This case is also being submitted to the Supreme Court of Mississippi to determine whether the lower Court erred in allowing Jerry Barrett to qualify as a police pursuit expert and in allowing him to give numerous opinions based upon accident reconstruction as to how the accident happened, whose fault the accident was, and as to whether the Appellee, Brown's, behavior did or did not amount to a reckless disregard for the safety and well being of the Appellants when he was not accepted as an accident reconstruction expert and when he was not qualified under *Daubert* to testify as a police pursuant expert. He was never qualified to be an expert on the standard as to reckless disregard. Finally, the Court erred in denying the Appellants' Motion requesting that the Court to reimburse the Appellants with regard to the Court ordering the Appellants to pay one-half of the entire transcript which the Court ordered to be done before he rendered a decision on the case. This was not part of the cost of transcribing the record for the appeal at that time.

The Appellants would show that they have submitted evidence and independent witness testimony that proves that the Appellants were not committing any criminal activity, that Appellants

in no way contributed to the subject accident, and that Robert Brown's negligence amounted to a reckless disregard for the safety and well being of the Appellants. The Appellants would further show unto the Court that under *Daubert*, Jerry Barrett was not qualified to testify as a police pursuit expert. The Appellants intends to prove that the trial court erred in finding in favor of the Appellees and in allowing Jerry Barrett to qualify as a police pursuit expert.

B. Course of Proceedings and Disposition of the Court Below

This matter was heard as a bench trial on February 13, 2008. The matter had been previously dismissed on summary judgment, but returned to this court after it having been remanded from the Court of Appeals with the following directive:

> "...we reverse and remand the court's judgment as to Roberto and Antonio because there are genuine issues of material facts as to: (1) whether the children were engaged in criminal activity given the absence of criminal charges or convictions; (2) whether any criminal activity on the part of the children had a "causal nexus" to the accident; and (3) whether Brown acted with reckless disregard in his pursuit of Giles." Giles v. Brown, 962 So.2d 612 (2006)

With the trial, having concluded, each of the parties, represented by counsel, were required to submit a *Proposed Finding of Fact and Conclusion of Law*, and having presented evidence, the court finds that (1) the Appellees engaged in criminal activity, that (2) Robert Giles' actions were the "superceding cause" of the subject accident, and that (3) that in the Appellee, Brown, " was not found to have been pursing the [Appellants] with *reckless disregard* for the safety of [Appellants]...as described under applicable MS. case law and is therefore entitled to all of the immunities prescribed under § 11-46-9(1)(c), *MCA*, and which immunity also extends to the Co-Defendant Leake County, Mississippi Board of Supervisors.

C. Statement of the Facts

On or about September 17, 2003, the Appellants, Roberto Giles, a 14 year old minor, and Antonio Giles, a 12 year old minor, were riding on the back of a 4-wheeler being driven by their father, Robert Lee Giles, in a rural area way out in the country in Leake County, Mississippi. Robert Brown, a Leake County Constable, stopped Robert Giles on the road that day and he asked for his driver's license and Robert Giles did not have a valid driver's license and he told the constable to follow him to his house which was about a mile and a half away. Robert Giles pulled off and was going to his house and apparently, Robert Brown, the constable, did not understand what Robert Giles had said about following him to his house or he did not agree to follow him. In any event, the Constable, Robert Brown, proceeded to follow the 4-wheeler with the two little boys on the back of it in a bizarre and reckless way and so ridiculous as to amount to a willful intent to injury the children or amount to such a reckless disregards for the rights and safety and well-being of the minor children that it in essence amounts to an intentional act. He drove his Constable car at the rate of 45 miles per hour and stayed as close as four inches to the back of the 4- wheeler for about a mile and when the 4-wheeler slowed to turn onto the next road to go to his house, the Constable rammed his vehicle into the rear of the 4-wheeler, knocking one of the children high up into the air and running his vehicle completely over once child breaking his hip and both legs. Also, he totaled out the 4-wheeler and another vehicle that was stopped waiting to pull out into the roadway. The Constable's behavior amounted to a road rage and he apparently was so mad that he showed a complete disregard for the safety and well being of these minor children. All of this was simply over Robert Giles being on the roadway with

a 4–wheeler and no driver's license. At all time in question the Constable was on duty and was working in the course and scope of his duties as a Constable for Leake County, Mississippi. It strictly was the Constable's fault in this accident. Following a 4-wheeler within four inches of his bumper is clearly a violation of the law. Failing to slow up behind the 4-wheeler for the 4-wheeler to make the right-hand turn is clearly a violation of the law. Running into the rear of the 4-wheeler is a violation of the law.

The Constable's bizarre conduct over a misdemeanor violation showed a willful and malicious conduct and showed such reckless disregard for the safety and well being of the minor children as to amount to an intentional act or at least to amount to a conduct that standard required under the Tort Claims Act for the minor children to be able to collect damages from his and the county for their injuries.

SUMMARY OF THE ARGUMENT

Robert Giles was a middled-aged African-American man who lived several miles out in the country from Carthage, Mississippi. He worked a steady job and had two little boys, who were ages twelve and fourteen on the date of this accident. Robert Giles had owned and used a used 4-wheeler for about seventeen years, which encompassed both of his sons' entire lives. Robert Giles would come in from work each day and take his two boys riding on the four-wheeler, whereby they would ride down the road for about two miles to a chicken house, then turn around and go back home. This was their family time and they had engaged in this activity for most of these children's' lives. At no time prior to the subject accident were they ever stopped by any law enforcement official for riding an ATV down the road nor were ever told by anyone that they could not ride down the road on an ATV. In fact,

their neighborhood engaged in fund raisers whereby the residents of the neighborhood would ride their 4-wheelers, in a caravan, on the highway *with the consent of the local sheriff's office*. Although they had never been stopped or reprimanded for riding an ATV on the road, the Giles children had heard that it was illegal to drive a 4-wheeler down the road.

On September 17, 2003, the date of the subject accident, Robert Giles came in from work and told his two sons to get on the four-wheeler, because they were going for their usual ride. They left their home on the four-wheeler and had gotten almost to the chicken house when they met Constable Brown coming from the opposite direction. Robert Brown happened to have recently received a call about some individuals riding on a four-wheeler in a different location and was on his way to that call when he came upon the Robert Giles and his two children. The call that Brown received was not in any way related to the Giles riding their 4-wheeler, and the Constable acknowledged this fact in his sworn testimony. When Brown passed the Giles, he continued down the road a little piece and then turned around. Robert Giles and his sons, seeing Brown was turning around, turned off the road into the closest driveway, turned around in the driveway, and met the Constable about two cars lengths from the highway, with the Giles 4-wheeler facing the highway and Brown's vehicle facing away from the highway. Constable Brown asked Robert Giles if he had his driver's license, among other things, and Robert Giles told him that his license had been suspended. Giles then told Robert Brown to follow him to his house. Both children testified that their daddy said this to Constable Robert Brown. All three Robert, Antonio and Roberto Giles, testified that the Constable did not say anything in return and that they assumed this to mean that he was going to follow them home. Robert Giles then pulled out onto Highway

488 and started towards their home. The distance between the driveway and the Giles' home was approximately one and a half (1 ½) miles. The Constable had his blue lights on while following the Giles 4-wheeler. One of the boys looked back and saw Brown following with blue lights on, so the Giles assumed that the Constable was, in fact, following them home. Robert Brown's ex-wife, Suzanne Sharpe, was in the car with him. Both Brown and Sharpe testified that they were traveling at the rate of about forty-five miles per hour (45 mph) as they traveled from the driveway at which they had conversed with Robert Giles to the point of the subject accident. It has been established that this distance was approximately one (1) mile. Both Brown and Sharpe further testified that Brown never attempted, at any time during the mile that they traveled, to pass the four-wheeler, in order to get in front of it and force Giles to stop. This would certainly indicate to Robert Giles, as well as the two children, that Brown was, in fact, following them to their home as Giles had requested.

