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IN THE SUPREME COURT OF MISSISSIPPI

BERNITA DAVIS

VERSUS

CITY OF CLARKSDALE, MISSISSIPPI

FILED

JAN 16 2009

Office of the Clerk
Supreme Court
Court of Appeals

APPELLANT

CAUSE NO. 2008-^{CA}~~XS~~-01439

APPELLEE

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

MEMORANDUM OF APPELLANT

Dana J. Swan, Esquire
CHAPMAN, LEWIS & SWAN
Post Office Box 428
Clarksdale, MS 38614
601/627-4105


Attorney for Bernita Davis

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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 this Court may evaluate potential disqualifications or refusal.

Honorable Kenneth Thomas
Circuit Court Judge
P.O. Box 548
Cleveland, MS 38732

Dana J. Swan, Esquire
CHAPMAN, LEWIS & SWAN
Attorney for Claimant
Post Office Box 428
Clarksdale, MS 38614

Curtis D. Boschert, Esquire
Post Office Drawer 940
Clarksdale, MS 38614



Dana J. Swan, MSB No. [REDACTED]

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BERNITA DAVIS

APPELLANT

VERSUS

CAUSE NO. 2008-TS -01439

**CITY OF CLARKSDALE, MISSISSIPPI
APPELLEE**

MEMORANDUM OF APPELLANT

COMES NOW THE APPELLANT/PLAINTIFF, by and through counsel, and files this her Memorandum of Appellant and would show unto the Court that the trial court erred in granting summary judgment in favor of City of Clarksdale, Mississippi ("City")

I.

COURSE OF PROCEEDING BELOW

Suit in this cause was filed on or about August 22, 1996 by the wrongful death beneficiaries of Annie Mae Johnson ("Johnson") by Bernita Davis in the Circuit Court of Coahoma County, Mississippi against, The City of Clarksdale. The City filed its answer on or about September 24, 1996. On July 28, 2008, the trial Court, the Honorable Albert Smith granted the City's motion to dismiss. On August 20, 2008, the Appellant filed her appeal.

II.

FACTS

This cause of action arises from a series of events which culminated with the murder of the Plaintiff's decedent, Annie Mae Smith, on August 20, 1995. That morning, the Plaintiff's decedent placed a 911 call at approximately 5:15 a.m. which was forwarded by the Northwest Mississippi Regional Medical Center to the City of Clarksdale, Police Department. R. 53. The department dispatched Officer Alfonzo Maddox to the decedent's residence at 246 Yazoo Ave. Officer Maddox's report indicates that he arrived on the scene at 5:19 a.m. R. 206. Officer Maddox only shined his spotlight on the front of the building, as well as the front of other commercial buildings on the block. *Id.* He then left the scene with no further investigation, such as knocking of the door or inspecting the interior of the building.

Less than thirty minutes later, at 5:48 a.m., Officer Walter Thomas and Officer Joey Logan drove past 246 Yazoo and observed broken glass in the entrance to the building. Id. Upon investigating the interior of the building, Officers Thomas and Logan discovered the body of Plaintiff's decedent, Annie Mae Johnson lying lifeless inside the building.

According to the report of officer Fortenberry, when the investigating officers Thomas and Logan arrived at the scene:

The complainant [Johnson] was found on her knees and buttocks on the floor and partially leaning on the couch with her right side. This officer counted approximately 22 stab wounds to the complainant's back. At least two defensive wounds to the right arm and hand were visible. The complainant was still very warm to the touch and no rigor mortis had begun to establish itself. Blood was still trickeling from one of the stab wounds on the back. . . There were signs of a struggle with newspapers and letters being scattered on the floor. . .

R. 239.

Later a suspect named Peter Earl Black was arrested and confessed to the murder. According to Black, he admitted "to burglarizing the store, robbing Annie Johnson, forcing her to perform oral sex on him, and then stabbing her to death." R. 242. He also admitted that Johnson "hit me with the phone and something else." R. 243. Black was later convicted of the murder of Johnson.

III.

SUMMARY OF ARGUMENT

The actions of Officer Maddox in failing to properly investigate the scene of the murder amounts to "reckless disregard" pursuant to the Tort Claim Act. Maye v. Pearl River County, 758 So.2d 391 (Miss. 1999).

IV.

