IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BERNITA DAVIS — APPELLANT

VERSUS — CAUSE NO. 2008-TS-01439

CITY OF CLARKSDALE, MISSISSIPPI — APPELLEE

APPEALED FROM THE CIRCUIT COURT OF COAHOMA COUNTY
CAUSE NO. 14-96-0051

BRIEF OF APPELLEE
CITY OF CLARKSDALE

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BRIEF OF APPELLEE CITY OF CLARKSDALE

COMES NOW the Appellee, City of Clarksdale, Mississippi ("Clarksdale") and files this its Brief in response to the Memorandum of Appellant Bernita Davis ("Davis") and would show unto this Court as set forth below, that the Order of Coahoma County Circuit Court Judge Kenneth Thomas dated July 23, 2008 in Bernita Davis, Administratrix of the Estate of Annie M. Johnson, Deceased vs. City of Clarksdale, et al., Coahoma County Circuit Court, Cause No. CI-14-96-0051 should be affirmed.

STATEMENT OF THE CASE

FACTS

The counsel for Clarksdale and Davis stipulated to the facts before the lower court which are incorporated into the Circuit Court order and are reproduced verbatim. (R. 205-206)

1. On August 24, 1995, at approximately 5:14-5:15 a.m., the local E-911 service received a "hang up" call originating from telephone number 627-7723 located at 246 Yazoo Avenue, Clarksdale, Mississippi[1].

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[1] In her Brief, Davis asserts that the decedent, Annie M. Johnson made the E-911call. It is unknown how the E-911 was made since it was a "hang up" call where no words were spoken from the point of origin of the call, so it would be speculation to say the decedent Annie M. Johnson made the call.

2. The E-911 operator notified the Clarksdale Police Department of the hang up call at 5:18 a.m.

3. The Clarksdale Police Department, in response to the E-911 operator's contact, immediately dispatched Police Officer Alfonzo Maddox ("Officer Maddox") to 246 Yazoo[2].

4. At 5:19 a.m. Officer Maddox arrived on the scene and took the following actions:

(a) Shone his spotlight on the front of the building;

(b) Observed nothing unusual at the scene to suggest any trouble or difficulty inside;

(c) Inspected the remaining commercial buildings on the block in the same manner;

(d) Observed no persons in the area or anything out of order; and

(e) Was then called to another location.

5. Other people were in the area at approximately 5:30 a.m. and did not notice anything out of the ordinary near 246 Yazoo.

6. At 5:48 a.m. two Clarksdale Police Officers drove past 246 Yazoo and observed broken glass in the entrance to the building.

7. The officers investigated the interior of the building and found the lifeless body of Ms. Annie Mae Johnson lying inside.

8. The following day Peter Earl Black was arrested and confessed to murdering Ms. Johnson. Subsequently, Black was convicted on the charge of murder and is serving a life sentence without the possibility of parole.

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[2] 246 Yazoo is located in the middle of the block in the Downtown Central Business District of Clarksdale.

SUMMARY OF THE ARGUMENT

The Circuit Court of Coahoma County correctly found that the conduct of the Clarksdale Police Officer Alfonzo Maddox ("Officer Maddox") on August 24, 1995 did not constitute reckless disregard for the safety of Annie Johnson ("Johnson").

ARGUMENT

GENERALLY

STANDARD OF REVIEW

The law in Mississippi is well established that a Circuit Court Judge sitting without a jury is accorded the same deference as a chancellor when considering the court's findings of fact. *Lander v. Singing River Hospital System*, 933 So. 2d 1043, 1045-1046 (¶ 9)(Miss. App. 2006), citing *Puckett v. Stuckey*, 633 So. 2d 978, 982 (Miss. 1992). This standard applies to cases brought pursuant to the Mississippi Tort Claims Act in considering the findings of a Circuit Court Judge. *Ogburn v. City of Wiggins*, 919 So. 2d 85, 88 (¶ 9) (Miss. App. 2005). In the case at bar, the Circuit Court found the "undisputed facts were established by the evidence in this case and were stipulated as to by the respective counsel for Clarksdale and Davis". (R. 205) When parties stipulate to facts, they are bound by those facts and may not later change positions. *Harper v. Harper*, 926 So. 2d 253, 256 (¶ 10) (Miss. App. 2006), citing *Wilbourn v. Hobson*, 608 So. 2d 1187, 1189 (Miss. 1992). Since the facts are undisputed this Court only needs to review matters of law.