When Robert Giles and his two children got to the point at which Laurel Hill Road meets Highway 488, the Giles, in order to go to their house, had to make a right-hand turn. Therefore, Robert Giles reduced his speed slightly, and maybe even moved a little toward the center line, in order to successfully make his right-hand turn. As Robert Giles began to do that, he was hit from the rear by Robert Brown's car. Not only was the Giles 4-wheeler hit, it was hit ***so hard*** that the four-wheeler was knocked into a third car, driven by Amber Wilcher, that was stopped at the stop sign at Laurel Hill Road and Highway 488, waiting to pull out onto Highway 488. Then, the Constable's car hit Amber Wilcher's car. Upon impact, one of the children, Antonio Giles, was thrown up into the air and then run over by Brown's vehicle, breaking Antonio's hip, left leg (the upper and lower bones), and right leg

(the upper and lower bones), permanently injuring him.

This case is a very unusual case. The two Giles children have sued Robert Brown, charging that he was negligent and that his negligence amounted to reckless disregard for the safety and well-being of the children. The testimony of the two main, unbiased witnesses clearly shows that this accident was caused by the reckless disregard of Constable Brown. These two witnesses are Suzanne Sharpe, Robert Brown's wife, who was in the vehicle with him during the "chase" and accident, and Amber Wilcher, who was the woman sitting in the car at the stop sign where Laurel Hill Road meets Highway 488, and who was also hit by Robert Brown and the 4-wheeler. Both Sharpe and Wilcher are totally unconnected to the Plaintiff, and neither even knew the Plaintiffs before the wreck. These witnesses tell a very bazaar story that proves, without a shadow of a doubt, that Brown's conduct showed a reckless disregard for the safety and well-being for the Giles children.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT FOUND IN FAVOR OF THE APPELLEES

A. Standard of Review

The Mississippi Court of Appeals rendered it's opinion in this cause and it set out the standard for recover under the *Mississippi Tort Claims Act* and, in doing so, the Court said that, in it's opinion (beginning on Page 5):

> "The Gileses' recovery is governed by the Mississippi Torts Claims Act (MTCA), which is found at Mississippi Code Annotated sections 11-46-1 to 11-46-23. The Gileses argue that section 11-46-9(1)(c) applies, while Brown and Leake County (Brown) argue that both 11-46-9(1)(c) and 11-46-9(1)(d) apply. In response to Brown's contention that he is also immune under

11-46-9(1)(d), the Gileses argue that it makes no sense to apply sections 11-46-9 (I)(d), because sections 11-46-9(1)(c) specifically applies to claims arising out of an act committed by an employee of a governmental entity while that employee was performing a law enforcement function. We agree with the Gileses that section 11-46-9(1)(c) is the applicable section based on the facts of this case. *See Collins v. Tallahachie County*, 876 So.2d 284, 289 (¶ 16)(Miss. 2004) (clarifying the holding in *L.W. vv. McComb Separate Mun. Sch. Dist.*, 754 So. 2d 1136 (miss. 1999) to make clear that the exercise by a governmental entity of conduct that is "of discretionary nature" does not mean that the government entity is exercising or performing a discretionary function with the meaning of section 11-46-9(1)(d).

Under 11-46-9(1)(c), Brown has immunity from liability unless he acted with reckless disregards for the Gileses' safety and well-being when the Gileses were not engaged in criminal activity. Miss. Code Ann. § 11-46-9(1)(c) (Supp. 2005). "Reckless disregard" has been defined by the Mississippi Supreme Court as "a higher standard than gross negligent [that] 'embraces willful or wanton conduct which requires knowingly and intentionally doing a thing or wrongful act." *City of Greenville vs. Jones*, 925 So. 2d 106, 110 (¶11) (Miss. 2006) (quoting City of Jackson v. *Powell*, 917 So. 2d 59, 71 (¶44) (Miss. 2005)). The Mississippi Supreme Court has also directed that the "criminal activity" contemplated by the stature must have "some causal nexus to the wrongdoing of the tortfeasor." *Powell*, 917 So. 2d at 69 (¶36) (quoting *City of Jackson v. Perry*, 764 So. 2d 373, 379 (¶25) (Miss. 2000)).

B. The Court Disregard of the Testimony of the Independent Witness

1. Suzanne Sharpe, Witness

Suzanne Sharpe, the (now) ex-wife of Robert Brown, appeared in her testimony to be attempting to help Robert Brown in every way possible; however, her testimony clearly shows that she was in a very frightening and dangerous situation as Robert Brown was pursuing the four-wheeler from the driveway at which he stopped them to the point of impact, which was approximately one (1) mile. Ms. Sharpe testified that when Robert

Brown stopped Robert Giles, Giles kept saying "you know me." Sharpe further testified that it was clear to her that it appeared that Brown and Giles knew each other (Deposition of Suzanne Sharp at page 9, Volume 1 of 1 of the Record, Plaintiff's Exhibit). Attorney for Defendant took the deposition of Suzanne Sharpe. When asked how fast this "chase" was, Sharpe answered "Like I told you, it seemed fast because we were ***so close***, but I would say forty, forty-five." (Deposition of Suzanne Sharp at page 9, Volume 1 of 1 of the Record, Plaintiff's Exhibit)(emphasis added).

Q: Okay. And do you recall about how long this chase lasted?

A: It seemed an eternity, you know, because I was upset, you know. But I would say from the time – from the trailer, I would say ten minutes, six minutes. Somewhere in that line.

(Deposition of Suzanne Sharp at page 11, Volume 1 of 1 of the Record, Plaintiff's Exhibit)

When asked, "Could you please tell me in your own words how it ended," Sharped responded by stating, "... – I remember – I do remember this so well. I think that's what upset me. The children kept looking and the man kept looking behind at Robert, you know. So we were right behind him and the next thing I know he was veering out to the left and there's a car at the stop sign..." (Deposition of Suzanne Sharp at page 12, Volume 1 of 1 of the Record, Plaintiff's Exhibit).

Q: And what happened next?

A: Then we hit the —and I don't know. At that point of time I could not tell what we hit but we hit. I know we hit the car a little bit on the side, the tail–I mean the headlight. And I don't know how hard we hit the ATV...We hit and the car goes airborne. And there's a gully because the stop sign was up on a hill. And the car is airborne and

we're flying through the air and then we hit the ground.

(Deposition of Suzanne Sharp at pages 13-14, Volume 1 of 1 of the Record, Plaintiff's Exhibit).

Q: Now, did you realize that y'all had run over him?

A: Yes, I knew.

(Deposition of Suzanne Sharp at page 16, Volume 1 of 1 of the Record, Plaintiff's Exhibit)

In describing the scene at the time of the impact, Suzanne Sharpe testified as follows:

Q: And could you actually tell when y'all actually ran over him?

A: I don't know if we ran over – I know that car – it looked like to me when we went over them, I don't know if the tire hit. That's what I'm saying. I cannot – it was like slow motion. I mean, people – I know I've heard say it and it's the truth. I don't know if we – you know, we just...

Q: You're waving your hand up in the air. You went airborne you said awhile ago.

A: Yes.

Q: Was that off the embankment?

A: No, when we hit them – hit the car or the ATV. See, I don't know if we hit both of them or a piece of the ATV and the car, but it was ***such a hard impact it threw us up in the air***. And that's when we – because at the stop sign, there's a gully right there. You see what I'm saying?