ARGUMENT

Since this cause is governed by The Tort Claim Act, the only question is, do the actions of Officer Maddox amount to reckless disregard. Reckless disregard was defined by the Mississippi Supreme Court in Turner v. City of Ruleville, 735 So.2d 226 (Miss. 1999). In Turner, the Court held

that reckless disregard was not the same as intentional conduct. The Plaintiff does not have to prove that the officer intended to cause harm, but only that the officer "intended to do the act that caused harm to come to the plaintiff." *id.* at 230. In Turner, the Court reversed a motion to dismiss granted by the trial court and held that an officer who allowed an intoxicated driver to continue driving acted with reckless disregard. Applying the doctrine of Turner to the facts in the case at bar, it is not necessary that Officer Maddox intended to harm the Plaintiff's decedent, but only that he intended not to further investigate her 911 call after shining his flashlight on the front of her building.

In Simpson v. City of Pickens, 761 So. 2d 855 (Miss. 2000) the Court held that the proper standard to determine reckless disregard is by a preponderance of the evidence, and not by clear and convincing evidence. *id.* at 858. In Simpson, Simpson was arrested by a police officer employed by the City of Pickens after being charged with driving under the influence, malicious mischief, resisting arrest and aggravated assault. He stated that he was inside his house when he noticed a police car outside his house. The police officer then knocked on his door and stated that Simpson had ran a stop sign. After he closed the door, Simpson stated that the officer broke down the door where he was then taken to several jails before an empty cell was found. Simpson was never prosecuted and denied guilt.

After filing suit against the City of Pickens and the officer for false arrest, the trial court dismissed the cause and applied a clear and convincing standard. Although the Supreme Court reversed and remanded for a new trial under a preponderance of the evidence standard, the City of Pickens urged that the Court should affirm because the officer's actions did not rise to reckless disregard even under the lower standard. However, the Court rejected that argument and held that a jury question remained as to whether or not the officer's conduct amounted to reckless disregard.

The City also argues that the actions of Maddox amount, at most, to simple negligence. In the case of Maye v. Pearl River County, 758 So.2d 391 (Miss. 1999), the Court held that the mere act of a sheriff backing his car out of a parking space amounted to reckless disregard and not simple negligence. In the case at bar, Maddox did not get out of his vehicle, did not knock on the door, and

did not investigate the interior of the building, despite the fact that less than thirty minutes later, two different officers did perform such an investigation, although by then it was too late. The Court held in Foster v. Noel, 715 So.2d 174 (Miss. 1998), that the failure to properly perform an investigation may amount to reckless disregard. In Foster, the Court held that an officer's actions in putting a plaintiff's name on an arrest warrant without performing an investigation amounted to reckless disregard. id. at 179.

V.

CONCLUSION

A factual question remains as to whether or not the actions of Officer Maddox amount to reckless disregard. Under the applicable standard, the Court should have denied the motion to dismiss. The Appellant would respectfully submit that this cause be reversed and remanded for a trial on the merits.

RESPECTFULLY SUBMITTED this the 16th day of January, 2009.

Respectfully submitted,
CHAPMAN, LEWIS & SWAN
Attorney for Plaintiff
P. O. Box 428
Clarksdale, MS 38614
(662) 627-4105

By: 

Dana J. Swar 

CERTIFICATE OF SERVICE

I Dana J. Swan, do hereby certify that I have this day served via U.S. Mail, postage paid, a true and correct copy of the above and foregoing document to the following:

Honorable Kenneth Thompson
Circuit Court Judge
P.O. Drawer 548
Cleveland, MS 38732

Ms. Betty W. Sephton
Supreme Court Clerk
Court of Appeals of the State of MS
P. O. Box 249
Jackson, MS 389205-0249

Curtis D. Boschert, Esquire
Post Office Drawer 940
Clarksdale, MS 38614

THIS, the 16th day of January, 2009.

A handwritten signature in cursive script, appearing to read 'Dana J. Swan', written over a horizontal line.

Dana J. Swan

CERTIFICATE OF SERVICE

I, Dana J. Swan, do hereby certify that I have this day faxed a true and correct copy of the foregoing Brief of Appellant to:

Honorable Kenneth Thompson
Circuit Court Judge
P.O. Drawer 548
Cleveland, MS 38732

Ms. Betty W. Sephton
Supreme Court Clerk
Court of Appeals of the State of MS
P. O. Box 249
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Curtis D. Boschert, Esquire
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Clarksdale, MS 38614

THIS, the 16th day of January, 2009.



Dana J. Swan