RECKLESS DISREGARD

Pursuant to MISS. CODE ANN. §11-46-9(1)(c) (Supp. 2008) governmental entities and their employees acting within the course and scope of their employment are immune from liability for actions related to police protection "unless the employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal conduct at the time of injury".

> Reckless disregard has been defined by this Court as a higher standard than gross negligence, and it embraces willful or wanton conduct which requires intentionally doing a thing or a wrongful act. *Phillips v. Mississippi Department of Public Safety*, 978 So. 2d 656, 661 (¶ 19) (Miss. 2008), citing *City of Greenville v. Jones*, 925 So. 2d 106, 110 (Miss. 2006); *City of Jackson v. Powell*, 917 So. 2d 59, 71 (Miss. 2005); and *Collins v. Tallahatchie County*, 876 So. 2d 284, 287 (Miss. 2004).

This Court says that it will look at the "totality of circumstances" when determining whether an officer acted in reckless disregard and will judge an officer's actions on an "objective standard". Id.

In *Turner v. City of Ruleville*, 735 So. 2d 226, 230 (¶ 19-21) (Miss. 1999), this Court found that in stating a case in a complaint, a plaintiff must show that an officer intended "to do the act that caused harm to the plaintiff", not that "the officer intended to harm the plaintiff". This Court has further defined reckless disregard as "conscious indifference to consequences, amounting almost to willingness that harm should follow". *Maye v. Pearl River County*, 758 So. 2d 391, 394 (Miss. 1999). In *Titus v. Williams*, 844 So. 2d 459, 468 (¶ 38) (Miss. 2003), the Court appears to have modified its position enunciated in *Turner*, when it wrote "[t]hus, in order to avoid summary judgment, plaintiffs must have created a material dispute as to whether the Sardis police took action that they knew would result or intended to result in injury to Titus". If it was not the intent of the Court in *Titus* to modify the *Turner* standard, a plaintiff still must prove that a police officer must know that his action or inaction would result in harm to someone.

Arguendo, even if the Court were to find that there was reckless disregard on behalf of the City, Davis must establish that the City's actions were the proximate cause of Ms. Johnson's death. See e.g. *Johnson v. Alcorn State University*, 929 So. 2d 398, 411 (Miss. App. 2006) and *Ogburn v. City of Wiggins*, 919 So. 2d 85, 91 (Miss. App. 2005). Proximate cause requires: (1) cause in fact and (2) foreseeability. *Johnson*, 929 So. 2d at 411. "Cause in fact means that the act or omission

was a substantial factor in bringing about the injury, and without it the harm would not have occurred". Id. "Foreseeability means that a person of ordinary intelligence should have anticipated the danger that his negligent act created for others". Id. Further, a plaintiff must establish a "sufficient causal connection or element of foreseeability" between any alleged duty owed by the officer and the death of Ms. Johnson. *Doe v. Mississippi Department of Corrections*, 859 So. 2d 350, 360 (Miss. 2003).

SPECIFICALLY

Clarksdale is immune from liability pursuant to MISS. CODE ANN. § 11-46-9(1)(c) (Supp. 2008) unless Davis can prove that on August 24, 1995, Clarksdale Officer Maddox acted in reckless disregard for the safety of Johnson. Davis has the burden of proving reckless disregard by the preponderance of the evidence. *Simpson v. City of Pickens*, 761 So. 2d 855, 859 (Miss. 2000). This Court has stated that "reckless disregard" encompasses a willful and wanton action, and that a willful and wanton action signifies "knowingly and intentionally" doing a thing or wrongful act. *Titus v. Williams,* 844 So. 2d 459, 468 (Miss. 2003), citing *Turner v. City of Ruleville*, 735 So. 2d 226, 230 (Miss. 1999) and *Little, ex rel Little v. Bell*, 719 So. 2d 757, 761 (Miss. 1998). Reckless disregard has been further defined as a "conscious indifference to consequences, amounting to willingness that harm should follow." *Titus v. Williams*, 844 So. 2d 468 citing *Maye v. Pearl River County*, 758 So. 2d 391, 394 (Miss. 1999). Additionally in *Titus*, this Court stated that "in order to avoid summary judgment, plaintiffs [Davis] must have created a material dispute as to whether the Sardis police officers [Officer Maddox] took action that they [he] knew would result or intended to result in injury to Titus [Johnson]". Id. Davis could not meet her burden and the Circuit Court correctly dismissed her claim.