(Deposition of Suzanne Sharp at page 16, Volume 1 of 1 of the Record, Plaintiff's Exhibit)(emphasis added).

Q: And could you tell where the little boys were at that time?

A: No.

Q: Had they already come of the ATV, or still on it?

A: I do remember one, like, flying in the air. You know, he had gotten bumped off the ATV. But I don't know what way he went or on the car, you know. I do remember that and that's all I can remember.

(Deposition of Suzanne Sharp at page 17, Volume 1 of 1 of the Record, Plaintiff's Exhibit).

In answering questions about her physical situation/condition during the subject accident, Sharpe's testimony was a follows:

Q: Did it throw you around in the car?

A: Huh-Uh. The only thing it did, when we – I had my legs so tight on the floorboard. ***I was scared to death.*** And when we were airborne, I was like holding my legs. And when we hit, my head just – that's just natural. And when we hit them, the air bag did not come out."

(Deposition of Suzanne Sharp at page 17-18, Volume 1 of 1 of the Record, Plaintiff's Exhibit)(emphasis added).

In regard to how fast they were traveling as they approached intersection, Suzanne Sharpe was asked this question:

Q: All right. Now, as you come around the curve, It's a hill as you're coming to where you could see that road T's in there. Laurel Hill Road T's in 488. About how fast were y'all traveling at that time?

A: I cannot answer that.

Q: Well –

A: Well, it was fast enough to stay behind him, so I would say 40, 45. I's guessing. You know, I don't want to guess.

Q: All right. How close were you behind the ATV or the 4-wheeler? I know you don't know the footage. But say –

A: ***A couple of times we were very close.***

Q: ***Like how close would you say?***

A: ***I'd say that close (indicating).***

Q: ***You're hold out a foot?***

A: ***Yes.***

Q: ***That's about four or five inches?***

A: ***Yes.***

Q: ***Y'all were that close to the back of the four-wheeler.***

A: ***A couple of times.***

Q: ***Were you afraid that y'all were going to hit it from behind being that close?***

A: ***At one point I was.***

(Deposition of Suzanne Sharp at page 18-19, Volume 1 of 1 of the Record, Plaintiff's Exhibit)(emphasis added).

Sharpe's further testimony reveals the distance traveled between the driveway and site of impact, as well as how close Brown was traveling behind the 4-wheeler. Suzanne Sharpe testified as follows:

Q: Now, how far had ya'll traveled from the time y'all started following him when he pulled out from the yard that you were speaking of up at the trailer to the point of the wreck? About how far was that?

A: Over a mile –

Q: Okay.

A: – I know. I know that.

Q: ***And during that time was when he was getting within about a foot***

of the bumper of that four-wheeler?

A: *(Nodded head affirmatively.)*

Q: *You have to say yes.*

A: *Yes.*

Q: *And at that time that you came up to the intersection you say it was obvious that he was fixing to make a right – that the guy on the four-wheeler was fixing to make a right-hand turn.*

A: *(Nodded head affirmatively.)*

Q: *You have to say it.*

A: *Yes.*

(Deposition of Suzanne Sharp at page 20-21, Volume 1 of 1 of the Record, Plaintiff's Exhibit)(emphasis added).

Suzanne Sharpe's testimony about what action, or inaction, Robert Brown took to avoid the accident, is as follows:

Q: *So the four-wheeler came across to turn, what did Robert Brown?*

A: He just...

Q: He just what?

A: *He just kept going.*

Q: *He kept going. And what did that do?*

A: *Well, that's when we hit the car.*

Q: Y'all hit the car before you hit the four-wheeler?

A; I don't know that. I don't know if we hit the four-wheeler first or the car. I cannot tell you that to be truthful. I don't know which. It seems like we hit both of the, at the same time.

(Deposition of Suzanne Sharp at page 23, Volume 1 of 1 of the Record, Plaintiff's Exhibit)(emphasis added).

Regarding the issue of whether Robert Brown ever tried getting around Robert Giles during the "chase" in order to let Giles know that Brown intended for him to stop, Sharpe testified:

Q: Did he ever try to get in front of them?

A: No.

Q: And the people on the four-wheeler never tried getting off the road to go through the woods or anything, did they?

A: Huh-uh.

Q: Is that a no?

A: No.

Q: So they basically just rode down the road right in front of y'all for that mile or so?

A: Yes.

Q: Is that correct?

A: Yes.

(Deposition of Suzanne Sharp at page 25, Volume 1 of 1 of the Record, Plaintiff's Exhibit.)

In regard to the where Robert Giles initially "tried running from the officer" when Giles was down in the field, the question was asked:

Q: But the guys on the four-wheeler, they didn't go on off in the woods, did they?

A: No.

Q: They turned around and come right by where y'all pulled in, didn't they?

A: (Nodded head affirmatively.)

Q: You have to say yes.

A: Yes.

Q: Okay. So where y'all were standing there – where y'all were sitting there, when y'all pulled off the road, they were pointed back toward the road?

A: Right.

Q: And y'all were just a little piece from the road at that point, weren't you.

A: Right.

Q: Would you say two or three car lengths or less?

A: I would say less.

Q: Maybe a car length from the road?

A: Maybe two.

Q: Two car lengths from the road. That's where the four-wheeler and him were stopped?

A: Uh-huh. It was like to the side of the trailer.

Q: Yes.

(Deposition of Suzanne Sharp at page 31-32, Volume 1 of 1 of the Record, Plaintiff's Exhibit).

In regard to whether Robert Giles slowed down to make his turn, Suzanne Sharpe was

asked the following:

Q: And did you at any time notice the guy on the four-wheeler slowing down as he went to make that curve – that turn into the Laurel Hill Road?

A: He had gotten over on the left side of the road and he had to slow down to make that turn.

Q: But you saw him slow down?

A: Yes.

Q: And you could tell that he was slowing down?

A: Yes.

Q: Do you think Robert Brown slowed down at all.

A: I do not know that. You've got to realize it's been five years.

(Deposition of Suzanne Sharp at pages 35-36, Volume 1 of 1 of the Record, Plaintiff's Exhibit).

In regard to whether Robert Brown and Robert Giles knew each other Suzanne Sharpe testified as follows:

Q: The question is, they acted like they knew each other, didn't they?

A: At the time, yes.

(Deposition of Suzanne Sharp at page 38, Volume 1 of 1 of the Record, Plaintiff's Exhibit).

The Court should be able to tell that this witness was totally independent of the Plaintiffs and she gave testimony of conduct by this law enforcement official with two little boys on the four-wheeler with breath-taking conduct. There is no doubt that this officer,

Constable Brown, who was going forty-five miles per hour (45 mph), traveling, at times, only ***four inches*** behind a 4-wheeler with two little boys on the back, knew that serious injury and/or death was surely impending. If the Constable did not know that, then there was something wrong with him that day.

2. Amber Wilcher, Independent Witness

Amber Wilcher was the only real, unbiased, independent witness. Ms. Wilcher had absolutely no connection to any of the parties involved. If you combine her testimony with the testimony of Suzanne Sharpe, it creates a slam-dunk case that Robert Brown was guilty of driving in a manner as to have reckless disregard for the safety and well-being of the two minor Giles children.

Amber Wilcher testified that she lived close to the intersection where the subject accident occurred. She further testified that she had pulled her car up to the stop sign where Laurel Hill Road intersects with Highway 488 and, as she stopped at the stop sign, she looked to her left, and saw the four-wheeler coming in her direction down the highway with the Constable following behind. Amber testified that she saw the Constable's blue lights and that she sat at the stop sign waiting for them to pass before entering the highway. When asked how far the Constable was behind the four-wheeler when she first saw them coming around the curve, Ms. Wilcher's testified as follows:

Q: Did you see the car and four-wheeler coming?

A: Yes, sir.

Q: And you saw – which one was in front?

A: The four-wheeler was in front.

Q: And which one behind?

A: The car was behind.

Q: And the car, what – did you see the blue lights on it?

A: Yes, sir.

Q: Now, how far ahead of the four-wheeler – of the car, was the four-wheeler?

* * *

Q: All right. Well, I've shown you a photograph here. And I'm not talking about back there where you can't see only in your distance. And in the photograph 5 is all I'm talking about right now. Let's just back up there where you see the car over to the side of the orad. A red car. About how far was the four-wheeler ahead of the car at that time?

A: ***Maybe a couple of feet?***

Q: A couple of feet. Okay. Now, as it come on up here, after we get almost to the intersection, what did the four-wheeler start to do?

A: ***It crossed over into the center line, like, to make a right-hand turn.***

Q: All right. You say it crossed over into the center line?

A: Yes, sir.

Q: And it, and the center means the middle. Was it on the center line?

A: Yes, sir, it – 'cause you have to make a wide right-hand turn for a ATV, so ***you could well that's what was gonna happen*** – it crossed over the double line.

Q: So you could tell from where you were that he was fixing to turn off?

* * *

Q: What was he doing?

A: ***Could I tell if he was fixing to turn?***

Q: ***Right.***

A: ***Yes, sir.***

Q: And what was he doing?

A: He was over in the middle line. And he started to turn the four-wheeler.

Q: He started turning the four-wheeler. All right. How far was the four-wheeler – Robert Brown's police car behind him at the time he started making his turn?

(Transcript at pages 100, 101, and 102)(emphasis added).

With regard to the distances the vehicles were apart as they were coming down the road towards her, Amber Wilcher testified as follows:

Q: All right. I don't remember my last question, but I'll just – as the vehicles were coming towards you, you say you were stopped in your car?

A: Yes, sir.

Q: And, and I had backed you up and asked you how far the car was behind the four-wheeler about where you said that red car is up there, And you said something like a couple of feet.

A: Yes, sir.

Q: Do you know what a couple of feet is?

A: Maybe two, three feet?

CR: You have to speak up.

A: Speak up? Two or three feet.

Q: ***All right. Now, as the car comes on down, and the four-wheeler***

comes down, when, when the four-wheeler starts making its turn, how close, in your opinion, was the four-wheeler, I mean, the car behind the four-wheeler.

A: *Maybe about a foot, foot and a half.*

Q: *Foot, foot and a half?*

A: *Yes, sir.*

Q: *Now, what happened at that point?*

A: *As the four-wheeler was starting to turn, the car hit the four-wheeler, the four-wheeler hit my car, and then the other car hit my car.*

Q: *Okay. Now, are you sure it happened that way?*

A: *Yes, sir.*

Q: *Is there any question that the officer's car hit the four-wheeler first?*

A: *No, sir.*

Q: *You were looking directly at it?*

A: *Yes, sir.*

Q: And did you see the four-wheeler come into your car?

A: Yes, sir.

Q: And you were looking at that?

A: Yes, sir.

Q: And then did you see the car – officer's car come into your vehicle?

A: Yes, sir.

Q: And you were looking straight at it?

A: Yes, sir.

Q: All right. ***At any time, did you see the people come off the four-wheeler?***

A: ***I saw one of the boys fly into the air.*** I'm not sure where he landed or what happened, I just remember seeing someone go past my windshield.

Q: Past your windshield. In the air?

A: Yes, sir.

Q: Now, have you – okay, at the time you were seeing the officer coming behind the four-wheeler, ***could you tell or not whether he had his blue lights on?***

A: ***I saw the blue lights.***

Q: He had his blue lights on?

A: Yes, sir?

Q: ***Could you tell if he had his siren on?***

A: ***I didn't hear a siren.***

(Transcript at pages 103, 104, and 105)(emphasis added).

Amber Wilcher, using a photograph of the scene of the accident, proceeded to draw the various places where people and vehicles were. Said photograph is Exhibits 3 and 8.

When asked if Robert Giles, when he pulled over to the left, ever got completely over in the other lane, Amber Wilcher testified as follows:

Q: Now, when you say the – Robert Giles pulled over in the center lane, is that, in looking at Exhibit 3, is that on the yellow line?

A: Yes, sir.

Q: All right. Did you ever ger completely over in the other lane?

A: I – I'm not sure. He might have.

(Transcript at page 107).

In regard to where Robert Brown was at the time that Robert Giles moved over to the left towards the center line, Amber Wilcher testified as follows:

Q: ***And so when, as he pulled over, what did – what did the officer do at that time? As he moved over to the left, what did the officer do?***

A: ***He just kept going straight.***

Q: ***He just kept going straight towards your direction?***

A: ***Yes, sir.***

Q: ***And then, as the four-wheeler come across, what did he do?***

A: ***He – as the four-wheeler came across, his car hit the four-wheeler, and slammed it into my car.***

(Transcript at page 108)(emphasis added).

In regard to how fast the four-wheeler was going when it started to turn, Amber Wilcher testified as follows:

Q: About how fast was the four-wheeler going, if you can give an opinion?

A: Probably, maybe 15 miles an hour.

Q: How far away from the turn was the four-wheeler when you say it started slowing down, approximately?

A: Oh, about ten feet before the turn.

Q: About ten feet before the turn –

A: Yes, sir.

(Transcript at pages 108-109).

When questioned about whether other people ride four-wheelers in the area, Amber Wilcher testified:

Q: Now, do you know if people ride four-wheelers out her in this area?

A: Yes, sir.

(Transcript at page 109).

Ms. Wilcher was shown a photograph (photograph 8) with some trails along the side of the road at the site of the subject accident and asked about the trail. Wilcher testified as follows:

Q: Is that a four-wheeler trail?

A: Yes, sir.

* * *

Q: Do many people ride four-wheelers out in that neighborhood?

A: Yes, sir.

Q: Is that on a regular basis?

A: Oh, yes, sir.

Q: And do they ride on the highway?

A: Sometimes.

(Transcript at pages 109-110).

In regard to whether, as the Defendants would have the Court believe, Robert Giles was having trouble making the right-hand turn onto Laurel Hill Road and whether she felt

Brown was following too closely to the Giles 4-wheeler, Amber Wilcher testified:

Q: ***All right. Now, in regard to Robert Giles making the turn, as he's turning into Laurel Lane Road, was he having any difficulty in making that turn.***

A: ***No, sir.***

Q: No, so he was already turning?

A: Yes, sir.

Q: He wasn't – your vehicle was over there. He wasn't coming your way, was he?

* * *

Q: As he turned off, which lane was he turning in?

A: Which, the four-wheeler, or –

Q: The four-wheeler.

A: ***The four-wheeler. It was turning into the right lane.***

Q: And was he –did – was he making that turn in the right lane?

A: Yes, sir.

Q: ***And could you tell, as he was coming that direction, he wasn't coming at your car?***

A: ***No, sir.***

Q: ***Ok. Now, it was not until the car hit his vehicle that he came to you?***

A: ***Yes, sir.***

Q: ***Now, as a layman, could you tell, in a lay opinion, as to whether Robert Giles was following too close to – I mean, Robert Brown was following too close to Robert Giles four-wheeler?***

* * *

A: ***Did I feel like he was following too close?***

Q: ***Right.***

A: ***Yes, sir.***

Q: Now, Amber, I never met you other than in the courtroom up here, have I?

A: Yes, sir.

Q: Met you when I come up for the deposition once, and I met you today, didn't I?