In her brief, Davis claims that the actions of Officer Maddox constituted reckless disregard "in failing to properly investigate the scene of a murder", which is a mischaracterization of the facts. Officer Maddox was dispatched to 246 Yazoo in the Downtown Central Business District based upon a "hang up" call from a telephone number at that address, where nobody spoke with the E-911 operator. Officer Maddox immediately drove to the building, shone his spotlight on the front of the building where he observed nothing unusual or anything to suggest trouble at the location or nearby, before he was called to another location. (R. 206). There is no evidence that all "hangup" calls result in death or serious bodily injury, so there was no reason for Officer Maddox to think that his actions amount to "knowingly and intentionally" doing a wrongful act "amounting to willingness that harm should follow" to Ms. Johnson or anyone else.

In her "Summary Argument", Davis cited *Maye v. Pearl River County*, 758 So. 2d 391 (Miss. 1999) to support her argument that Officer Maddox failed "to properly investigate the scene of a murder". As the Court is aware, *Maye* dealt with a Sheriff's Deputy who backed out of a parking lot up an incline where he could not see behind him, which has nothing to do with an investigation by a police officer. Davis also cited *Foster v. Noel*, 715 So. 2d 174 (Miss. 1998) concerning investigations by police officers. In *Foster*, the Court found that an officer acted in reckless disregard when he placed a female's name on an affidavit for an arrest warrant based upon a car tag number when the witnesses stated that the perpetrators were males. Id. at 179 (¶31). In *Foster*, the officer had information in his possession which clearly showed that the perpetrators were males, yet he proceeded with an affidavit charging a female. There is no parallel in this case. Here, the officer responded and found nothing wrong before being called to another location. The officer was not "responding to the scene of a murder", but to a E-911 hangup call in the central business district.

The officer had no indication that anything specific was wrong and proceeded to another call.

Arguendo, if the facts were that the officer found the window broken out and he kept going, it very well could be reckless disregard, but that is not what happened. There is no evidence that if Officer Maddox took any different actions that Ms. Johnson would not have been murdered. The officer had no knowledge that Ms. Johnson was being or had been attacked when he rode by and shone his light at 246 Yazoo. Officer Maddox did not murder Ms. Johnson, Peter Earl Black did and Clarksdale should not be held liable for the criminal acts of others.

In her conclusion, Davis argues that questions of fact remain as to whether Officer Maddox's actions amount to reckless disregard and asks that the case be reversed and remanded for a trial on the merits. Since this a Tort Claim Act case the Circuit Court Judge sits as the trier of fact and in this case the facts were stipulated to, so it is unnecessary to remand the case to the Circuit Court. Additionally, there is no legal reason to reverse the Circuit Court's ruling since the Circuit Court applied the appropriate legal standard.

CONCLUSION

Based upon the facts and the totality of circumstances, Davis can present no evidence that Officer Maddox's conduct on August 24, 1995 amounted to reckless disregard for the safety and well being of Ms. Johnson. Officer Maddox responded to the address and found nothing wrong and left. Davis can present no evidence to show that if Officer Maddox did anything different that this tragedy could have been avoided. The person responsible for this heinous murder is at Parchman, where he belongs for the rest of his life. The Circuit Court properly found that Clarksdale is not liable for this tragedy, and this Court should affirm the dismissal of this case.

RESPECTFULLY SUBMITTED, on this, the 19th day of March, 2009.

BY: _____

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CERTIFICATE OF SERVICE

I, CURTIS D. BOSCHERT, attorney for Appellee, the CITY OF CLARKSDALE, MISSISSIPPI, do hereby certify that I have this day by mailed, by United States mail, postage prepaid, true and correct copies of the above and foregoing BRIEF OF APPELLEE CITY OF CLARKSDALE to the following:

Dana J. Swan, Esquire
Chapman Lewis & Swan
Post Office Box 428
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Attorney for the Appellant, Bernita Davis

Honorable Kenneth Thomas
Coahoma County Circuit Judge
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THIS, the 19th day of March, 2009.

_____
CURTIS D. BOSCHERT