A: Yes, sir.

Q: And I just basically out there this morning asked you what you was going to say, didn't I?

A: Yes, sir.

Q: And I didn't basically tell you anything, did I?

A: No, sir.

Q: I asked you what was your opinion still the same as before, basically?

A: Yes, sir.

(Transcript at pages 113-117).

C. Criminal Activity

The Court of Appeals determined that, since Robert Giles was driving reckless and was driving with a suspended licence, his activity was of such a manner that he would be barred from bringing an action against the Defendants. However, the Court found (on page 6 of its opinion), "We find that this limitation bars Giles from proceeding with his case, but

does not bar his children from proceeding."

The Court also found that the activity engaged in by the children, riding the ATV on the highway and riding without their helmets on, was not sufficient to rise to the level of criminal activity contemplated by the statute. The Court said, "Unlike their father, Giles's children were neither charged with, nor convicted of, any crime. While they both admitted that they knew it was against the law for them to be riding the ATV on the highway and riding without their helmets on, we find that this does not rise to the level of criminal activity contemplated by the statute. Unlike their father, the children could not have been charge with reckless driving, as they were not driving, nor could the children have been charged with driving with a suspended license."

As the Court of Appeals has ruled that the children's riding of the four-wheeler on the highway and their not having helmets on was ***not*** criminal activity that would bar their actions, the only question left would be whether Robert Brown's conduct amounted to reckless disregard for the safety and well-being of the two minor children.

D. Reckless Disregard or Intentional Act

Robert Brown's conduct of pursuing the four-wheeler once it had already been stopped by him, and then pursuing the Giles' for approximately one (1) mile before he collided with the rear of the four-wheeler (at the intersection of Highway 488 and Laurel Hill Road) was ***so gross and reckless,*** that in itself amounted to an intentional act or a willful disregard for the safety and well being of the minor Giles children. It appears that Robert Brown was so angry about he chase, that he was intentionally trying to run into the four-wheeler in order to stop it. No law enforcement official in his right mind could have

rationally concluded that, in pursuing this four-wheeler in the manner that he did, that Brown would not cause immediate, serious injury, or even death, to these children. In order to establish the present claim, a party could not have a better set of witnesses than those that the Plaintiff has presented in this case, Suzanne Sharpe and Amber Wilcher. The testimony of these two witnesses reveal the true facts of the case. Suzanne Sharpe and Amber Wilcher had no connection whatsoever to the Plaintiffs. In fact, these two witnesses had a ***direct connection to the Defendant***, Robert Brown. Not only was Suzanne Sharpe the Defendant's wife, she was riding in the car with him during the chase and at the time of the wreck. Amber Wilcher did not know Robert Brown, but she knew Robert Brown's children. Therefore, Ms. Wilcher was somewhat connected to Brown. Even with their connections to Defendant Brown, both of these women told a story of bizarre behavior by Robert Brown in his pursuit of the four-wheeler upon which the two children were riding. If the only testimony in support of Plaintiffs' position was the testimony of the Plaintiffs themselves, then the Court could possibly conclude that, as they are Plaintiffs, they are telling their stories for their side. However, in this case, the willful, malicious, intentional, and grossly negligent acts of Defendant Brown, which show a reckless disregard for the safety of the minor Giles children, is clearly shown through the testimony of Suzanne Sharpe and Amber Wilcher. No one was in as good of a position to observe exactly what occurred as Suzanne Sharpe and Amber Wilcher. According to the testimony of Robert Giles and his two children, they assumed that Robert Brown was simply following them to their house, that they did not know that they were involved in a police pursuit, and therefore they were not really paying attention to what was going on behind them. The Giles' knew that the officer had his blue

lights on and that he was following them, but they were not aware of his closeness to them. The testimony regarding the officer's closeness to the Giles four-wheeler had to come from Suzanne Sharp and Amber Wilcher.

Suzanne Sharpe says, in regard to the chase, that ***she was scared because they were traveling so fast and they were so close to the four-wheeler with the children***. She testified that they were going approximately forty-five miles per hour (45 mph), and that as Robert Brown was following the four-wheeler ***with two children on the back***, Brown was getting ***within four inches to a foot (at times) behind the four-wheeler***. Suzanne Sharpe also testified that Robert Brown ***never tried to go around the four-wheeler*** to stop them. She testified that, on at least two occasions, their vehicle got within ***four inches*** to the back of the four-wheeler.

One cannot imagine a more dangerous and reckless situation than a law enforcement official, in a car, following a four-wheeler with two minor children on the back, with his bumper within four inches of the back of the four-wheeler, going forty-five miles an hour. Any normal, reasonable human being would have to conclude that the slightest error by either the Constable or the driver of the four-wheeler would mean instant death and/or serious harm to those minor children. There is simply no other rationale that one could conclude. Based on Suzanne Sharpe's testimony, this closeness in proximity between the Constable's car and the four-wheeler went on for the majority of the mile during which the chase lasted. Obviously, even had Robert Giles realized that Brown was in pursuit of him, and attempted to slow his four-wheeler in the slightest bit, as the Constable's vehicle was merely four inches from the back of the four-wheeler, death or serious injury would have

ensued upon Giles' slowing. There would be no way that the Constable's car could keep from hitting the back of the four-wheeler, ending in disastrous results. The Constable would have, or should have, assumed that there was always the possibility of the four-wheeler hitting a bump or performing some action that might cause one of the children to fall off. Further, the Constable would have, or should have, known that, had anything along those lines occurred, his vehicle would have, beyond a shadow of a doubt, run over the child(ren).

One could further conclude that this chase was not a high speed chase, which may be true when both parties are in a car. In many city limits, forty-five miles per hour (45 mph) is the speed limit. However, with the Giles children being on a four-wheeler going forty-five miles per hour (45 mph), that would be almost equivalent to someone going a hundred and twenty miles per hour (120 mph) in a car. The Giles four-wheeler was a used four-wheeler, which had been bought by Robert Giles. Giles had owned the four-wheeler for seventeen years, and it was probably not one which was built to go forty-five miles per hour (45 mph) and, at that speed, would be very unstable, especially with three people riding on it. The Constable, Robert Brown, should have been taking all of this into consideration as he was pursuing this four-wheeler. Suzanne Sharpe even testified that, at times, she though they may have a wreck. If she was riding in the car and she was scared because they were so close to the four-wheeler, going so fast, then obviously Constable Brown knew it was dangerous too. Constable Brown should have slowed his speed and backed off, but he did not do so. This indicates that he knew ***exactly*** what he was doing, and that he was ***intentionally*** driving within such a close proximity in an attempt to stop them or run into them. Constable Brown must have ***intentionally*** put his so close to the four-wheeler. This is not negligence. This

is an intentional move on Constable Brown's part. Constable Brown intentionally put himself into a situation so reckless as to show a total disregard for the safety of the minor Giles children. These children were not committing a crime. Not one that had anything to do with this wreck, anyway. In fact, the children were off the roadway while their daddy was talking with the officer. Then their daddy pulled out onto the roadway and, during this pursuit, these children had absolutely no voice as to whether or not they were on the road. There is no testimony indicating that the children authorized or encouraged their father to pull out onto the roadway. Further, the children had ***nothing*** to do with the way their father drove the four-wheeler. The person who did have a choice as was Robert Brown. ***Robert Brown chose to drive within inches of the four-wheeler***. The natural consequence of this act would be that an automobile/four-wheeler collision would inevitably occur. Obviously, had Robert Giles, on the four-wheeler, happen to slow up in the slightest bit, then the car, being within inches of the four-wheeler, would ram the rear of the four-wheeler. As they proceeded down the road, nearing the Laurel Hill Road intersection, Amber Wilcher was stopped at the intersection, waiting to pull out onto the road. Amber Wilcher observed the Giles four-wheeler, with the Constable's vehicle being approximately ***two (2) feet*** behind the four-wheeler. The behavior of the Constable was absurd. Amber Wilcher testified that, as they got closer to where the Giles' turn was, the Constable was probably ***a foot to a foot and a half*** behind the four-wheeler, which she testified, in her opinion, was too close. Amber Wilcher further testified that she thought Constable Brown intentionally ran into the back of the four-wheeler. Amber Wilcher testified that she saw the four-wheeler slow down to make the turn, and that ***she could tell that he was going to make that turn***. Robert Brown,

traveling so closely to the back of the four-wheeler, could not do anything other than rammed into the back of the four-wheeler as Robert Giles attempted to slow down to make his turn. Robert Giles was not aware that Robert Brown was that close to the bumper of his four-wheeler when he went to make his turn. The accident that occurred was the natural consequence(s) of the bizarre, reckless driving of Constable Brown. Brown's car propelled into the back of the four-wheeler and, as Suzanne Sharpe said, the impact was ***so hard*** that it ***knocked their car airborne*** and ***she saw one child go way up in the air***. Suzanne Sharpe testified as to how nervous she was and how scared she felt as their car was in the air and then came down, hitting the ground and one of the children. Suzanne Sharpe testified that she knew that they had run over one of the children. One of the children suffered numerous, numerous broke bones. If the conduct by Robert Brown in pursuing the Giles four-wheeler with two minor children on the back is not reckless disregard for the safety and well-being of these children, it would be ***almost impossible*** to ***ever*** make a case against a government official and/or entity.

There has been much talk about what happened in different ways but all that matters is the testimony that has been set out above. Robert Giles has already had his case dismissed and we are not on the case pertaining to Robert Giles. We are only on the case pertaining to these two minor children. The law probably would not even allow this king of pursuit with these two minor children on the back of a four-wheeler even if Robert Giles would have been guilty of murder or bank-robbery or some tremendous felony of that nature. Most any situation would have required that the Constable, Robert brown, simply follow the four-wheeler until it stopped and made his arrest or until assistance arrived. Robert Brown did

not do this. He put the children in eminent danger for over a mile until he finally managed to wreck with them and do great bodily damage to them. Most anyone else committing what he did would be charged with a felony and possibly sent to the pen for his reckless behavior to what amounted to assault with this big vehicle against two children on the back of a four-wheeler. A drunk driver would not have been as dangerous as what Robert Brown was doing. His conduct was totally out of the realms of any logic or any police chase or any behavior of a rational human being.

On page 496 of the transcript, Jerry Barrett, who the Court qualified as a police pursuit expert, testified that when he reached Laurel Hill Road, that he was going forty to forty-five miles per hour. Jerry Barrett further said that Robert Brown stated, on page 496 of the trial transcript, that when the four-wheeler went to turn off Laurel Hill Road that he, Robert Brown, was going forty to forty-five miles per hour. Jerry Barrett also testified that this was not a sharp turn at all. He said it was right opposite, it turned at an angle and that it was an easy turn because its like an exit off the road. He also said that the width of the turn there from Laurel Hill Road was like a hundred-fifteen feet wide, which gave them plenty of room to turn. Therefore, there was no reason for Robert Giles to be having trouble making his turn. Everyone involved said that Robert Giles was not having any trouble making his turn except for the Defendant, Robert Brown, and Jerry Barrett, his expert. If you take the word of Robert Brown, Suzanne Sharpe, and Jerry Barrett all agreeing that Robert Brown was going between forty to forty-five miles an hour at the time he got to the turn off at Laurel Hill Road and that when Robert Giles attempted to slow up to make the turn that he was hit in the rear by the car driven by Robert Brown. This is the most gross and reckless

negligence that one could have. If you consider that he was just so negligent as to drive within a foot or so of a vehicle going forty-five miles an hour with these kids on it at a time they were making a turn you would have to say something was wrong with him. However, since Amber Wilcher felt that he deliberately ran into the back of the four-wheeler, this would account for the reason that he was still going forty-five miles an hour at the point of impact and why there was such a drastic wreck that totaled numerous vehicles. It appears that he had gotten to the point of road rage so bad that he was willing to risk everything just to make the four-wheeler stop. The most logical explanation of all regarding the accident is that Brown intentionally ran into the four-wheeler, attempting to stop them, just as Amber Wilcher testified. Certainly under the *Mississippi Tort Claims Act* this is sufficient evidence to warrant a verdict against the Defendants.

The Courts in Mississippi have held, in several cases, that a police officers had committed acts of willful disregard for the safety and well-being of the Plaintiff(s) when the officer's conduct was ***minor*** in comparison to this case. In Michael Maldonado and the Hinds County Board of Supervisor v. Tommy Kelly, 768 So.2d 906 (Miss. Sup. Ct. 2000), the Court found:

> "Since "reckless disregard" is not defined by statute, Maldonado directs this Court's attention to the various sources we have used in the past to define recklessness. This Court examined this issue in *Turner v. City of Ruleville,* and the Court looked to *Black's Law Dictionary* for guidance as to the proper definition:
>
> 'Reckless disregard of the rights of others' is defined [a]s used in automobile guest law, means the voluntary doing by motorist of an improper or wrongful act, or with knowledge of existing conditions, the voluntary refraining from doing a proper or prudent act when such an act or failure to act evinces an entire

> abandonment of any care, and heedless indifference to results which may follow and the reckless taking of chance of accident happening without intent that any occur....
>
> *910 735 So.2d 226, 228-29 (Miss.1999) (quoting *Black's Law Dictionary* 1270 (6th ed. 1991))."

Additionally, this issue was also revisited in *Maye v. Pearl River County,* where we cited a definition of recklessness given by the Fifth Circuit:

> "The terms 'willful,' 'wanton,' and 'reckless' have been applied to that degree of fault which lies between intent to do wrong, and the mere reasonable risk of harm involved in ordinary negligence. *These terms apply to conduct which is still merely negligent, rather than actually intended to do harm, but which is so far from a proper state of mind that it is treated in many respects as if harm was intended.* The usual meaning assigned to do [sic] terms is that the actor has intentionally done an *act of unreasonable character in reckless disregard of the risk known to him, or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.* It usually is accompanied by a conscious indifference to consequences, amounting almost to a willingness that harm should follow.
>
> 758 So.2d 391, 394 (Miss.1999)(quoting *Orthopedic & Sports Injury Clinic v. Wang Labs., Inc.*, 922 F.2d 220, 224 n. 3 (5th Cir.1991) (emphasis in original)). Additionally, this Court has held that 'wantonness is a failure or refusal to exercise any care, while negligence is a failure to exercise due care." *Turner*, 735 So.2d at 229 (citing *Beta Beta Chapter v. May*, 611 So.2d 889, 895 (Miss.1992)) (quoting *Covington v. Carley*, 197 Miss. 535, 541-42, 19 So.2d 817, 818 (1944)).
>
> **In *Maye,* an officer was backing his vehicle up an incline, which was also the entrance of a parking lot. *Maye v. Pearl River County*, 758 So.2d 391, 392 (Miss.1999). The officer collided with a vehicle which had turned off the road onto the incline. *Id.* The officer testified that he could not see the road from the parking lot because the jail sat below the level of the road. He checked his rear view mirrors before backing up the incline. *Id.* We held that the officer "showed a conscious disregard for the safety of others when he backed up the incline entrance to the parking lot knowing he could not be sure the area was clear." *Id.* at 395. Similarly, in *Turner,* this**

> **Court found an officer's alleged actions to constitute reckless disregard when an officer, who had pulled over a visibly intoxicated person, allowed the driver to continue driving. 735 So.2d at 227. The intoxicated driver later was involved in a traffic accident. *Id.* It is important to note, however, that *Turner* reversed a Miss. R. Civ. P. 12(b)(6) dismissal by the trial court. *Id.* Accordingly, all facts discussed in the case are allegations made in the plaintiff's complaint and were not put before a factfinder.**
>
> **In the recent case of *City of Jackson v. Perry,* an officer driving his police vehicle collided with a car while going to meet fellow officers for dinner. 764 So.2d at 373. The officer testified "he would customarily drive without knowing how fast he was going" and was speeding at the time the accident occurred. *Id.* We found that the officer acted with reckless disregard for the safety of others because he was speeding without purpose and failed to use any lights or sirens."**
>
> (Emphasis added)

II. THE TRIAL COURT ERRED WHEN IT ALLOWED JERRY BARRETT TO TESTIFY AS AN EXPERT WITNESS IN THE FIELD OF POLICE PURSUANT

A. Motion to Strike Jerry Barrett as a Police Pursuant Expert

The Plaintiffs' filed a Motion prior to the trial requesting the Court to Strike Jerry Barrett as an Expert in Police Pursuant, basically on the grounds that he was not qualified to testify as an expert in police pursuant under the *Daubert* decision and other applicable Mississippi law. Rule 702 of the *Mississippi Civil Rule of Evidence* state:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, or experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness had applied the principles and methods reliably to the facts of the case."

B. Relevant Law and Analysis

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the United States Supreme Court set out the criteria that district courts are to follow in assessing challenged expert testimony offered under the Mississippi Rules of Evidence 702.[1] As the Court states, "Proposed testimony must be supported by appropriate validation – i.e., 'good grounds,' based on what is known. In short, the requirements that an expert's testimony pertains to 'scientific knowledge' establishes a standard of evidentiary reliability." *Id.* At 590. Accordingly, the Supreme Court has held that the trial court has a duty to screen expert testimony for both its reliability. *Id.* An expert, to state an opinion, must have a "reliable basis in the knowledge and experience of his discipline." *Id.* At 592. Thus, this court must determine that the reasoning and methodology can properly be applied to the facts in issue. *Id.* At 592-93. Under Rule 703[2], says the United States Supreme Court, an expert must base his opinion upon facts and data

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[1] Rule 702 of the Civil Rule of Evidence states:
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, or experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness had applied the principles and methods reliably to the facts of the case.

[2]Civil Rules of Evidence 703 reads as follows:
The fact or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by expert in the particular field in forming opinion or inferences upon the subject, the facts or data need no be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall bot be disclosed to the jury by the proponents of the opinion or inference unless the court determines that their probative value is assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

of a type reasonably relied upon by experts in the field.. *Id.* At 595.

Although the Supreme Court has suggested that the *Daubert* standard is a flexible one, the Court should "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999); *Daubert*, 509 U.S. at 592; *Vogler v. Blackmore*, 352 F.3d 150 (5th Cir. 2003).

Daubert also instructs the trial court on the procedural mechanics for resolving disputed relative to the experts's competence to testify under the standards enunciated in that opinion. That it, *Daubert* directs that the court determine admissibility under Rule 702 by following the directions provided in Mississippi Rules of Evidence 104(a).[3] Rule 104(a) required the trial judge to conduct preliminary fact-finding, to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93.

The party sponsoring the expert testimony has the burden of showing that the expert's findings and conclusions are based upon the scientific method and, therefore, are reliable. "This requires some objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted scientific methodology is in

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[3]Civil Rules of Evidence 104(a) provides in pertinent part:
"preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject tot he provisions of subdivision (b).

sufficient." *Moore v. Ashland Chemicals, Inc.*, 151 F.3d 269, 276 (5th Cir. 1998). "The proponent[s] need not prove to the judge that the expert's opinion is correct, but [they] must prove by a preponderance of the evidence that the testimony is reliable." *Id.*

Mississippi, basically, goes by the *Daubert* decision in regard to Rule 702 of the Mississippi Rules of Civil Procedure. This being identical to the Federal Rule of Procedure.

C. Testimony and Analysis

Under Rule 702 of the Mississippi Rules of Civil Procedure and pursuant to the *Daubert* decision, Jerry Barrett could in no way and did in no way qualify as a police pursuit expert. Plaintiffs offered his resume, which he had prepared for the purpose of his qualification of being the expert witness in this case. He was born in 1947 and has basically been in law enforcement all of his life. In looking at his resume, the word "police pursuit" does not appear at any time in the five page documents. The resume simply shows that he has been a narcotics agent or officer most of those years and all training and skills that he has is strictly due to regular enforcement duties which does not mention police pursuit duties. He only has less than a year at Hinds County Community College whereby he was just taking general courses and had nothing to do with police pursuit. He testifies that he has never qualified as a police pursuit expert before and he has never testified, either by deposition or otherwise, as an expert in police pursuit. He testified that his only formal training pertaining to police pursuit would be less than two and a half weeks. He listed on his resume, and the Plaintiffs' attorney and the Judge had him mark it in yellow the training to do with police pursuit. He only marked four (4) places on the whole resume. However, none of these headings even mentioned police pursuit. The first one was called tactical police driving

school which was from November 18, 1978 to November 20, 1987 in Jackson, Mississippi, and that was for only three days. The next training was listed as Police Emergency Driving Instructor, a class that only lasted one week in March of 1996 at Texas A&M University. The next schooling he had was classified as two topics in 2001, with one class being Oklahoma Highway Patrol Driving School and the other Tactical Vehicle Intervention Instructor, all done in one week at Oklahoma. If you add all of this together, it gives him less than two and a half weeks of training related to driving, but at no where does it say anything about "pursuit driving". Certainly, this would not make him an expert under *Daubert* or under Rule 702 of the Mississippi Rules of Civil Procedure. He testified that he was not an accident reconstruction expert and he has never had any courses or training whatsoever in accident reconstruction. He also testified that he went to about one year to junior college and that he has no training whatsoever in anything to do with police pursuit there. He testified that he used no formulas or calculations in forming his opinions. He gave no methodology as to how he was able to form an opinion and did not show that the had any scientific knowledge to establish the standard of evidentiary reliability. In fact, he gave no scientific bases and testified that he did not use any scientific bases to form his opinion. He did not attempt to show that his findings and conclusions were based upon scientific method and, therefore, reliable during voir dire, when the Plaintiffs' lawyer was trying to disprove his qualifications, the Plaintiffs' attorney started to go through each and every one of the jobs Jerry Barrett had had to show that they had nothing to do with police pursuit, the Plaintiff's attorney had gone through a great number of them and they totally had nothing to do with police pursuit. The Judge then stopped the Plaintiffs' attorney and advised him to have Jerry

Barrett just mark the ones that involved police pursuit training. At the request of the Judge, the Plaintiffs' attorney did what the Judge requested and the Defendant marked in yellow the two and a half weeks when he had some training and where he mentioned police pursuit training could be involved. He answered under oath. Then, during the Defendant's questions, Defendant made it sound as though the other jobs had something to do with police pursuit which was totally absurd. The Judge would not let the Plaintiffs' attorney re-cross Jerry Barrett, although he had stopped the Plaintiffs' attorney from examining the manner which would have established that there was no pursuit training in any of this or at least very little. Jerry Barrett had just testified under oath that he had only had police pursuit training for three and one-half (3 ½) weeks . The Judge allowed him to be qualified without allowing the Plaintiffs' attorney the ability to re-cross

During the regular testimony of Jerry Barrett he said that he had no methodology of his opinions; he had no scientific testing for his opinions; he did not use any kind of formula and did not know how to use formulas in this type matter; he had never used any type of testing method. The only claim of a possibility of him having any experience is that he said he worked for a short time as a driving instructor at the law enforcement academy in Rankin County. However, there was no detail in what his position was and how much pursuit that involved. At the time, he was no longer working at that job and had not been for quite some time. He was not working in any area that had anything to do with police pursuit.

After the Court had ruled that he was an expert in police pursuit, the Plaintiffs' attorney tried to ask him questions about his qualifications and how he arrived at certain opinions, however, the Court would not allow the Plaintiffs' attorney to question him in this

regard.

However, Mr. Barrett did not give an opinion that had anything to with "police pursuit." He did not ever attempt to give an opinion as to the proper way the Constable should have been pursuing the Plaintiffs. He refused to answer any questions in regard to how far back the Defendant should have been following and the Court refused to make him testify along this line. There is nothing in the record that could, in anyway, qualify as an opinion that a police pursuit expert would give. He testified very briefly over the objection of the Plaintiffs, that it was the four-wheeler's fault because Robert Giles swung the four-wheeler out to the left and that the Defendant thought that he was going to turn left and the four-wheeler cut right and Defendant could not avoid hitting him. This opinion could only be the opinion that an "accident reconstructionist expert" could have given. It is in no way an opinion that a police pursuit expert could give. In fact, Jerry Barrett testified that in police pursuit he was not taught to determine who was at fault.

Barrett testified that he knew nothing about accident reconstruction, yet nearly every opinion that he gave at all was as to how the accident happened and who was at fault. The only other question that was an opinion was when he was asked whether or not the Defendant's conduct amounted to a reckless disregard for the safety and well-being of the minor children. He certainly was not qualified to give this opinion. He did not even testify that he had any training whatsoever or any experience in determining the degree of negligence of anyone in an accident. Furthermore, in the Designation of Experts answers in the interrogatories, the Defendants only listed that he was going to testify to as follows:

(1) Plaintiff failed to yield to the blue lights and sire;

(2) Plaintiffs' vehicle failed to signal or provide overwhelming warning, that which would indicate that he was making a right hand turn;

(3) The Plaintiff suddenly and without warning turns in such a manner as to cause the collision; and

(4) There was no physical evidence that the Constable's vehicle hit the car or ATV and that the Defendant's conduct did not amount to a reckless disregard for the safety and well-being of the minor children.

In regard to the testimony regarding the blue light and siren, an expert opinion is not required and therefore is not even an issue. In regard to whether the Constable's car hit Amber Wilcher's car, this would require an accident reconstructionist to give his opinion since Jerry Barrett was not at the scene, nor was he even in the Court room to hear any of the testimony that was given. He did not even see the Constable's car after the wreck, nor Amber Wilcher's car, nor the four-wheeler. In no way could he given an opinion in that regard. The Court showed have striking Jerry Barrett's testimony and it should not rely or consider any of this testimony.

III. THE TRIAL COURT ERRED IN DENYING THE APPELLANTS' MOTION REQUESTING THAT THE COURT REIMBURSE THE APPELLANTS FOR THE COST OF THE TRANSCRIPT

At the close of the trial of this matter, but before a decision was rendered by the Court, Judge Cotten himself order himself a transcript and then ordered that the Appellants and the Appellees to each pay one-half of the cost of the transcript. At no time did the Appellants or their attorney ask that a transcript be transcribed of the trial. Judge Cotten

further ordered that the payment of the transcript must be paid at the delivery of the transcript to the Appellants' and the Appellees' lawyer and that the lawyers use the transcript to write him a proposed order. The Appellants are not objecting to the proposed order or the research, but are objecting to the Court ordering almost indigent children, the Appellants, to pay for the transcript that is used only for the aide of the Judge in making his decision. The Appellants filed a Motion for Reimbursement for the Cost of the Transcript, which the Court denied.

This transcript for a two day trial cost $5,160.00 and the Appellants' attorney, Don H. Evans, had to pay the minor children's portion, which was $2,580.00 because they had no means of paying the money and there was a risk that the Judge would dismiss their case for failure to do so. Once all the testimony had been completed and all the parties had rested, the case was in order for the Judge to render a decision or to make a ruling on the case. If the Court needed a transcript in order for him to better make his decision and the Court order the transcript, then that would strictly be the county's cost and in no way be obligating of these minor children. The minor children did not need the transcript at that time.

By the Court assessing these minor children with the high priced transcript that was ordered by the Court, it almost amounts to the Court trying to force the minor children, financially, out of the case. The transcript for a two-day trial was $5,160.00, which makes it almost impossible for these children to go forward with their case. They have already had to go to the Supreme Court and back.

The Appellants have not seen any law that requires the minor children to pay for a

prejudgment transcript that was order ordered solely by the Judge solely for the purpose of aiding the Judge in making his decision. A jury does not get a transcript before them making a decision, nor is the Appellants' attorney ever seen a Court order a prejudgment transcript of the trial before the Court's decision either in the Circuit Court of the Chancery Court and requiring the parties to pay the cost of said transcript.

CONCLUSION

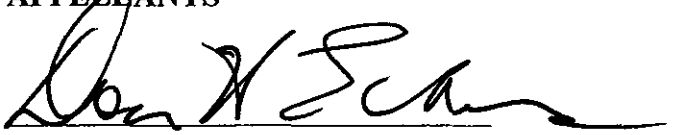
Appellants would show that the trial court abused its discretion finding in favor of the Appellees and determining that the Appellants were engaged in criminal activity, in determining that the Robert Giles' actions were the "superceding cause" of the subject accident, and in determining that the Appellee, Brown, " was not found to have been pursing the [Appellants] with *reckless disregard* for the safety of [Appellants]...as described under applicable MS. case law and is therefore entitled to all of the immunities prescribed under § 11-46-9(1)(c), *MCA*, and which immunity also extends to the Co-Defendant Leake County, Mississippi Board of Supervisors." The Appellants would also show that the Court erred in in allowing Jerry Barrett to qualify as a police pursuit and to give numerous opinions based upon accident reconstruction as to how the accident happened, whose fault the accident was, and as to whether the Appellee, Brown's, behavior did not amount to a reckless disregard for the safety and well being of the Appellants when he was not accepted as an accident reconstruction expert and when he was not qualified under *Daubert* to testify as a police pursuant expert. Finally, the Court erred in denying the Appellants' Motion requesting that the Court to reimburse the Appellants with regard to the Court ordering the Appellants to pay one-half of the entire transcript which the Court ordered to be done before he rendered a

decision on the case.

The Appellants pray that the Court will reverse the Court's judgment and that it will send the case back to lower court for a trial on damages only and that the Court order that a Judge from outside the court district hear the case since Judge Cotton has already dismissed the case twice, once on Summary Judgment and once on the regular trial. If the Appellants have prayed for the wrong or insufficient relief, then the Appellants pray that the Court will grant whatever relief the Court deems proper.

RESPECTFULLY SUBMITTED,

ROBERT LEE GILES, ROBERTO GILES, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, ROBERT LEE GILES, AND ANTONIO GILES, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, ROBERT LEE GILES, APPELLANTS

BY: 

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CERTIFICATE OF SERVICE

I, Don H. Evans, attorney for Appellants, do hereby certify that I have served, via U.S. Mail, postage prepaid, a copy of the foregoing Appellants' Brief to the following:

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Circuit Court Judge of Leake County, Mississippi
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On this the 5th day of October, 2008.

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